

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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The Indiana General Assembly and Indiana's appellate courts confronted a variety of significant issues during the survey period October 1, 2010, to September 30, 2011. The bills that passed were modest, except for legislation that provided broad new opportunities for restrictions on arrest and conviction records for many Hoosiers. The Indiana Supreme Court saw the end of Justice Boehm's fourteen year tenure and the appointment of Justice David, as both it and the Indiana Court of Appeals addressed issues a wide range of issues that affect cases from their inception to their conclusion. Some of the most significant developments are explored below.

I. LEGISLATIVE DEVELOPMENTS

What looked early in 2011 like a blockbuster year for sentencing reform fizzled into a legislative session with mostly tinkering in the criminal law realm. This section summarizes some of the bills passed in the long session of 2011 to take effect July 1, 2011, and concludes with the failure of the general assembly to pass sweeping sentencing reform, which held considerable promise early in the session.

A. Texting

Few doubt that texting while driving is a bad idea, but the ban enacted in House Bill 1129 may create more problems than it solves.¹ Only those who type, transmit, or read a text or email message while operating a motor vehicle commit a Class C infraction.² Drivers remain free to dial their phone, read the *New York Times* app, Google any term they'd like, or play *Angry Birds*. Police may not confiscate the "telecommunications device,"³ but could presumably ask consent to see it,⁴ which savvy drivers will refuse. If an officer tickets a person for the infraction, proof may be difficult at trial without the phone unless the driver makes an admission. Moreover, some motorists will be charged with criminal offenses if an officer sees contraband in their vehicle and makes an arrest. If courts find the officer lacked "an objectively justifiable reason" for the stop (how can an officer tell a person is texting as opposed to engaging in one of the many other things a person does with his or her smart phone?), the evidence may be suppressed.⁵

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1. H.R. 1129, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

2. IND. CODE § 9-21-8-59 (2011).

3. *Id.*

4. *See, e.g.,* State v. Washington, 898 N.E.2d 1200, 1206 (Ind. 2008).

5. *See* State v. Massey, 887 N.E.2d 151, 155-58 (Ind. Ct. App. 2008).

B. Sexting

A separate bill creates a new defense to the crimes of child exploitation and obscene performance before minors when a person engages in the consensual exchange of sexual pictures.⁶ The defense applies if the defendant is twenty-one or younger, used a wireless device or social networking site to exchange the sexual pictures, and engaged in an “ongoing personal relationship” (but not a familial relationship) with another person who is within four years of the defendant’s age.⁷ The defense does not apply if the message is then forwarded to others.⁸

C. Restricted Criminal Records

Although Indiana’s expungement statute has long provided a small group of individuals an avenue for the complete obliteration of criminal records under narrow circumstances,⁹ House Bill 1211 was enacted in the final days of the session to provide relief to a much broader class of both arrest and conviction records.¹⁰

An individual arrested but not prosecuted, acquitted of all charges, or vindicated on appeal may now petition to restrict access of the *arrest record*.¹¹ If successful, the court shall order the state police not to disclose or permit disclosure of the arrest record to noncriminal justice organizations.¹² Those convicted or adjudicated delinquent of a misdemeanor or D felony that did not result in injury may now petition to restrict their *conviction record*.¹³ The defendant must wait eight years, have satisfied all obligations of the sentence, and cannot have been convicted of any felonies in the interim.¹⁴ The new bill expressly states “the person may legally state on an application for employment or any other document that the person has not been arrested for or convicted of the felony or misdemeanor recorded in the restricted records.”¹⁵

The following chart compares the long-standing expungement statute (the first column on the left) and the new provisions that allow restrictions on arrest records (middle column) or conviction records (far right column).

6. See IND. CODE §§ 35-49-3-4(b) & (c) (2011).

7. *Id.*

8. *Id.* For an excellent overview of the myriad of concerns underlying sexting, see Jordan J. Szymialis, Note, *Sexting: A Response to Prosecuting Those Growing Up with a Growing Trend*, 44 IND. L. REV. 301 (2010).

9. IND. CODE §§ 35-38-5-1 & -2.

10. H.R. 1211, 117th Gen. Assemb. 1st Reg. Sess. (Ind. 2011).

11. IND. CODE § 35-38-5-5.5 (2011).

12. *Id.*

13. *Id.* § 35-38-8.

14. *Id.*

15. *Id.*

	Expungement (pre-2011)	Restrict Arrest Records	Restrict Conviction Records
Statute	Ind. Code §§ 35-38-5-1 & -2	Ind. Code § 35-38-5-5.5	Ind. Code § 35-38-8
Eligibility	Person (1) arrested but no charges filed or (2) all charges dropped because (a) mistaken identity (b) no offense or (3) no probable cause	Person arrested but (1) not prosecuted or dismissed; (2) acquitted; or (3) convicted but conviction later vacated	Person convicted or adjudicated delinquent of “a misdemeanor or a Class D felony that did not result in injury to a person”
Defense Procedure	Verified petition in county of charges or arrest. Include: date of arrest, charge, I.e.a. and case identifying information, petitioner’s d.o.b. and SSN Serve: I.e.a. and c.r.r.	Verified petition in court where charges filed or trial held. Include: date of arrest; charge; date of dismissal, acquittal or vacated conviction; reason vacated; I.e.a.; known case identifying information; petitioner’s d.o.b. and SSN. Serve: pros. and c.r.r.	“the person may petition a sentencing court to order the state police department to restrict access to the records concerning the person’s arrest and involvement in criminal or juvenile court proceedings” (no petition specifics)
Timing	No deadlines in statute	Must wait at least (1) 30 days after acquittal (2) 365 days after conviction vacated or (3) 30 days after charges dismissed (if not refiled)	Eight “years after the date a person completes the person’s sentence and satisfies any other” sentencing obligation
Prosecutor or law enforcement agency (I.e.a.)	I.e.a.: notify all agencies with records. Agencies may file opposition (with sworn statements) within 30 days.	Pros.: may file opposition within 30 days. Must attach “certified cop[ies] of any documentary evidence showing that the petitioner is not entitled to relief”	No procedure for opposition in statute
Court	(1) summarily grant; (2) set for hearing; or (3) summarily deny if (a) insufficient petition or (b) petitioner not entitled to relief based on I.e.a. affidavits. If hearing: shall grant unless (1) requirements not met or (2) petitioner has a record of arrests or (3) pending charges	(1) summarily grant; (2) set for hearing; (3) summarily deny if (a) insufficient petition or (b) petitioner not entitled to relief based on pros. documentary evidence. If hearing: shall grant unless petitioner is being re-prosecuted on same charge	“shall grant” if person is (1) not a sex/violent offender (2) qualifying D felony or misdemeanor; (3) eight years have passed; and (4) satisfied sentencing obligation and no new felony convictions
Relief	I.e.a.: “shall within thirty (30) days of receipt of the court order, deliver to the individual or destroy all fingerprints, photographs, or arrest records in their possession”	“shall order the state police department not to disclose” information to “a noncriminal justice organization or an individual” under Title 10	Order DOC, I.e.a, c.r.r., and others “who incarcerated, provided treatment for, or provided other services” to prohibit release “to a noncriminal justice agency”

Some of the information restricted under the new legislation, though, may already be available to companies that do background checks or be accessible elsewhere.¹⁶ The legislation will likely need to be revisited to meet its well-intentioned goal of giving people a second chance.¹⁷

D. Guns and Drugs

Some of the most popular areas for legislative intervention are guns and drugs. Although one might expect a stiffening of penalties or broadening of offenses for both, during the 2011 session handgun laws were loosened while marijuana laws were broadened. Senate Bill 506 changed the parameters of restrictions on carrying a handgun without a license by expressly exempting the ability to carry a handgun without a license “in or on” private property and allowing unloaded guns in “legally controlled” vehicles.¹⁸ An owner of property may still prohibit possession.¹⁹ Those who wish to use synthetic cannabinoids were not so lucky. Senate Bill 57 broadened all existing prohibitions on marijuana possession and dealing to include synthetic cannabinoid and salvia.²⁰

E. Voyeurism

The voyeurism statute was amended largely in response to a highly publicized case at a mall in Indianapolis. In 2010, voyeurism was defined to include “A person: . . . who . . . peeps into an area where an occupant of the area reasonably can be expected to disrobe, including: (A) restrooms; (B) baths; (C) showers; and (D) dressing rooms; without the consent of the other person”²¹ When a man put a camera on his shoe to look up dresses at a mall,²² a trial court had little choice but to dismiss the charges under the existing statute.²³ Voyeurism required peeping in areas where people were reasonably expected to disrobe, which did not include mall hallways.²⁴ In 2011, though, the voyeurism statute was broadened to create the offense of public voyeurism for the non-

16. See generally Niki Kelly, *Fixes Sought for 2nd Chance Law*, J. GAZETTE, Oct. 14, 2011, <http://www.journalgazette.net/article/20111014/LOCAL/310149960/1002> (observing the law “doesn’t quite work in the digital world” where “some businesses specialize in doing criminal background checks for private employers and have data already on file that would not be scrubbed” of the information restricted under the new legislation).

17. See *id.* (observing, among other things, that felons could be admitted to practice law without being required to disclose prior crimes and schools may be denied access to criminal records when doing background checks on prospective employees).

18. IND. CODE § 35-47-2-1 (2011).

19. *Id.*

20. *Id.* 35-41-1-24.2.

21. *Id.* § 35-45-4-5(a).

22. See *Police Show Gadgets Inside Man’s Pants*, WANE.COM, June 25, 2010, <http://www.wane.com/dpp/news/wane-ftwayne-Police-show-camera-inside-mans-pants>.

23. See *Delagrang v. State*, 951 N.E.2d 593, 594 (Ind. Ct. App. 2011).

24. IND. CODE § 35-45-4-5(a) (2011).

consensual “peep[ing] at the private area of an individual.”²⁵

F. Selling Alcohol to the Middle-Aged

Last year’s survey mentioned a 2010 bill that criminalized carry-out sales of alcohol without checking identification.²⁶ The offense was a Class B misdemeanor but included a defense for those selling to someone who “was or reasonably appeared to be more than fifty (50) years of age.”²⁷ The legislation was revisited in 2011 and now criminalizes only sales to a person “who is or reasonably appears to be less than 40 years of age.”²⁸

G. Bad Test Results and a New Home for the Department of Toxicology

A number of Indianapolis Star articles focused on problems at the Department of Toxicology, which was housed for many years in the Indiana University School of Medicine Department of Pharmacology & Toxicology.²⁹ For example, an audit of tests during 2007-09 found “a flawed marijuana result every 3.28 days and a false positive marijuana result once every 18 days.”³⁰ Legislation passed in 2011 removed the Department from the School of Medicine and created a new state department of toxicology within the executive branch of state government, which will be led by a director who serves at the governor’s pleasure.³¹

But what about the inaccurate tests from the past several years? Flawed tests alone do not necessarily lead to relief for criminal defendants, many of whom pleaded guilty. Those defendants convicted after trial might pursue a post-conviction claim based on newly discovered evidence,³² while those who pleaded guilty could assert their plea was not knowing and voluntary.³³ Both sets of defendants might also attempt to pursue claims that the State, through one of its agencies, withheld exculpatory evidence in violation of *Brady v. Maryland*.³⁴

25. *Id.* § 35-45-4-5(d).

26. Joel M. Schumm, *Recent Developments in Indiana Criminal Law & Procedure*, 44 IND. L. REV. 1135, 1135-36 (2011) [hereinafter Schumm, *2010 Recent Developments*].

27. *Id.* at 1136.

28. IND. CODE § 7-1-5-10-23 (2011).

29. *See, e.g.*, Mark Alesia & Tim Evans, *Drug and Alcohol Tests Had “Error After Error,”* INDIANAPOLIS STAR, May 17, 2011, at A1.

30. *Id.*

31. IND. CODE § 9-27-5-1 (2011).

32. IND. R. POST-CONVICTION REMEDIES 1(a)(4); *see Rhymer v. State*, 627 N.E.2d 822, 823-24 (Ind. Ct. App. 1994). Guidance may also be found in cases from other states. *See, e.g., In re Investigation of W. Va. State Police Crime Lab, Serology Div.*, 438 S.E.2d 501 (W. Va. 1993).

33. IND. CODE § 35-35-1-4(c) (2011); *see also Turner v. State*, 843 N.E.2d 937, 944 (Ind. Ct. App. 2006).

34. 373 U.S. 83 (1963); *see also Kyles v. Whitley*, 514 U.S. 419 (1995).

H. Forfeitures: More Confusion than Clarity

Article 8, section 2 of the Indiana Constitution has long provided, “The Common School fund shall consist of . . . all forfeitures which may accrue” The practice of trial courts around the state, however, had taken a different course, with forfeiture funds being retained for law enforcement and rarely sent to the common school fund.³⁵ Shortly before the end of the legislative session, the Indiana Supreme Court took note of the existing statutory language allowing trial courts to except from the proceeds “law enforcement expenses incurred ‘for the criminal investigation associated with the seizure’ and a prosecutor’s expenses associated with the forfeiture proceeding and the expenses related to the criminal prosecution.”³⁶ The supreme court offered something far short of an endorsement, though: “Whether this limited diversion, calculating actual expenses on a case-by-case basis, is consonant with the constitutional command that ‘all forfeitures’ be deposited in the Common School Fund is an unresolved question.”³⁷ A bill passed late in 2011 session expressly provided eighty-five percent of forfeiture proceedings to law enforcement and fifteen percent to the common school fund (after the deduction of an administrative fee).³⁸ Governor Daniels vetoed Senate Bill 215, noting that the

bill would take more than ninety cents of every dollar collected through forfeiture for the “expense of collection” rather than sending it to the Common School fund. That is unwarranted as policy and constitutionally unacceptable in light of the Supreme Court’s recent guidance and the plain language of Article 8, Section 2 of the Indiana Constitution.³⁹

I. Failed Sentencing Reform

After months of study, the 15-0 support of the Criminal Code Evaluation Commission, and Governor Daniels’ endorsement, Senate Bill 561 proposed a shift from Indiana’s “one-size-fits-all sentencing policy for theft and drug offenses to a more graduated approach.”⁴⁰ Among other things, the bill would have reduced many felony drug offenses by one class felony if less than ten grams were involved and restricted previous strict liability enhancements for proximity within 1000 feet of parks, schools, family housing complexes, and

35. See Heather et al., *Cashing in on Crime*, INDIANAPOLIS STAR, Nov. 14, 2010, at A1.

36. *Serrano v. State*, 946 N.E.2d 1139, 1142 n.3 (Ind. 2011) (quoting IND. CODE § 34-6-2-73 (2011)).

37. *Id.*

38. S. Enrolled Act 215, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

39. Letter from Mitchell E. Daniels, Jr., Governor, State of Indiana, to David Long, President Pro Tempore, Indiana State Senate (May 13, 2011), available at <http://www.in.gov/gov/files/215VetoMessage.pdf>.

40. JUSTICE CTR., JUSTICE REINVESTMENT IN INDIANA 2 (2010), available at http://issuu.com/csgjustice/docs/jr_indiana_summary_report_final.

youth centers to apply only “when children are present.”⁴¹ It would also have reduced theft from a felony to a misdemeanor unless the property taken was valued at \$750 or more or the defendant had a prior theft conviction.⁴² It wasn’t long before “prosecutors assailed [the bill] as soft on crime, senators gutted the bill and even lengthened sentences for some offenders.”⁴³ The Governor threatened a veto of the new bill that no longer achieved the goal of graduated penalties and “smarter incarceration,” and the bill died.⁴⁴

II. SIGNIFICANT CASES

The Indiana Supreme Court and Indiana Court of Appeals addressed a wide range of issues that impact criminal cases from their inception to their conclusion. Although the five members of the Indiana Supreme Court were unchanged from the appointment of Justice Rucker in 1999 until the retirement of Justice Boehm in 2010, the replacement of Justice Boehm by Justice David could signal at least a modest shift in the court. Some of Justice David’s opinions and votes are mentioned below, and the impact of his appointment is explored in the conclusion.

A. Resisting Unlawful Home Entries by Police

No Indiana Supreme Court case in recent memory has generated the magnitude of public and press reaction that came after the 2011 opinion in *Barnes v. State*.⁴⁵ The reaction was not a product of the facts: a defendant convicted of battery on a police officer and other offenses after police responded to a domestic violence call from his wife.⁴⁶ Police observed his wife enter the apartment from the parking lot, saw Barnes follow her, and attempted to enter the apartment after Barnes refused to allow them entry to investigate.⁴⁷ The reaction focused instead on the breadth of the court’s holding: “the right to reasonably resist an unlawful police entry into a home is no longer recognized under Indiana law.”⁴⁸ The supreme court acknowledged the longstanding common law right to resist unlawful police action but concluded that the right “is against public policy and

41. S.B. 561, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011), available at <http://www.in.gov/legislative/bills/2011/SB/SB0561.3.html>

42. *Id.*

43. Heather Gillers, *Gov. Daniels: I’ll Veto Amended Prison Bill*, INDIANAPOLIS STAR, Mar. 23, 2011, at A1.

44. *Id.*

45. 946 N.E.2d 572 (Ind. 2011), *aff’d on reh’g*, 953 N.E.2d 473 (Ind. 2011); see also Dan Carden, *Ind. Attorney General Wants Cop Entry Ruling Revised, but not Entirely*, NW. IND. TIMES, May 30, 2011, http://www.nwitimes.com/news/local/govt-and-politics/article_e7415da6-3906-5f71-87e3-dc781019b8ae.html (observing that the “[p]ublic reaction to the court’s ruling has been overwhelmingly negative”).

46. *Barnes*, 946 N.E.2d at 574.

47. *Id.*

48. *Id.* at 577.

modern Fourth Amendment jurisprudence.”⁴⁹ Specifically, arrestees now have civil redress against unlawful police action and allowing resistance may escalate “the level of violence and therefore the risk of injuries to all parties involved without preventing the arrest.”⁵⁰ Barnes’s convictions were affirmed.⁵¹ Both Justice Dickson and Justice Rucker dissented, concluding “the wholesale abrogation of the historic right of a person to reasonably resist unlawful police entry into his dwelling is unwarranted and unnecessarily broad,”⁵² and “it is breathtaking that the majority deems it appropriate or even necessary to erode this constitutional protection based on a rationale addressing much different policy considerations.”⁵³

Barnes filed a petition for rehearing, and the Attorney General filed a response arguing for the same result but a narrowed holding.⁵⁴ The Legislative Council created a summer “Barnes v. State subcommittee” to consider a statutory response to the case.⁵⁵ Members of the General Assembly also filed a bipartisan amicus brief joined by forty state senators and thirty-one representatives, asking the court to narrow its holding in a manner consistent with Indiana’s robust self-defense statute, which “has long allowed citizens to use ‘reasonable’ force if the person ‘reasonably believes’ such force is necessary to prevent or terminate unlawful entry into their home.”⁵⁶ The legislators’ amicus brief argued that the statute was broadened by large majorities in 2006 to make clear Hoosiers had no duty to retreat, which embodies the public policy of the state to grant citizens “greater autonomy to protect themselves from unlawful incursions into their homes.”⁵⁷

The Indiana Supreme Court granted rehearing in September. The opinion acknowledged that petitions for rehearing had been filed by “thoughtful people” and did not repeat the broad language that generated the public ire.⁵⁸ Instead, the opinion reframed the issue as a narrower one: “the suspected spouse abuser’s contention that the trial court erred when it refused to instruct the jury that he had the right to get physical with the police officers if he believed their attempt to enter the residence was legally unjustified.”⁵⁹ The opinion emphasized that its

49. *Id.* at 576.

50. *Id.*

51. *Id.* at 578.

52. *Id.* at 579 (Dickson, J., dissenting).

53. *Id.* at 580 (Rucker, J., dissenting).

54. All briefs filed in the case are available on the Indiana Law Blog. See Marcia Oddi, *Ind. Decisions—Attorney General Files Response in Barnes v. State*, IND. L. BLOG (July 27, 2011 5:15 PM), http://indianalawblog.com/archives/2011/06/ind_decisions_a_153.html.

55. See *Legislative Council Barnes v. State Subcommittee*, IND. GEN. ASSEMBLY, <http://www.in.gov/legislative/interim/committee/lcbs.html> (last visited Jun 5, 2012).

56. Brief of Amicus Curiae Senators and Representatives in Support of Appellant’s Petition for Rehearing, at 2, *Barnes v. State*, 946 N.E.2d 572 (no. 82S05-1007-CR-343).

57. *Id.* The author of this Article served as counsel for amici and authored the brief.

58. *Barnes v. State*, 953 N.E.2d 473, 473 (Ind. 2011).

59. *Id.*

original holding did “not alter, indeed says nothing, about the statutory and constitutional boundaries of legal entry into the home or any other place.”⁶⁰ It concluded that “[t]he General Assembly can and does create statutory defenses to the offenses it criminalizes, and the crime of battery against a police officer stands on no different ground. What the statutory defenses should be, if any, is in its hands.”⁶¹ Justice Dickson concurred in the result, and Justice Rucker dissented, citing “some tension” with the court’s opinion and the self-defense statute cited by the legislative amicus brief.⁶² The issue is almost certain to resurface as a legislative development in next year’s survey.

B. Indigent Counsel Issues

The supreme court and court of appeals each issued opinions about the role and responsibility of trial courts in addressing issues involving appointment of counsel for indigent defendants. Specifically, the supreme court addressed the responsibility of trial courts when confronted with persistent complaints by a defendant about his or her appointed counsel, and the court of appeals addressed the propriety of making a change in determination of indigency status based on obstreperous conduct.

In *Johnson v. State*,⁶³ the supreme court addressed the not-so-uncommon situation of an indigent defendant writing the trial court to complain about neglect by appointed counsel. There, the trial court had simply passed the complaint along to the county public defender, believing she lacked authority to take any other action.⁶⁴ The supreme court detailed the history of “Indiana’s reform of public defender services” and the importance of independence of defense counsel through the creation of public defender boards in many counties instead of employment by trial courts.⁶⁵ Nevertheless, trial courts “cannot take a complete ‘hands-off’ approach and totally rely on a bureaucratic agency,” which the court cautioned could lead to “inefficiency and overspending” as in England.⁶⁶

Although it would be “impossible and unreasonable for a judge to investigate every” complaint about appointed counsel, the court held that trial courts “should at minimum require assurance from the public defender’s office that the issue will be resolved” when confronted with a complaint against counsel who has “a track record of the professional misconduct complained of.”⁶⁷ Specifically, appointed counsel in *Johnson* had been previously reprimanded and later suspended for neglecting clients, “the very reason prompting the defendant’s complaint to the trial judge in this case.”⁶⁸ The court’s opinion suggests that trial courts will

60. *Id.* at 474-75.

61. *Id.* at 475.

62. *Id.* (Rucker, J., dissenting).

63. 948 N.E.2d 331 (Ind. 2011), *cert. denied*, 132 S. Ct. 1575 (2012).

64. *Id.* at 333.

65. *Id.* at 337.

66. *Id.* at 338.

67. *Id.*

68. *Id.* at 334 (citing *In re Schrems*, 922 N.E.2d 618 (Ind. 2010); *In re Schrems*, 856 N.E.2d

seldom need to involve themselves in complaints from defendants about appointed counsel, as the vast majority of public defenders have not been disciplined for neglecting their clients' cases. One would also hope that the independence of the defense function, which led to the creation of largely autonomous public defender agencies, would carry with it the responsibility of sometimes trimming its ranks to avoid thrusting counsel with repeated instances of neglecting cases on future clients.

Gilmore v. State,⁶⁹ is a must-read for trial judges and others who confront the difficult and often nebulous issues surrounding indigency determinations. There, after a case had been pending for five years and five court-appointed attorneys had withdrawn because of breakdowns in the attorney-client relationship, the trial court entered an order finding the defendant was no longer indigent and had waived his right to counsel by his "obstreperous conduct."⁷⁰ The court of appeals reversed, finding first that trial courts cannot reverse an indigency determination without finding a change in circumstances.⁷¹ Rather, an indigency determination must be based on the defendant's financial condition and not his conduct and behavior in dealing with counsel.⁷²

The court then turned to a comprehensive discussion of whether the defendant waived or forfeited his right to counsel by his conduct. Although the trial court was understandably frustrated by the delay caused by Gilmore's behavior, which had led five court-appointed lawyers to withdraw, Gilmore had never signaled an interest in representing himself and repeatedly requested representation by counsel.⁷³ In such cases of "waiver by conduct or forfeiture with knowledge," a defendant "is entitled to a hearing during which he should be warned that if his obstreperous behavior persists, the trial court will find that he has chosen self-representation by his own conduct."⁷⁴ Then, the trial court must determine whether he "made a knowing and intelligent waiver of his right to counsel, which includes a warning of the dangers and disadvantages of self-representation established in an on-the-record evidentiary hearing where specific findings are made."⁷⁵ In the absence of such a hearing, warning, and findings, the court of appeals vacated the trial court's order and remanded for further proceedings.⁷⁶ The Attorney General did not seek transfer in *Gilmore*, and the Indiana Supreme Court has not explicitly imposed the same requirements but likely would set a similar bar. Trial courts that do not conduct a hearing and issue a warning and findings before removing appointed counsel do so at peril of reversal.

1201 (Ind. 2006)).

69. 953 N.E.2d 583 (Ind. Ct. App. 2011).

70. *Id.* at 585.

71. *Id.* at 588.

72. *Id.*

73. *Id.* at 592.

74. *Id.*

75. *Id.*

76. *Id.* at 592-93.

Finally, a more conventional challenge regarding appointment of counsel comes from *Reese v. State*,⁷⁷ where a misdemeanor conviction was entered against a defendant after a trial at which he was required to represent himself.⁷⁸ Although the defendant was employed early in the case, he did not hire counsel and later became unemployed and was not receiving unemployment compensation.⁷⁹ Rather than focusing on the bills the defendant had to pay, the trial court focused on the defendant's failure to save money to hire counsel.⁸⁰ Based on his "total financial picture," the court of appeals concluded that ordering the defendant to hire private counsel would result in a substantial financial hardship, remanding for a new indigency hearing and new trial.⁸¹

C. Discovery for Criminal Defendants

In a pair of cases issued on the same day, the supreme court ruled against defendants who sought discovery in criminal cases. In *In re Crisis Connection, Inc.*,⁸² a defendant charged with child molesting sought the counseling records of the alleged victims and their mother.⁸³ The trial court ordered Crisis Connection to deliver the records for *in camera* review. The court of appeals upheld the order for *in camera* review, concluding the "interest in privacy" of the records was "important" but not strong enough to bar *in camera* review.⁸⁴ The supreme court disagreed, focusing on the victim advocate privilege codified in Indiana Code section 35-37-6-9(a),⁸⁵ which protects victims and their advocates and service providers from being "compelled to give testimony, to produce records, or to disclose any information concerning confidential communications and confidential information to anyone or in any judicial, legislative, or administrative proceeding."⁸⁶

The supreme court distinguished other cases that had permitted *in camera* review in the face of a statutory privilege that contained exceptions,⁸⁷ because the victim advocate privilege prohibits any and all disclosure of information making it clear the *in camera* review "would not reveal any nonprivileged information."⁸⁸ The court also rejected the defendant's Confrontation Clause challenge because he would not be prevented from cross-examining the alleged victims "at trial,"⁸⁹

77. 953 N.E.2d 1207 (Ind. Ct. App. 2011).

78. *Id.* at 1209.

79. *Id.* at 1211.

80. *Id.*

81. *Id.*

82. 949 N.E.2d 789 (Ind. 2011).

83. *Id.* at 792.

84. *Id.*

85. *Id.* at 792-93.

86. *Id.* (citing IND. CODE § 35-37-6-9(a) (2011)).

87. *Id.* at 794 (discussing exceptions "in connection with a criminal prosecution" or court access).

88. *Id.* at 795.

89. *Id.* at 798.

and rejected his due process challenge because the State's "compelling interest in maintaining the confidentiality of information gathered in the course of serving emotional and psychological needs of victims of domestic violence and sexual abuse" is not outweighed by the defendant's "right to present a complete defense."⁹⁰

In *Crawford v. State*,⁹¹ decided the same day as *Crisis Connection*, the court easily dispatched with a defendant's broad discovery request for footage from the nonfiction police show, "The Shift."⁹² The first of the three-step test for determining whether information is discoverable in criminal cases requires a "sufficient designation of the items sought to be discovered (particularity)."⁹³ Acknowledging that reasonable particularity will vary based on the facts, charges, and information sought in each case, the court nevertheless reiterated that defendants cannot merely request "everything related to the case."⁹⁴ The court found "no real difference" between such a broad request and Crawford's requests for footage of "any and all statements" of police officers or anyone "interviewed or questioned" in the specific case.⁹⁵ A footnote in the opinion recited some examples of discovery requests that were more particular and had been granted by the trial court, including footage, statements, and reenactments of statements made to specific individuals by name and footage of the crime scene by address.⁹⁶ These examples provide counsel and trial courts in future cases a better idea of the contours of reasonable particularity in the context of footage from television programs and more broadly.

Related to the importance of receiving documentary evidence as part of discovery is the importance of receiving the names of likely witnesses from opposing counsel. In *Kennedy v. State*,⁹⁷ the trial court permitted a witness discovered in the middle of a trial to testify for the State. Exclusion is appropriate "only if the State has blatantly and intentionally failed to provide discovery or if the exclusion is necessary to avoid substantial prejudice to the defendant."⁹⁸ Moreover, any error may be waived if the defendant does not alternatively request a continuance when additional time is an appropriate remedy.⁹⁹ In *Kennedy*, the defendant did not request a continuance and refused the trial court's offer of a one-day continuance to investigate the newly disclosed witness. This waived any claim of error.¹⁰⁰ On the merits the court of appeals also found no error in allowing the witness because she had approached the State, which promptly

90. *Id.* at 802.

91. 948 N.E.2d 1165 (Ind. 2011).

92. *Id.* at 1166-67.

93. *Id.* at 1168.

94. *Id.*

95. *Id.* at 1168-69.

96. *Id.* at 1169 n.4.

97. 934 N.E.2d 779 (Ind. Ct. App. 2010).

98. *Id.* at 787.

99. *Id.*

100. *Id.* at 788.

disclosed her to the defense.¹⁰¹ Defense counsel had an opportunity to depose her, and she did not testify until seven days after she was discovered at which time defense counsel had an opportunity “to vigorously cross-examine her.”¹⁰²

D. Jury Issues: Unanimity and Size

The supreme court addressed proper jury instructions to ensure verdicts are unanimous and the court of appeals considered a challenge to a five-person jury. In both cases, defense counsel either agreed or did not object, which helped seal the fate of affirmance.

In *Baker v. State*,¹⁰³ a defendant was charged with three counts of child molesting, each involving a different victim, but “the jury heard evidence of multiple acts of molestation concerning each alleged victim.”¹⁰⁴ He asserted that some jurors may have relied on different evidence than others in convicting him of each count. The supreme court adopted the reasoning of a California Supreme Court case, which explained

the State may in its discretion designate a specific act (or acts) on which it relies to prove a particular charge. However if the State decides not to so designate, then the jurors should be instructed that in order to convict the defendant they must either unanimously agree that the defendant committed the same act or acts or that the defendant committed all of the acts described by the victim and included within the time period charged.¹⁰⁵

The court slightly modified the language of a California jury instruction, which “provides a useful model for this jurisdiction.”¹⁰⁶ Although the trial court’s instruction did not comply with the requirements outlined in the case, the convictions were nevertheless affirmed because defense counsel “neither objected to the trial court’s instruction nor offered an instruction of his own,” thus resulting in waiver of the issue for appeal.¹⁰⁷

Beyond unanimity concerns are issues regarding the size of a jury. By statute juries in D felony and misdemeanor cases must include six persons.¹⁰⁸ Trial courts will often seat one or more alternate jurors to replace a juror in the event one cannot conclude the trial due to an unforeseen emergency. In *Bex v. State*,¹⁰⁹ the prosecutor and defense counsel agreed not to seat an alternate and that only

101. *Id.*

102. *Id.*

103. 948 N.E.2d 1169 (Ind. 2011), *reh’g denied*, 2011 Ind. LEXIS 781 (Sept. 7, 2011).

104. *Id.* at 1177.

105. *Id.* (citing *People v. Jones*, 792 P.2d 643 (Cal. 1990)).

106. *Id.* at 1177 n.4.

107. *Id.* at 1178. The court also found the error was not fundamental because “the only issue was the credibility of the alleged victims,” and the jury resolved the credibility dispute against Baker. *Id.* at 1179.

108. IND. CODE § 35-37-1-1(b) (2011).

109. 952 N.E.2d 347 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 651 (Ind. 2011).

five jurors would decide the case if something happened to one of the six jurors. Nevertheless, counsel later moved for a mistrial after a juror suffered a medical emergency, which was denied.¹¹⁰ Although the United States Supreme Court has invalidated a state statute allowing five-person juries,¹¹¹ it has also held that a criminal defendant may waive his or her right to a twelve-person jury.¹¹² Similarly, the Indiana Supreme Court has upheld a verdict from an eleven-person jury when defense counsel agreed not to seat an alternate.¹¹³ The court of appeals applied these precedents in *Bex*, upholding the verdict of five jurors based on defense counsel's agreement, finding the defendant had consented to counsel's decision by failing to object.¹¹⁴

E. Prosecutorial Misconduct Claims

Challenges to prosecutorial conduct come in many forms, although comments made during closing argument seem to be especially popular fodder for appeal.¹¹⁵

Justice David's first opinion was unanimous and involved fairly straightforward claims in a life without parole case. In *Delarosa v. State*,¹¹⁶ the defendant challenged the State's comment in closing argument that "it would have been great if [the defendant] had admitted" his guilt to police officers.¹¹⁷ The court concluded that in context the statement did not refer to the defendant's failure to testify but rather suggested a confession to police was not necessary because the defendant had already confessed to others.¹¹⁸

The Rules of Professional Conduct prohibit lawyers from stating "a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused."¹¹⁹ Prosecutors must be especially careful when responding to defense counsel's arguments that State's witness is telling the truth. In *Gaby v. State*,¹²⁰ the prosecutor crossed the line by telling the jury, "I cannot and would not bring charges that I believe were false" and that "I can tell you that with a guilty verdict on this case I will be able to sleep fine tonight. Just fine. In fact, better than fine. You will be able to also."¹²¹ The court of appeals found the comments were improper vouching because they "were not based solely on reasons which arose from the evidence, but rather,

110. *Id.* at 350.

111. *Id.* at 351 (citing *Ballew v. Georgia*, 435 U.S. 223 (1978)).

112. *Id.* at 352 (citing *Patton v. United States*, 281 U.S. 276 (1930)).

113. *Id.* at 353 (citing *Holliness v. State*, 467 N.E.2d 4 (Ind. 1984)).

114. *Id.* at 354.

115. *See, e.g.*, Schumm, *2010 Recent Developments, supra* note 26, at 1140-41 (discussing a reversal based on the prosecutor showing a YouTube video during closing argument).

116. 938 N.E.2d 690 (Ind. 2010).

117. *Id.* at 696.

118. *Id.*

119. IND. PROF. COND. R. 3.4(e).

120. 949 N.E.2d 870 (Ind. Ct. App. 2011).

121. *Id.* at 880.

asserted a personal knowledge of the facts at issue.”¹²²

In *Emerson v. State*,¹²³ the prosecutor referred to the defendant as a “bully” during voir dire, opening statements, and closing arguments. Defense counsel failed to object or request an admonishment, and the court found any misconduct did not rise to the level of fundamental error.¹²⁴ The prosecutor’s general questions about bullying during voir dire could “help the prosecutor, as well as defense counsel, determine whether evidence of bullying would negatively affect any of the potential jurors’ ability to render an impartial verdict” and were therefore “proper and relevant.”¹²⁵ The court also found no misconduct based on comments that the defendant “tried to bully his way out of” the initial stop and later trial through aggressive behavior that could be viewed as bullying.¹²⁶ Finally, although the prosecutor’s request to “stand up to this bully” was deemed improper, it did not make a fair trial impossible because it was a fleeting comment and the jury was advised that counsel’s arguments were not evidence.¹²⁷

F. *Bad Advice from Counsel Regarding Plea Agreements*

In a pair of cases, the court of appeals considered challenges to guilty pleas based on improper advisement of penal consequences. The Indiana Supreme Court has divided such claims into two categories: (1) “claim[s] of intimidation by an exaggerated penalty or enticement by an understated maximum exposure” and (2) “claims of incorrect advice as to the law.”¹²⁸

The court of appeals considered a claim from the first category in *Roberts v. State*,¹²⁹ where a defendant charged with burglary and theft agreed to plead guilty to both counts in exchange for the State not pursuing a motion to add a habitual offender allegation.¹³⁰ One of the convictions alleged in the proposed information for the habitual offender allegation, however, was not the defendant’s; therefore, the State could not have lawfully obtained the enhancement.¹³¹ Although a plea agreement under these circumstances was certainly no bargain, the court of appeals upheld the denial of post-conviction relief because Roberts knew the alleged prior conviction was not his, and therefore “the State’s threat to pursue the amendment to add the habitual offender count could not have reasonably been Roberts’s main motivation for his decision to plead guilty.”¹³²

Addressing the second category in *Springer v. State*,¹³³ the court of appeals

122. *Id.* at 881.

123. 952 N.E.2d 832 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 649 (Ind. 2011).

124. *Id.* at 837.

125. *Id.*

126. *Id.* at 837-38.

127. *Id.* at 838.

128. *Segura v. State*, 749 N.E.2d 496, 504-05, 507 (Ind. 2001).

129. 953 N.E.2d 559 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 650 (Ind. 2011).

130. *Id.* at 561.

131. *Id.*

132. *Id.* at 565.

133. 952 N.E.2d 799 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 650 (Ind. 2011).

reversed the denial of post-conviction relief when the defendant explained his guilty plea was based on his “belie[f] he would die in prison if he did not plead.”¹³⁴ There, the twenty-six-year-old defendant was presented with a choice between a plea agreement with a maximum sentence of 100 years or going to trial with the prospect of 141 years, although the correct maximum would have been “approximately 111 years.”¹³⁵ Based on the erroneous advisement, the court of appeals concluded the defendant “demonstrated at least a reasonable probability that the hypothetical reasonable defendant would have elected to go to trial if properly advised.”¹³⁶

Somewhat related to these cases are post-conviction challenges to the voluntariness of a guilty plea. Although there is no federal constitutional bar to accepting guilty pleas from defendants who simultaneously assert their innocence,¹³⁷ Indiana has long held that judges “may not accept a plea of guilty when the defendant both pleads guilty and maintains his innocence at the same time. To accept such a plea constitutes reversible error.”¹³⁸ This seemingly clear rule becomes a bit murkier in accomplice liability cases. In order to convict a defendant as an accomplice, the defendant must have knowingly or intentionally aided, induced, or caused another person to commit that offense.¹³⁹ In *Huddleston v. State*,¹⁴⁰ although the defendant professed that he wanted to plead guilty to murder, he “quite clearly and unequivocally stated during the factual basis colloquy that he did not intend for [the victim] to be killed, nor did he know or anticipate that [his accomplice] would kill [the victim].”¹⁴¹ The court of appeals concluded the defendant’s statements were “an outright denial” of the requisite mens rea for murder, and his later affirmative responses to the trial court when asked if he was guilty of murder were not “sufficient to override his earlier statement expressly denying the requisite culpability for murder.”¹⁴² Therefore, the denial of his petition for post-conviction relief was reversed.¹⁴³

G. *Crime or Not a Crime?*

As documented in previous survey articles, challenges to the sufficiency of evidence in a criminal case are often raised but frequently fail. Reversal is more common when an issue is framed as “a legal one with broader applicability than the facts of the particular case.”¹⁴⁴ This section begins with cases where the

134. *Id.* at 806.

135. *Id.*

136. *Id.* at 807.

137. *See* *North Carolina v. Alford*, 400 U.S. 25, 38 (1970).

138. *Ross v. State*, 456 N.E.2d 420, 423 (Ind. 1983).

139. IND. CODE § 35-41-2-4 (2011).

140. 951 N.E.2d 277 (Ind. Ct. App. 2011).

141. *Id.* at 281.

142. *Id.*

143. *Id.*

144. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 42 IND. L. REV. 937, 962 (2009) [hereinafter Schumm, *2008 Recent Developments*].

appellate courts reversed for insufficient evidence and then turns to those where the evidence was found sufficient.

1. *Poor Parenting Is Not Necessarily a Crime.*—Parents or others with a legal obligation to care for a dependent commit D felony child neglect if they knowingly place “the dependent in a situation that endangers the dependent’s life or health.”¹⁴⁵ In *Villagrana v. State*,¹⁴⁶ the father of a two-year child was watching television and not paying attention when the mother of his child asked him to watch the child while she ran errands. At the next commercial he went to the kitchen to feed the child but could not find her there or elsewhere in the house. He soon noticed the back door was open and went to search for her. A neighbor had found the child and called police and the Department of Child Services.¹⁴⁷ The court of appeals reversed the conviction, emphasizing “the entire incident occurred within approximately twenty minutes” and the defendant’s conduct was surely “negligent” but was not knowingly done, i.e., he was not subjectively aware of a high probability that his daughter was placed in a dangerous situation.¹⁴⁸

2. *Reasonable Discipline by Parents and Teachers.*—A few years ago, the Indiana Supreme Court set aside a mother’s conviction for battery of her child based on reasonable discipline.¹⁴⁹ In such cases the State must prove either “(1) the force the parent used was unreasonable or (2) the parent’s belief that such force was necessary to control her child and prevent misconduct was unreasonable.”¹⁵⁰ The court adopted a non-exhaustive list of six factors from the *Restatement (Second) of Torts* that should be weighed.¹⁵¹ There, the court concluded five to seven swats on the buttocks, arm, and thigh with a belt or extension cord was not unreasonable when it left only temporary bruising and did not require medical attention.¹⁵²

In a pair of cases applying *Willis*, the Indiana Court of Appeals found a parent’s discipline unreasonable while finding a teacher’s discipline was reasonable. First, in *Hunter v. State*,¹⁵³ a fourteen-year-old girl engaged in worsening behavioral problems including having a friend forge her father’s name on a permission slip for a school trip. The father instructed his daughter to remove her clothing down to her undergarments and go to the living room where he struck her approximately twenty times with a belt on the back, arms, and legs.¹⁵⁴ A scab on her thigh and swollen finger remained three and a half months

145. IND. CODE § 35-46-1-4(a)(1) (2011).

146. 954 N.E.2d 466 (Ind. Ct. App. 2011).

147. *Id.* at 468.

148. *Id.* at 469.

149. *Willis v. State*, 888 N.E.2d 177 (Ind. 2008).

150. *Id.* at 182.

151. *Id.*

152. *Id.* at 183-84.

153. 950 N.E.2d 317 (Ind. Ct. App. 2011).

154. *Id.* at 319.

later.¹⁵⁵ The court distinguished *Willis* in concluding the “arguably degrading and long-lasting physical effects” made the discipline unreasonable.¹⁵⁶

In *Barocas v. State*,¹⁵⁷ the court reversed a teacher’s conviction for battery against a special needs student whose tongue she “flicked” with two fingers.¹⁵⁸ It agreed the force used by the teacher fell far short of that used in *State v. Fettig*,¹⁵⁹ where the court upheld a trial court’s dismissal of battery charges against a gym teacher who slapped a student on the face.¹⁶⁰ The court in *Barocas* found it immaterial that the student “let out a wail” when flicked, finding no authority for the State’s suggestion that the reasonableness of force can be determined by the victim’s reaction to it.¹⁶¹

Although *Hunter* and *Barocas* were both challenges to the sufficiency of the evidence brought after trial, other defendants have filed pretrial motions to dismiss battery charges based on the privilege of reasonable discipline.¹⁶² Rarely are criminal cases resolved by defense motions to dismiss, as highlighted by another recent case where the Indiana Court of Appeals reiterated “it is an abuse of discretion to dismiss a case pursuant to Indiana Code section 35-34-1-4(a)(5) where the State has stated facts sufficient to constitute an offense.”¹⁶³

3. *Insufficient Evidence for Resisting Law Enforcement.*—Resisting law enforcement occurs only when done “forcibly.”¹⁶⁴ Several cases have been reversed because resistance was only passive or the purported force used by the defendant was ambiguous.¹⁶⁵ In *Aguirre v. State*, a divided court reversed a conviction because the State did not present any evidence of threatening or violent actions by the defendant during her encounter with police; rather, she only “dove her hand into her purse” to answer a cell phone call from her mentally ill son.¹⁶⁶ Looking to the evidence most favorable to the verdict, though, Judge Baker dissented because the officer testified “when she grabbed Aguirre’s hand to place it in handcuffs, Aguirre pulled her hand away.”¹⁶⁷ He concluded this was sufficient evidence of resisting,¹⁶⁸ similar to when the defendant “stiffened up”

155. *Id.* at 321.

156. *Id.*

157. 949 N.E.2d 1256 (Ind. Ct. App. 2011).

158. *Id.* at 1260-61.

159. 884 N.E.2d 341, 345 (Ind. Ct. App. 2008).

160. *Id.*

161. *Barocas*, 949 N.E.2d at 1260.

162. *See, e.g., Fettig*, 884 N.E.2d at 342.

163. *State v. Gill*, 949 N.E.2d 848, 850 (Ind. Ct. App.) (reciting two other bases for dismissal of a criminal case including “a jurisdictional impediment to the conviction” and “any other ground that is a basis for dismissal as a matter of law”), *trans. denied*, 962 N.E.2d 642 (Ind. 2011).

164. IND. CODE § 35-44-3-3 (2011).

165. *See Aguirre v. State*, 953 N.E.2d 593, 597 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 653 (Ind. 2011) (collecting cases).

166. *Id.* at 596-97.

167. *Id.* at 597 (Baker, J., dissenting).

168. *Id.*

in an earlier case.¹⁶⁹

Aguirre highlights the potential conflict between refusing to reweigh conflicting evidence and wearing blinders when confronted with pertinent, uncontroverted evidence that favors the defendant. For example, in reversing an invasion of privacy conviction as summarized below, the Indiana Supreme Court considered the respondent's "mixed messages" of oral notice regarding a protective order.¹⁷⁰

In *Stansberry v. State*,¹⁷¹ the defendant charged toward a police officer while removing his clothing despite the officer's threat to use pepper spray.¹⁷² Based on the trial court's comments at the end of a bench trial that it was "satisfied that the attempted resisting was forcible," the court of appeals held the defendant could not be convicted of resisting law enforcement.¹⁷³ The trial court had, though, entered a conviction for "attempted resisting law enforcement,"¹⁷⁴ which did not fly either because the trial court had concluded the defendant's "actions fell short of the modest level of resistance necessary to sustain a conviction."¹⁷⁵ Whether an attempted resisting law enforcement conviction could be pursued in a future case remains in doubt, as the court of appeals observed that "almost any action one takes toward thwarting law enforcement is necessarily one of an attempt," but a conviction requires "force."¹⁷⁶

4. *Failure to Register as a Sex Offender*.—A detailed statutory scheme governs the requirements of sex offenders to provide information for the sex offender registry, and defendants who make material misstatements or omissions can face felony charges. In *Dye v. State*,¹⁷⁷ the court addressed the special challenges presented by defendants who are illiterate and homeless. There, the defendant acknowledged many of his answers were incorrect because he did not understand the sex offender registry forms.¹⁷⁸ He was not assisted in completing the forms, and he complied with the requirement that homeless registrants appear in person before local law enforcement every seven days.¹⁷⁹ Accordingly, the court found insufficient evidence that he knowingly violated the registry requirements.¹⁸⁰

5. *Violations of Protective Orders*.—In a pair of cases, the Indiana Supreme Court provided clearer parameters for adjudicating violations of protective orders,

169. *Johnson v. State*, 833 N.E.2d 516, 518-19 (Ind. Ct. App. 2005).

170. *Tharp v. State*, 942 N.E.2d 814, 818 (Ind. 2011).

171. 954 N.E.2d 507 (Ind. Ct. App. 2011).

172. *Id.* at 509.

173. *Id.* at 511-12.

174. *Id.* at 509.

175. *Id.* at 512.

176. *Id.*

177. 943 N.E.2d 928 (Ind. Ct. App. 2011).

178. *Id.* at 931.

179. *Id.*

180. *Id.*

a misdemeanor offense known as “invasion of privacy” in Indiana.¹⁸¹ In *Joslyn v. State*,¹⁸² the court emphasized that protective orders need not be properly served under the trial rules in order to secure a conviction for invasion of privacy, which simply requires a knowing or intentional violation of an order.¹⁸³ There, the defendant received a copy of the protective order at his home from a process server but was not sent a copy by first-class mail as required by Trial Rule 4.1(B).¹⁸⁴ Nevertheless, Joslyn’s statements to police and trial testimony about his awareness of the protective order and its terms were sufficient to prove he knowingly violated the order.¹⁸⁵

In *Tharp v. State*,¹⁸⁶ the court applied the rule from *Joslyn*, reiterating that oral notice can be sufficient, “even when it comes from someone other than an agent of the State if it includes adequate indication of the order’s terms.”¹⁸⁷ There, the only evidence the defendant knew of the protective order came from his girlfriend telling him about the order “at the same time she told him it was no longer valid.”¹⁸⁸ Emphasizing the importance of respondents being given an “adequate opportunity to know that they have been enjoined,” and understanding “what is covered by the injunction,” the court found the “mixed messages” insufficient for a conviction.¹⁸⁹

Joslyn and *Tharp* offer useful guidance to lawyers and lower courts, but the issue of knowledge will likely remain a point of contention in many cases when the notice requirements of the trial rules are not followed. Although *Joslyn* offers clear evidence of knowledge through admissions by the respondent, in other cases the protected person’s testimony will likely conflict with the respondent’s. Factfinders will need to determine not only who to believe but also whether the respondent was provided adequate notice of the specific terms of the protective order. A vague statement that “I got a protective order on you” may not be sufficient.

In some cases, though, direct contempt proceedings may be required instead of an invasion of privacy charge. In *Thomas v. State*,¹⁹⁰ an ex parte protective order was issued and the parties met in court a few weeks later where the respondent told the protected person, “Stop calling me, fagot [sic].”¹⁹¹ The court of appeals reversed the conviction for invasion of privacy, concluding “the institution of direct contempt proceedings was the more appropriate” under the

181. See IND. CODE § 35-46-1-15.1 (2011).

182. 942 N.E.2d 809 (Ind. 2011).

183. *Id.* at 811-12.

184. *Id.* at 812.

185. *Id.* at 813-14.

186. 942 N.E.2d 814 (Ind. 2011).

187. *Id.* at 818.

188. *Id.* at 817.

189. *Id.* at 818.

190. 936 N.E.2d 339 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1198 (Ind. 2011).

191. *Id.* at 339.

circumstances.¹⁹² Judge Bradford dissented, agreeing that “direct contempt proceedings would have been the more efficient and preferred remedy,” but finding “nothing in the statute that precluded the State from choosing to file the invasion of privacy charges.”¹⁹³

6. *Creepy Conduct*.—Creepy conduct is not always criminal.¹⁹⁴ Sexual battery requires a touching intended to arouse sexual desires when the victim is compelled to submit to the touching or “so mentally disabled or deficient that consent to the touching cannot be given.”¹⁹⁵ In *Ball v. State*,¹⁹⁶ a woman awoke to the defendant “kissing and licking her face.”¹⁹⁷ Because “[s]leep is not equivalent to a mental disability or deficiency for purposes of the sexual battery statute,” the court reversed the D felony sexual battery conviction.¹⁹⁸ The case was remanded for entry of a Class B misdemeanor battery conviction because “[e]vidence of a touching, however slight, is sufficient to support a conviction for battery.”¹⁹⁹

A case involving voyeurism, lies, and videotape, however, reached the opposite result. Sean Chiszar set up a video camera in his bedroom where he attempted to tape himself having sex with his fiancée.²⁰⁰ His fiancée heard “beeping sounds,” confronted Chiszar, and police were eventually called.²⁰¹ Chiszar was ultimately convicted of voyeurism, a Class D felony, which he challenged on appeal on both vagueness and sufficiency grounds.

The base voyeurism offense requires peeping “into an area where an occupant of the area reasonably can be expected to disrobe,” and the term “peep” is separately defined as “any looking of a clandestine, surreptitious, prying, or secretive nature.”²⁰² In rejecting Chiszar’s vagueness challenge, the court of appeals emphasized the crime is limited to areas where people are expected to disrobe, which would not include living rooms, kitchens, or surprise birthday parties, as the defendant posited.²⁰³ Moreover, the “crux of the statute is consent.”²⁰⁴ The statute provides notice to persons of ordinary intelligence by its limitation to only looking that is “clandestine, surreptitious, prying, or secretive

192. *Id.* at 341.

193. *Id.* (Bradford, J., dissenting).

194. See Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 41 IND. L. REV. 955, 981-83 (2008).

195. IND. CODE § 35-42-4-8(a) (2011).

196. 945 N.E.2d 252 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 640 (Ind. 2011).

197. *Id.* at 253.

198. *Id.* at 258.

199. *Id.*

200. *Chiszar v. State*, 936 N.E.2d 816, 819 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1212 (Ind. 2011).

201. *Id.*

202. IND. CODE § 35-45-4-5(2011).

203. *Chiszar*, 936 N.E.2d at 823-24.

204. *Id.* at 823.

[in] nature.”²⁰⁵ “There can be no reasonable purpose for that kind of looking since, by definition, it is without the other person’s knowledge, and, therefore, it is without the other person’s consent.”²⁰⁶

In addressing Chiszar’s sufficiency claim, the court rejected a narrow interpretation of the word “into” and found it irrelevant whether Chiszar was physically present in the bedroom.²⁰⁷ To find otherwise “would mean that a conviction for voyeurism by the use of a video camera could only stand if the video camera were set up at the doorway to a room or outside of the room looking in. That could not have been the Legislature’s intent.”²⁰⁸ Moreover, the court was not persuaded that Chiszar’s fiancée had “impliedly consented to the video taping since she was in a consensual sexual relationship with him.”²⁰⁹ Consent to engage in sex is not tantamount to consent to be taped having sex.²¹⁰ Chiszar’s grabbing the video camera, running out of the bedroom, and repeated denials further undermined any notion of consent.²¹¹

Finally, *Temple v. State*²¹² provides another example of creepy conduct that was found criminal where the twenty-six-year-old defendant exchanged text messages with a fifteen-year-old neighbor to arrange a sexual rendezvous when she could sneak out of her house. The court interpreted the term “‘induce’ in a manner consistent with its broad dictionary definition.”²¹³

7. *Public Intoxication Charges for Drunk Passengers.*—In *Moore v. State*,²¹⁴ a divided panel of the Indiana Court of Appeals reversed a conviction for public intoxication entered against a passenger who was sleeping in a car pulled over by police.²¹⁵ The majority attempted to distinguish *Miles v. State*,²¹⁶ which had held a man in his tractor-trailer cab parked along a highway was in a public place for purposes of the statute,²¹⁷ comparing “the sole occupant of a running and dangerously parked vehicle arrested at a time when a charge of operating while intoxicated was not possible under such circumstances, versus a sleeping passenger in a vehicle traveling upon a public road stopped for an equipment violation.”²¹⁸ Judge Vaidik dissented, reasoning that

the key determination is whether the vehicle is in a public place, and in [*Miles*], the defendant was in a parked vehicle three or four feet from the

205. *Id.*

206. *Id.*

207. *Id.* at 830.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. 954 N.E.2d 513 (Ind. Ct. App. 2011).

213. *Id.* at 515.

214. 935 N.E.2d 301 (Ind. Ct. App. 2010), *vacated*, 949 N.E.2d 343 (Ind. 2011).

215. *Id.* at 305-06.

216. 216 N.E.2d 847 (Ind. 1966).

217. *Id.* at 849.

218. *Moore*, 935 N.E.2d at 304.

traveled portion of a busy highway. If being inside a vehicle on the side of a road is in a public place, then being inside a vehicle on the road is also a public place.²¹⁹

She also noted the General Assembly had not amended the public intoxication statute in response to *Miles*.²²⁰ Nevertheless, Judge Vaidik acknowledged the troubling policy implications of discouraging “the practice of securing a designated driver or a taxicab.”²²¹

Because *Moore* conflicted with *Miles*, it was no surprise that the Indiana Supreme Court quickly granted transfer.²²² Its opinion, which affirmed the conviction, though, did not grapple with the analytic underpinnings of *Miles*, where the court did not engage in a discussion of the purpose of the statute or the need to construe penal statutes strictly against the State. In *Miles*, the supreme court simply observed, “While there are few authorities on the subject, there is some authority to uphold a conviction under this statute of a person in a motor vehicle at the time of the arrest.”²²³ Rather, the Indiana Supreme Court majority in *Moore* simply (1) “decline[d] the defendant’s request to reverse her conviction on public policy grounds,” and (2) found her “accountability under the public intoxication statute does not violate her personal liberty rights [to consume beverages of choice] under the Indiana Constitution.”²²⁴ Justice Rucker dissented, suggesting that *Miles* should be overruled and pointing to century-old precedent holding that “[t]he purpose of the [law] is to protect the public from the annoyance and deleterious effects which may and do occur because of the presence of persons who are in an intoxicated condition.”²²⁵

This continued criminalization of riding drunk as a passenger in a vehicle is likely to generate a legislative response, although the paucity of appellate case law suggests it has been applied rarely by police and prosecutors. If police arrest a drunk or suspended driver, it may be easier to arrest a drunk passenger for public intoxication than to arrange for someone to pick up that person. If there is another sober driver in the vehicle, though, the car could be released to that person. At least one prosecutor recently declined to pursue a public intoxication charge against a drunk passenger in a vehicle driven by his sober mother.²²⁶ The prosecutor remarked, “I just think it’s good business to reward those who use designated drivers.”²²⁷

8. *Buying Drugs is a Crime (Even for Criminal Defense Lawyers)*.—Viewers

219. *Id.* at 306 (Vaidik, J., dissenting).

220. *Id.*

221. *Id.* at 307.

222. *Moore v. State*, 949 N.E.2d 343 (Ind. 2011).

223. *Miles v. State*, 216 N.E.2d 847, 849 (Ind. 1996) (citing *Winters v. State*, 160 N.E. 294 (Ind. 1928)).

224. *Moore*, 949 N.E.2d at 345.

225. *Id.* at 346 (Rucker, J., dissenting) (quoting *State v. Sevier*, 20 N.E. 245, 246-47 (Ind. 1889)).

226. See John Tuohy, *NFL Player Off Hook*, INDIANAPOLIS STAR, July 8, 2010, at B6.

227. *Id.*

of *The People's Court* in the 1980s were offered a quip of sage advice at the end of each episode: "Don't take the law into your own hands: you take 'em to court."²²⁸ The lawyer/defendant in *Schalk v. State*²²⁹ could have benefitted from that advice. There, the court of appeals rejected a criminal defense lawyer's challenges to his conviction for possession of marijuana, which resulted from a drug buy he orchestrated with a State's witness in a pending drug case.²³⁰ "His ostensible purpose was to prove that the witness, a confidential informant, was actively dealing drugs and, thus, to discredit the witness who was scheduled to testify against his client at trial."²³¹ This didn't end well for him. First, although the Indiana Code provides a fairly broad definition of "law enforcement officer," the definition doesn't include criminal defense attorneys.²³² Thus, even if his intent was to deliver the marijuana to a law enforcement officer for use in defending his client at trial, his conduct was not immunized from prosecution.²³³ Next, although citizens have a right to arrest others under certain circumstances, that statute was of no aid to Schalk, who arranged an illegal drug buy and never tried to arrest the seller. Finally, the court was not persuaded by his assertion of a "right to defend his clients" under the Sixth Amendment to the U.S. Constitution and article 1, section 13 of the Indiana Constitution; attorneys, who are officers of the court and take an oath to uphold the federal and state constitutions, are not authorized to engage in criminal activity under those same constitutions.²³⁴

I. A Rare Reversal on Insanity

Appellate courts defer significantly to the verdicts of juries and judges, especially regarding the insanity defense. Even when expert testimony has unanimously concluded a person was insane, guilty verdicts have been affirmed if lay testimony or "other sufficient probative evidence" suggested sanity.²³⁵

In *Galloway v. State*,²³⁶ the Indiana Supreme Court offered an excellent overview of the history and evolution of the insanity defense. There, although nonconflicting expert and lay testimony established the defendant was insane, a trial court rejected the insanity defense because the defendant could continue to

228. *Doug Llewelyn*, IMDB, <http://www.imdb.com/name/nm0515770/news> (last visited June 5, 2012).

229. 943 N.E.2d 427 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 639 (Ind. 2011).

230. *Id.* at 431-32.

231. *Id.* at 428. Although not mentioned in the opinion, Schalk's plan could have been difficult to carry through at trial in light of Indiana Rule of Professional Conduct 3.7, which prohibits lawyers from acting as an "advocate at a trial in which the lawyer is likely to be a necessary witness," except under narrow circumstances.

232. *Id.* at 430 (citing IND. CODE § 35-41-1-17 (2011)).

233. *Id.* at 431.

234. *Id.*

235. *Galloway v. State*, 938 N.E.2d 699, 710 (Ind. 2010), *reh'g denied*, 2011 Ind. LEXIS 349 (May 6, 2011); *see, e.g.*, *Thompson v. State*, 804 N.E.2d 1146, 1149 (Ind. 2004).

236. *Galloway*, 938 N.E.2d 699.

be a danger to society due to the state's inadequate mental health system.²³⁷ The court emphasized "a person is either sane or insane at the time of the crime; there is no intermediate ground."²³⁸ Although one of the experts in the case submitted a preliminary report opining the defendant was sane, he recanted that opinion after learning critical facts on cross-examination. Without a conflict in expert testimony, lay testimony was necessary to establish sanity. After a lengthy discussion of the limited value of demeanor evidence, the court emphasized such evidence "must be considered as a whole, in relation to all the other evidence. To allow otherwise would give carte blanche to the trier of fact and make appellate review virtually impossible."²³⁹ The court rejected the trial court's findings, including the defendant's deterioration during trial, which is not probative of sanity at the time of the offense.²⁴⁰ Perhaps most significantly, though, the court made clear it was not appropriate "for the trier of fact to consider the condition of our State's mental health system" in rendering its verdict.²⁴¹ Justices Rucker and David joined Justice Sullivan's opinion.

Chief Justice Shepard, joined by Justice Dickson, wrote an impassioned dissent.²⁴² Relying on the views of "our fellow citizens," he disagreed with the majority's declaration that "it is not relevant what may happen as a result of this reversal by appellate judges."²⁴³ Rather than discussing or distinguishing the precedent cited in the majority's opinion, the dissent instead focused on "some innocent future victim [being] placed at risk by this [c]ourt's decision to second-guess" the trial court.²⁴⁴

J. Sentencing Issues Under Appellate Rule 7(B)

Sentencing claims are among the most, if not the most, popular for defendants to raise on appeal in Indiana. They come in many varieties, but the robust review for "appropriateness" under appellate rule 7(B) is raised hundreds of times each year.

1. Increasing Sentences on Appeal.—As discussed in detail in last year's survey,²⁴⁵ the Indiana Court of Appeals increased a sentence for the first time on appeal in 2010 in *Akard v. State*.²⁴⁶ The court of appeals increased the ninety-three-year sentence to 118 by focusing on the horrendous nature of the crime.²⁴⁷ The court relied on the supreme court's opinions in *McCullough v. State*,²⁴⁸ which

237. *Id.* at 703.

238. *Id.* at 711.

239. *Id.* at 714.

240. *Id.* at 715.

241. *Id.* at 716.

242. *Id.* at 718 (Shepard, C.J., dissenting).

243. *Id.* at 719.

244. *Id.* at 720.

245. See Schumm, *2010 Recent Developments*, *supra* note 26, at 1155-59.

246. 924 N.E.2d 202 (Ind. Ct. App.), *aff'd in part*, 937 N.E.2d 811 (Ind. 2010).

247. *Id.* at 211-12.

248. 900 N.E.2d 745 (Ind. 2009).

made clear the power to review and revise sentences included the ability to increase a sentence on appeal—but only when the defendant requested a sentence reduction.²⁴⁹

Just a few weeks after granting transfer and hearing oral argument in *Akard*, the supreme court unanimously vacated the increased sentence, emphasizing that the prosecutor had requested a ninety-three-year sentence in the trial court and the Attorney General had argued that sentence was appropriate on appeal.²⁵⁰ The *Akard* opinion is a narrow one that largely begs the question of when an increased sentence will be appropriate. The supreme court has developed a rich body of case law that applies coherent and consistent principles when *decreasing* a sentence.²⁵¹ In the absence of any principles for *increasing* sentences, though, appellate counsel is hard-pressed to advise clients when they are at risk for challenging a sentence. For the time being anyway, the bar for an increase appears to be a very substantial one that has not yet been met in the hundreds of sentencing appeals since *McCullough*.

Defendants who seek to insulate themselves from the possibility of an increased sentence by challenging the sentence on only one count and waiving review of the sentence imposed on other counts “to shield himself from the risk of having his aggregate sentence revised upward on appeal” are out of luck under *Webb v. State*.²⁵² The court of appeals relied heavily on *Cardwell v. State*,²⁵³ where the supreme court made clear “appellate review should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count.”²⁵⁴ In *Webb*, the defendant received a twenty-five year aggregate sentence when the maximum possible sentence would have been forty-five years for one count of robbery as a Class B felony, six D felony counts of fraud, two D felony counts of attempted fraud, and an A misdemeanor count of driving while suspended.²⁵⁵ Although the trial court appeared to have “exercised no leniency” in imposing the twenty year maximum sentence for robbery, the aggregate sentence of twenty-five years “could have been [imposed] in a number of different ways, and so long as that is an appropriate sentence for Webb’s offenses as a whole,” the court found “no

249. *Id.* at 750-51.

250. *Akard*, 937 N.E.2d at 814. As explained in last year’s survey, the Attorney General requested increased sentences several times in the months after *McCullough* was issued. Schumm, *2010 Recent Developments*, *supra* note 26, at 1156. This practice appears to have been curtailed in the months following the supreme court’s opinion in *Akard*.

251. For example, in *Smith v. State*, 889 N.E.2d 261 (Ind. 2008), the court cited the defendant’s minor criminal history, and poor mental health balanced against his violation of the victim’s trust and psychological abuse in reducing a 120-year sentence to sixty. *Id.* at 264. The opinion included a string citation of cases to demonstrate the revision was “consistent with this [c]ourt’s general approach to [sentencing] matters.” *Id.* at 264-65.

252. 941 N.E.2d 1082, 1087 (Ind. Ct. App.), *trans. denied*, 950 N.E.2d 1205 (Ind. 2011).

253. 895 N.E.2d 1219 (Ind. 2008).

254. *Id.* at 1225.

255. *Webb*, 941 N.E.2d at 1085, 1088.

reason to meddle with the particular method used by the trial court.”²⁵⁶

2. *Reducing Sentences on Appeal.*—During the survey period, the court of appeals issued 1,337 opinions in criminal cases, and nearly thirty percent (391 cases) included a claim for a reduced sentence under appellate rule 7(B).²⁵⁷ Surprisingly, nearly thirty percent (114) of these cases with a sentencing claim were appealed after the defendant entered into a plea agreement with the State of Indiana. Although many county prosecutors include explicit provisions in plea agreement precluding an appeal of the sentence,²⁵⁸ some still do not. Of the 391 opinions, less than seven percent (twenty-six cases) were reversed. Reductions sometimes occurred in cases with fairly graphic facts but weighty mitigation regarding the defendant’s character. For example, the defendant in *Koch v. State*²⁵⁹ received a forty-five year sentence for offenses arising from a multi-state abduction of his former girlfriend, which spanned Evansville to New Mexico and included physical abuse, a shot to the ankle, and robbery of her debit card along the way.²⁶⁰ The court of appeals reduced the sentence to thirty years, emphasizing the defendant’s minimal criminal history (two misdemeanor convictions nearly a decade earlier), his service in the military, and his mental illness.²⁶¹ Specifically, the court recounted the defendant “believed that someone was trying to kill him, that there was a conspiracy against him, and that he was hearing voices coming from the speakers of his vehicle causing him to rip the speakers out.”²⁶²

Beyond mental illness, other reductions by the court of appeals focused on considerations such as the defendant’s age and even reduced sentences below the advisory term. For example, in *Eiler v. State*,²⁶³ the sentence appealed was near the minimum—twenty-two years (with four years suspended) for a Class A felony, which has a sentencing range of twenty to fifty years. In modifying the

256. *Id.* at 1088.

257. This data came from Westlaw searches in the Indiana Court of Appeals database on October 10, 2011, which were later tabulated and are on file with the Author. The following search yielded a total of 1337 opinions: “DA(aft 09-30-2010 & bef 10-01-2011) & dn(cr).” A narrowing search then yielded 483 results, which were individually assessed to remove those in which a 7(B) claim was not raised on appeal: “(rule-7 inapprpr!) & DA(aft 09/30/2010 & bef 10/01/2011) & DN(cr).”

258. The supreme court upheld the enforceability of these provisions in *Creech v. State*, 887 N.E.2d 73 (Ind. 2008). See Schumm, 2008 *Recent Developments*, *supra* note 144, at 944.

259. 952 N.E.2d 359 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 653 (Ind. 2011).

260. *Id.* at 364-65, 367.

261. *Id.* at 376.

262. *Id.* As other cases make clear, however, not every defendant suffering from a mental illness will secure reduced sentence on appeal, especially when less than the maximum sentence is imposed. See, e.g., *Washington v. State*, 940 N.E.2d 1220, 1223-24 (Ind. Ct. App.) (affirming thirty-five year sentence for Class A felony battery when the defendant’s “mental illness bears little weight on our analysis of his character”), *trans. denied*, 950 N.E.2d 1202 (Ind. 2011).

263. 938 N.E.2d 1235 (Ind. Ct. App. 2010), *reh’g denied*, 2011 Ind. App. LEXIS 400 (Feb. 24, 2011).

sentence to twenty-two years with ten years suspended, the court focused on the defendant's age (sixty), "his minimal criminal history, his ability to maintain a job for the past twenty-five years, his taking responsibility for his actions, and that he was the family's main financial provider, as well as the fact that he sold cocaine only to the same people with whom he used and that he did not profit financially from doing so."²⁶⁴

During the survey period, the Indiana Supreme Court reduced sentences in four cases. In *Sanchez v. State*,²⁶⁵ Justice David authored an opinion reducing an eighty-year sentence for child molesting convictions involving the defendant's two stepdaughters to forty years. As to the nature of the offense, the opinion noted the offenses were isolated incidents and the absence of "significant force" or injury.²⁶⁶ Although the defendant had four prior unrelated arrests, none were even remotely related to child molesting.²⁶⁷ The court concluded the aggravating circumstances warranted an enhanced sentence for an A felony but not consecutive sentences.²⁶⁸ Justice Dickson dissented in *Sanchez*, as he frequently does when the court reduces a sentence.²⁶⁹ He emphasized the limited ability of appellate judges to "fully perceive and appreciate the totality of the circumstances personally perceived by the trial judge," which should "restrain appellate revision of sentences to only extremely rare, exceptional cases."²⁷⁰ He also expressed concern that appellate revisions could foster reliance and "serve as a disincentive to the cautious and measured fashioning of sentences by trial judges," who may not believe their decisions are "essentially final."²⁷¹

Two of the three additional cases in which a sentence was reduced were also child molesting cases, which often include particularly lengthy enhanced and consecutive sentences. In *Horton v. State*,²⁷² a unanimous court reduced a 324-year sentence to 110 years,²⁷³ which even with good time credit will likely be a life sentence.²⁷⁴ There, the defendant had no adult criminal history but was in a

264. *Id.* at 1239.

265. 938 N.E.2d 720 (Ind. 2010).

266. *Id.* at 722.

267. *Id.*

268. *Id.* at 723.

269. *Id.* (Dickson, J., dissenting); *see also* *Smith v. State*, 889 N.E.2d 261, 265 (Ind. 2008) (Dickson, J., dissenting); *Cardwell v. State*, 895 N.E.2d 1219, 1227 (Ind. 2008) (Dickson, J., dissenting).

270. *Sanchez*, 938 N.E.2d at 723 (Dickson, J., dissenting).

271. *Id.*

272. 949 N.E.2d 346 (Ind. 2011).

273. *Id.* at 349.

274. The date of the offense is unclear from the court's opinion. Defendants who are at least twenty-one and commit A felony child molesting offenses against victims under age twelve after June 30, 2008 are classified as credit-restricted felons and must serve nearly eighty-five percent of their sentences instead of the fifty percent for those defendants convicted of other offenses who maintain good behavior in prison. *See Upton v. State*, 904 N.E.2d 700, 704-05 (Ind. Ct. App. 2009).

position of trust with the seven-year-old victim who was molested on a daily basis and contracted herpes.²⁷⁵

Justice David was not always in the majority in sentence reduction cases. In *Pierce v. State*,²⁷⁶ the three-justice majority reduced a 120-year sentence for multiple counts of child molesting against the same ten-year-old victim to eighty years.²⁷⁷ Although the defendant was in a position of trust and had a prior conviction for child molesting, the majority noted the prior offense had occurred eight years earlier and the defendant had no other criminal record.²⁷⁸ Justice David, joined by Justice Dickson, emphasized the trial court “did exactly what he was supposed to do—exercise discretion within the required statutory and case law framework” and suggested concern that the majority opinion “is more akin to a second guessing by this [c]ourt.”²⁷⁹ In addition to the prior conviction, the dissent noted that “the molestations occurred over a span of one year and involved fondling, oral sex, and intercourse on multiple occasions.”²⁸⁰

Outside the realm of child molesting, in *Carpenter v. State*²⁸¹ the supreme court cut a forty-year sentence in half for a defendant who was convicted of being a felon in possession of a handgun and a habitual offender.²⁸² The defendant had stipulated to the latter enhancement, which punished his lengthy criminal history, but offered a fairly benign nature of the offense: he was found asleep in the waiting room of a dental office “apparently drunk or overdosed.”²⁸³

K. Other Sentencing Claims

The appellate courts also addressed a variety of other legal claims of sentencing error involving minimum sentences for A felonies, enhancements, limitations on crimes committed within the same criminal episode, and restrictions on modifying D felonies to Class A misdemeanors.

From the basic realm, in *Mauricio v. State*,²⁸⁴ the Indiana Supreme Court offered yet another reminder to counsel and trial courts that sentencing statutes at the time of an offense are controlling, and the failure to argue a significant statutory conflict may constitute ineffective assistance of counsel.²⁸⁵ Beginning with *Smith v. State*,²⁸⁶ the court has held that a forty-year presumptive sentence applies to murders committed between July 1, 1994, and May 5, 1995, a period

275. *Horton*, 949 N.E.2d at 348-49.

276. 949 N.E.2d 349 (Ind. 2011).

277. *Id.* at 353.

278. *Id.* at 352-53.

279. *Id.* at 353 (David, J., dissenting).

280. *Id.*

281. 950 N.E.2d 719 (Ind. 2011).

282. *Id.* at 721-22.

283. *Id.* at 719.

284. 941 N.E.2d 497 (Ind. 2011).

285. *Id.* at 499.

286. 675 N.E.2d 693 (Ind. 1996).

when conflicting statutes were on the books.²⁸⁷ Because the court in *Mauricio* could not say the trial court “clearly intended to sentence [the defendant] to fifty years as a specific term rather than as the presumptive sentence,” the supreme court held appellate counsel was ineffective for failing to raise the issue and remanded the case for resentencing.²⁸⁸

1. *Minimum Sentence for Class A Felonies.*—Other cases have presented statutory conflicts regarding the appropriate parameters of a sentence. Class A felonies generally carry a sentencing range of twenty to fifty years.²⁸⁹ Another statute, however, provides other restrictions on sentences for A felony child molesting. Indiana Code section 35-50-2-2(b) provides that “the court may suspend only that part of the sentence that is in excess of the minimum sentence,” while section 2(i) restricts the court to suspending “only that part of the sentence that is in excess of thirty . . . years” if the defendant was over twenty-one and the victim was younger than twelve.²⁹⁰ The court of appeals held in *Hampton v. State*²⁹¹ that section 2(i) “dictates only the discretion trial courts have in designating which portions of a defendant’s sentence may be suspended and does not expressly set sentencing minimums,”²⁹² but that trial courts retain discretion “whether to sentence defendants to the advisory sentence, and require those so sentenced to serve thirty years of executed time, or to sentence defendants to a sentence below the advisory level under certain circumstances.”²⁹³ The Indiana Supreme Court in *Miller v. State*,²⁹⁴ held that *Hampton* “correctly decided the issue.”²⁹⁵ Because the trial court in *Miller* originally sentenced the defendant to thirty years with ten suspended but later changed the sentence to thirty years executed when the State erroneously asserted section 2(i) required a minimum thirty-year sentence, the supreme court remanded the case to the trial court for resentencing.²⁹⁶

2. *Firearm Enhancements.*—Other cases addressed enhancements, such as the five-year sentence enhancement if a defendant knowingly or intentionally “used” a firearm during the commission of certain delineated crimes, including B felony criminal confinement.²⁹⁷ In *Nicoson v. State*,²⁹⁸ the majority upheld the enhancement over the defendant’s double jeopardy and statutory challenges.²⁹⁹ Criminal confinement is enhanced from a C to B felony if a person is “armed”

287. *Id.* at 696-98.

288. *Mauricio*, 941 N.E.2d at 499.

289. IND. CODE § 35-50-2-4 (2011).

290. *Id.* § 35-50-2-2.

291. 921 N.E.2d 27, 30-31 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 821 (Ind. 2010).

292. *Id.* at 31.

293. *Id.* at 31 n.5.

294. 943 N.E.2d 348 (Ind. 2011).

295. *Id.* at 349.

296. *Id.*

297. IND. CODE § 35-50-2-11 (2011).

298. 938 N.E.2d 660 (Ind. 2010).

299. *Id.* at 665.

with a deadly weapon, but the section 11 enhancement requires more—the “use” of a firearm in the offense.³⁰⁰ Justice Rucker, joined by Justice Sullivan, dissented on double jeopardy grounds because the defendant was “armed” with the firearm the entire time he was “using” it.³⁰¹ Relying on *Nicoson*, the court of appeals found no double jeopardy violation in *Cooper v. State*,³⁰² where the defendant was convicted of reckless homicide and a five-year firearm enhancement under Indiana Code section 35-50-2-11 was imposed. In language that rings more in statutory construction than state constitutional double jeopardy jurisprudence, the court concluded:

[E]ven though the jury relied upon Cooper’s use of the shotgun for both the underlying offense and the enhancement, the legislature’s intent is clear that criminal offenses committed with firearms are to receive additional punishment. Moreover, if the legislature intended that offenses resulting in serious bodily injury alleged to have been committed with a firearm were to be excepted from the firearm enhancement, it could have drafted the statute in that manner.³⁰³

3. *Conspiracies Are Not Crimes of Violence*.—Although trial courts generally have considerable discretion to impose consecutive sentences, Indiana Code section 35-50-1-2(c) limits the total of consecutive terms of imprisonment “arising out of an episode of criminal conduct” to the advisory sentence for the next class of felony.³⁰⁴ Crimes of violence are excepted from the rule.³⁰⁵ In *Coleman v. State*,³⁰⁶ the defendant was convicted of conspiracy to commit robbery, a Class A felony, and possession of a firearm by a serious violent felon, a class B felony, and sentenced to a total of sixty years. The offenses were part of the same episode of criminal conduct, and the defendant argued the sentence should be limited to fifty-five years, the advisory sentence for murder, because neither offense is listed as a crime of violence.³⁰⁷ The court of appeals agreed, finding conspiracies “akin to attempts,” which the Indiana Supreme Court previously held were not crimes of violence.³⁰⁸ “The legislature has been on clear notice for at least ten years that Indiana courts will strictly construe the meaning of ‘crimes of violence’ under Section 35-50-1-2, and that courts will not infer that the legislature intended any unlisted offenses to qualify as such crimes.”³⁰⁹

4. *Restrictions on Modifying D Felonies to Misdemeanors*.—The difference between a misdemeanor and felony conviction goes far beyond the sentencing

300. *Id.*

301. *Id.* at 666 (Rucker, J., dissenting).

302. 940 N.E.2d 1210 (Ind. Ct. App.), *trans. denied*, 950 N.E.2d 1208 (Ind. 2011).

303. *Id.* at 1216.

304. IND. CODE § 35-50-1-2 (2011).

305. *Id.*

306. 952 N.E.2d 377 (Ind. Ct. App. 2011).

307. *Id.* at 380.

308. *Id.* at 383 (citing *Ellis v. State*, 736 N.E.2d 731 (Ind. 2000)).

309. *Id.*

ranges of a maximum of one year in jail and three years in prison, respectively.³¹⁰ Misdemeanors are often seen as “college-aged high jinks or youthful indiscretions that harmed no one,” while felony convictions “are met with much more suspicion and caution.”³¹¹ One might think trial courts would be encouraged to give defendants convicted of low level felonies an opportunity to have their convictions later modified to a misdemeanor. After all, as explained in Part I.C., many Hoosiers with D felony convictions may now have those records restricted after waiting eight years and meeting certain conditions such as no additional felony convictions. But in *State v. Brunner* the Indiana Supreme Court reversed a trial court’s modification of a pro se defendant’s request to change his past D felony drunk driving conviction from 2000 to a Class A misdemeanor nine years later, which the trial court had ordered because the felony conviction “was preventing him from obtaining a second job.”³¹² The Indiana Supreme Court reasoned that the trial court lacked statutory authority for the modification because Indiana Code section 35-50-2-7(b) limits any such modification “to the moment the trial court first entered its judgment of conviction and before the trial court announced its sentence.”³¹³ “Although it may be equitable and desirable for the legislature to give a trial court discretion in modifying a conviction years later for good behavior, we recognize at this time the legislature has not given any such authority.”³¹⁴

L. Probation Revocation

A variety of issues sometimes arise when a defendant is placed on probation, including issues surrounding the type of proof to establish a violation. Generally speaking, the State must prove a violation by a preponderance of the evidence.³¹⁵ In *Runyon v. State*,³¹⁶ the supreme court considered the burden of proof when the State seeks to revoke a defendant’s probation for failure to pay child support. Specifically, the court held the State “has the burden to prove (a) that a probationer violated a term of probation and (b) that, if the term involved a

310. See generally IND. CODE § 35-50-2-7 (2011).

311. *State v. Brunner*, 947 N.E.2d 411, 417 (Ind. 2011), *reh’g denied*, 2011 Ind. LEXIS 696 (Aug. 19, 2011).

312. *Id.* at 413.

313. *Id.* at 416.

314. *Id.* at 417. The court acknowledged that a separate statute, IND. CODE § 35-38-1-1.5 (2011), allows modifications within three years “if the person fulfills certain conditions,” which includes a guilty plea and consent of the prosecutor. *Id.* The court applied this statute in reversing a trial court’s modification in another case decided the same day as *Brunner*. See *State v. Boyle*, 947 N.E.2d 912, 914 (Ind. 2011) (noting the State did not consent, more than three years had passed, and “neither a copy of Boyle’s sentencing order is in the record, nor does the CCS entry mention the possibility of modifying his sentence from a Class D felony to a Class A misdemeanor”).

315. IND. CODE § 35-38-2-3(e) (2011).

316. 939 N.E.2d 613 (Ind. 2010).

payment requirement, the failure was reckless, knowing, or intentional.”³¹⁷ However, the probationer has the burden “to show facts related to an inability to pay and indicating sufficient bona fide efforts to pay so as to persuade the trial court that further imprisonment should not be ordered.”³¹⁸ In *Runyon*, the court upheld the revocation of probation because the defendant had “an opportunity to present facts and explanation regarding his alleged resources, employment circumstances, inability to pay, and efforts to make the required payments.”³¹⁹

Justice Sullivan dissented. Although he agreed with the allocation of the burden of proof, he opined that the State had not proven the failure to pay was reckless, knowing, or intentional, and the defendant had established his inability to pay resulted from his job loss, inability to find new employment, and extremely low wages when he was working.³²⁰

Two days after *Runyon* was issued, the court of appeals reversed a revocation of probation because the State failed to prove that a defendant’s failure to pay child support was willful.³²¹ The probation violation in that case was filed a mere forty-one days after the defendant was placed on probation.³²² The probation officer testified that he had not investigated whether the nonpayment was willful or intentional, and the defendant testified that he was not employed and had not been employed for more than three years.³²³

Beyond the child support payment context, the court of appeals in *Beeler v. State*,³²⁴ addressed the necessity of an evidentiary hearing when a CCS entry noted an admission by the defendant. The court found the entry is “presumptively true” unless “it is shown to be otherwise.”³²⁵ Moreover, an alleged error is generally waived for appeal when no objection is made in the trial court, unless fundamental error is shown.³²⁶ Judge Crone dissented, concluding the defendant had established fundamental error because the transcript “does not contain even a single reference” to an admission.³²⁷ Going beyond the State’s concession that “it would be a better practice for the trial court to record a defendant’s admissions on the record,” the dissent opined “it was incumbent upon the State to ensure that the admission was repeated on the record.”³²⁸

CONCLUSION

For more than two decades under the leadership of Chief Justice Shepard, the

317. *Id.* at 617.

318. *Id.*

319. *Id.* at 618.

320. *Id.* (Sullivan, J., dissenting).

321. *Snowberger v. State*, 938 N.E.2d 294 (Ind. Ct. App. 2010).

322. *Id.* at 298.

323. *Id.* at 297-98.

324. 959 N.E.2d 828 (Ind. Ct. App. 2011).

325. *Id.* at 830-31.

326. *Id.* at 830.

327. *Id.* at 831 (Crone J., dissenting).

328. *Id.*

Indiana Supreme Court has generally been receptive to many claims presented by criminal defendants in non-capital cases.³²⁹ This survey period included relief for defendants in the sentencing realm and a rare reversal based on insanity in a 3-2 opinion, but defendants did not succeed in most of the supreme court cases summarized above.³³⁰

For the first time in over a decade, the membership of the Indiana Supreme Court changed in 2010, which could mean a shift in some of its jurisprudence. Justice David, who replaced Justice Boehm, has been a swing vote in some of the criminal cases summarized above. He has largely gone along with the majority in reducing sentences and joined Justice Sullivan and Justice Rucker over a strongly worded dissent by Chief Justice Shepard in an insanity defense case. But he also authored the court's 3-2 opinion in *Barnes*, which included broad language that led to a strong public reaction regarding the right to resist unlawful entry into a home by police. The most glaring example of the difference a new justice can make comes from *Hopper v. State*,³³¹ which was summarized in last year's survey and required trial courts to provide an advisement of the specific risks of waiving counsel before pleading guilty.³³² That 3-2 opinion was authored by Justice Boehm over an impassioned dissent by Chief Justice Shepard, who was joined by Justice Dickson.³³³ The Attorney General sought rehearing, which was granted and resulted in a 3-2 opinion authored by Chief Justice Shepard and joined by Justice David.³³⁴ The dissent aptly noted the rehearing opinion "entertains and effectively grants the State's petition even though the State's claim is that this [c]ourt's original opinion was wrongly decided . . . making essentially the same arguments it made before."³³⁵

Shortly after the survey period ended, Chief Justice Shepard announced his retirement, effective March 2012. Then, in April 2012, Justice Sullivan announced his retirement. One might expect a further shift in approach and perspective in cases summarized in next year's survey, especially without the Chief Justice's leadership in the realm of appellate sentence review.

329. In capital cases the supreme court has often divided on 3-2 lines in rejecting claims. *See generally* Joel M. Schumm & Paul L. Jefferson, *Tribute to Justice Theodore R. Boehm*, 44 IND. L. REV. 347, 350 n.30 (2011).

330. Of the seventy-six criminal or civil opinions issued by the Indiana Supreme Court during the survey period, *Nicoson* was one of only two that divided along so-called partisan lines with the three justice appointed by Republican governors (Shepard, Dickson, and David) in the majority and the two appointed by Democratic governors (Sullivan and Rucker) in dissent. The other was *Sloan v. State*, 947 N.E.2d 917 (Ind. 2011), where the majority held the statute of limitation for criminal offenses is tolled when concealment is established "until a prosecuting authority becomes aware or should have become aware of sufficient evidence to charge the defendant." *Id.* at 919.

331. 934 N.E.2d 1086 (Ind. 2010), *aff'd on reh'g*, 957 N.E.2d 613 (Ind. 2011).

332. Schumm, *2010 Recent Developments*, *supra* note 26, at 1150-51.

333. *Id.*

334. *Hopper*, 957 N.E.2d 613.

335. *Id.* at 624 (Rucker, J., dissenting).