

# RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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The General Assembly and Indiana's appellate courts confronted several significant criminal law issues during the Survey Period October 1, 2011 to September 30, 2012. Some of the most notable developments are explored below.

## I. LEGISLATIVE DEVELOPMENTS

In the two months of the 2012 short session, the General Assembly responded decisively to two recent Indiana Supreme Court opinions with legislation that granted more rights to criminal defendants, granted immunity for low-level alcohol offenses for those who seek police assistance to help someone in need because of alcohol consumption, gave teeth to last year's legislation restricting access to some criminal records, was restrained in broadening statutes and creating new offenses, and consolidated definitions previously scattered throughout Title 35 to a new section.

### A. *Self-Defense and Law Enforcement: The Barnes v. State Reprise*

Last year's Survey discussed at length the supreme court's controversial decision in *Barnes v. State*.<sup>1</sup> The negative public reaction focused 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."<sup>2</sup> The supreme court acknowledged the longstanding common law right to resist unlawful police action, but it concluded that the right "is against public policy and is incompatible with modern Fourth Amendment jurisprudence."<sup>3</sup> On rehearing, the court explained that its original "holding d[id] not alter, indeed says nothing, about the statutory and constitutional boundaries of legal entry into the home or any other place."<sup>4</sup>

After a summer study commission held hearings and debated a response to

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1. 946 N.E.2d 572 (Ind.), *adhered to on rehearing*, 953 N.E.2d 473 (Ind. 2011); Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 45 IND. L. REV. 1067, 1073 (2012) (citing Dan Carden, *Ind. Attorney General Wants Cop Entry Ruling Revised, but not Entirely*, NW. IND. TIMES (May 30, 2011, 12:00 AM), [http://www.nwitimes.com/mobile/article\\_e7415da6-3906-5f71-87e3-dc781019b8ae.html](http://www.nwitimes.com/mobile/article_e7415da6-3906-5f71-87e3-dc781019b8ae.html) (observing the "[p]ublic reaction to the court's ruling has been overwhelmingly negative")).

2. *Barnes*, 946 N.E.2d at 577.

3. *Id.* at 576.

4. *Barnes v. State*, 953 N.E.2d 473, 474-75 (Ind. 2011).

the *Barnes* decision, the commission proposed Senate Bill 1.<sup>5</sup> Although Indiana statutes rarely include a statement of purpose, this legislation left little doubt about its purpose through the following prefatory language:

[I]t is the policy of this state to recognize the unique character of a citizen's home and to ensure that a citizen feels secure in his or her own home against unlawful intrusion by another individual or a public servant. By reaffirming the long standing right of a citizen to protect his or her home against unlawful intrusion, however, the general assembly does not intend to diminish in any way the other robust self defense rights that citizens of this state have always enjoyed. Accordingly, the general assembly also finds and declares that it is the policy of this state that people have a right to defend themselves and third parties from physical harm and crime. The purpose of this section is to provide the citizens of this state with a lawful means of carrying out this policy.<sup>6</sup>

The bill made changes to the self-defense statute by adding the term "public servant" to mean law enforcement officer<sup>7</sup> and delineated when force may and may not be used by citizens against public servants:

- (i) A person is justified in using reasonable force against a public servant if the person reasonably believes the force is necessary to:
  - (1) protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force;
  - (2) prevent or terminate the public servant's unlawful entry of or attack on the person's dwelling, curtilage, or occupied motor vehicle; or
  - (3) prevent or terminate the public servant's unlawful trespass on or criminal interference with property lawfully in the person's possession, lawfully in possession of a member of the person's immediate family, or belonging to a person whose property the person has authority to protect.
- (j) Notwithstanding subsection (i), a person is not justified in using force against a public servant if:
  - (1) the person is committing or is escaping after the commission of a crime;
  - (2) the person provokes action by the public servant with intent to cause bodily injury to the public servant;
  - (3) the person has entered into combat with the public servant or is the initial aggressor, unless the person withdraws from the encounter and communicates to the public servant the intent to do so and the public servant nevertheless continues or threatens to continue unlawful action; or

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5. See S. Enrolled Act 1, 117th Gen. Assemb., 2d Reg. Sess. (Ind. 2012).

6. IND. CODE § 35-41-3-2(a) (2013).

7. *Id.* § 35-41-3-2(b).

- (4) the person reasonably believes the public servant is:
- (A) acting lawfully; or
  - (B) engaged in the lawful execution of the public servant's official duties.
- (k) A person is not justified in using deadly force against a public servant whom the person knows or reasonably should know is a public servant unless:
- (1) the person reasonably believes that the public servant is:
    - (A) acting unlawfully; or
    - (B) not engaged in the execution of the public servant's official duties; and
  - (2) the force is reasonably necessary to prevent serious bodily injury to the person or a third person.<sup>8</sup>

Senator David Long, president pro tem of the Senate, described the legislation as

reasserting the 150-year-old law ensuring the right to defend yourself in your home, a concept that was threatened by the Indiana Supreme Court's controversial ruling in the *Barnes v. State* case last year. At the same time, this legislation was carefully crafted to provide better protection for our law enforcement officers.<sup>9</sup>

In signing the legislation, former Governor Daniels similarly concluded that "contrary to some impressions, the bill strengthens the protection of Indiana law enforcement by narrowing the situations in which someone would be justified in using force against them."<sup>10</sup> He issued a statement explaining that "[t]he right thing to do is cooperate with (police) in every way possible," because the new statute "is not an invitation to use violence or force against law enforcement officers. In fact, it restricts when an individual can use force, specifically deadly force, so don't try anything."<sup>11</sup>

### B. Public Intoxication

As predicted in last year's Survey, the "continued criminalization of riding drunk as a passenger in a vehicle is likely to generate a legislative response."<sup>12</sup> Last year, the Indiana Supreme Court, in *Moore v. State*,<sup>13</sup> affirmed a conviction for public intoxication entered against a passenger who was sleeping in a car

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8. *Id.* §§ 35-41-3-2(i)-(k).

9. David C. Long, Editorial, *Legislature Provides Significant Achievements*, INDIANAPOLIS STAR, Mar. 18, 2012, at B9.

10. Mary Beth Schneider, *Police Fear New State Law*, INDIANAPOLIS STAR, Mar. 22, 2012, at B1.

11. *Id.*

12. Schumm, *supra* note 1, at 1089.

13. 949 N.E.2d 343 (Ind. 2011).

pulled over by police.<sup>14</sup> Specifically, the court (1) declined 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."<sup>15</sup> Justice Rucker dissented, suggesting that *Miles v. State*<sup>16</sup> should be overruled and pointing to century-old precedent holding that "[t]he purpose of the [public intoxication statute] 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."<sup>17</sup>

The General Assembly significantly amended the public intoxication statute in response to *Moore* and in a manner that ensures passive drunkenness will no longer suffice for a conviction. Specifically, a conviction for public intoxication now requires, in addition to the previous requirement that an individual be intoxicated in a public place, that the person's conduct:

- (1) endangers the person's life;
- (2) endangers the life of another person;
- (3) breaches the peace or is in imminent danger of breaching the peace;
- or
- (4) harasses, annoys, or alarms another person.<sup>18</sup>

### *C. Immunity for Certain Alcohol Offenses*

A new statute provides immunity from arrest or prosecution for the offenses of public intoxication, minor in possession, or minor consumption for individuals who request emergency medical assistance "for an individual who reasonably appeared to be in need of medical assistance due to alcohol consumption."<sup>19</sup> To qualify for immunity, a person must have met the following requirements:

- (A) provided:
  - (i) the person's full name; and
  - (ii) any other relevant information requested by the law enforcement officer;
- (B) remained at the scene with the individual who reasonably appeared to be in need of medical assistance due to alcohol consumption until emergency medical assistance arrived; and
- (C) cooperated with emergency medical assistance personnel and law enforcement officers at the scene.<sup>20</sup>

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14. *Id.* at 344-45.

15. *Id.* at 345.

16. 216 N.E.2d 847 (Ind. 1966).

17. *Moore*, 949 N.E.2d at 345-46 (Rucker, J., dissenting) (alterations in original) (quoting *State v. Sevier*, 20 N.E. 245, 246-47 (Ind. 1889)).

18. IND. CODE § 7.1-5-1-3(a) (2013).

19. *Id.* §7.1-5-1-6.5(a)(1).

20. *Id.* §7.1-5-1-6.5(a)(2).

The bill's sponsor explained the bill does not encourage teen drinking but recognizes that reality: "The bottom line is that kids do make mistakes," he said.<sup>21</sup> "But we don't want those mistakes to lead to tragedy."<sup>22</sup>

#### *D. Further Restrictions on Criminal History Information*

As summarized in last year's Survey, House Bill 1211 was enacted in the final days of the 2011 session to allow criminal defendants to restrict a much broader class of both arrest and conviction records than the existing and narrow expungement law.<sup>23</sup> In an effort to ensure the protected information is indeed limited, in the 2012 short session, the General Assembly added a new chapter to Title 24, which governs trade regulation. The new statutes prohibit criminal history providers from providing criminal history information—such as expunged records, restricted records, and Class D felony convictions converted to Class A misdemeanors.<sup>24</sup> Such providers cannot include criminal history information in a criminal history report if the information was not updated within the past sixty days.<sup>25</sup> The statute allows both the Attorney General and injured individuals to bring an action against criminal history providers who violate the law.<sup>26</sup> The bill also included amendments to Title 35 to create a Class B infraction for employers who ask if a person's criminal records have been sealed or restricted.<sup>27</sup>

#### *E. Alternative Misdemeanor Sentences More Readily Available*

The General Assembly also created a new avenue for converting a Class D felony conviction to a misdemeanor through the filing of a verified petition, "a hearing of which the prosecuting attorney has been notified," and findings on the following grounds:

- (1) The person is not a sex or violent offender (as defined in IC 11-8-8-5).
- (2) The person was not convicted of a Class D felony that resulted in bodily injury to another person.
- (3) The person has not been convicted of perjury under IC 35-44-2-1 or official misconduct under IC 35-44-1-2.
- (4) At least three (3) years have passed since the person:
  - (A) completed the person's sentence; and
  - (B) satisfied any other obligation imposed on the person as part of the sentence; for the Class D felony.

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21. Matthew Tully, *Getting Out the Word about a Lifesaving Law*, INDIANAPOLIS STAR, Aug. 12, 2012, at B1 (quoting State Senator Jim Merritt).

22. *Id.*

23. Schumm, *supra* note 1, at 1068.

24. IND. CODE § 24-4-18-6 (2013).

25. *Id.* § 24-4-18-7.

26. *Id.* § 24-4-18-8.

27. *Id.* § 35-38-8-7 (repealed 2013).

- (5) The person has not been convicted of a felony since the person:
  - (A) completed the person's sentence; and
  - (B) satisfied any other obligation imposed on the person as part of the sentence; for the Class D felony.
- (6) No criminal charges are pending against the person.<sup>28</sup>

If a defendant whose Class D felony conviction was converted to a misdemeanor is convicted of a felony within five years of the conversion, the prosecutor may petition the court to reinstate the Class D felony conviction.<sup>29</sup>

#### *F. Sexual Battery Broadened*

As summarized in last year's Survey, the court of appeals, in *Ball v. State*,<sup>30</sup> concluded that "[s]leep is not equivalent to a mental disability or deficiency for purposes of the sexual battery statute," reversing the Class D felony sexual battery conviction in a case where a woman awoke to the defendant "kissing and licking her face."<sup>31</sup>

In apparent response to that case, the General Assembly amended the sexual battery statute to criminalize the touching of "another person's genitals, pubic area, buttocks, or female breast when that person is unaware that the touching is occurring."<sup>32</sup>

#### *G. Other New Crimes*

In anticipation of Indianapolis hosting the Super Bowl in 2012,<sup>33</sup> the human trafficking statutes were broadened in a few respects, including the addition of a Class B felony offense for a person who

knowingly or intentionally recruits, harbors, or transports a child less than sixteen (16) years of age with the intent of: (1) engaging the child in: (A) forced labor; or (B) involuntary servitude; or (2) inducing or causing the child to: (A) engage in prostitution; or (B) participate in sexual conduct.<sup>34</sup>

In addition, a provision that previously criminalized the selling of a child for prostitution by a parent, guardian, or custodian was broadened to criminalize that conduct by *any adult* who sells a child under sixteen for prostitution or "participating in sexual conduct."<sup>35</sup>

And, unrelated to the Super Bowl, the General Assembly created a new Class

28. *Id.* § 35-50-2-7(c).

29. *Id.* § 35-50-2-7(e).

30. 945 N.E.2d 252 (Ind. Ct. App. 2011).

31. *Id.* at 253, 258.

32. IND. CODE §35-42-4-8(a)(2) (2013).

33. *General Assembly in Brief*, INDIANAPOLIS STAR, Jan. 28, 2012, at B2.

34. IND. CODE §35-42-3.5-1(b) (2013).

35. *Id.* § 35-42-3.5-1(c).

C felony offense of “unlawful use of an embryo” for an individual “who recklessly, knowingly, or intentionally uses a human embryo created with an ovum provided to a [fertility clinic] for purposes of embryonic stem cell research.”<sup>36</sup>

#### *H. New Definitional Section*

Finally, what was billed as a non-substantive change could have a significant lingering effect on those researching and arguing criminal law issues. Public Law 114-2012 reorganized all the definitions previously scattered throughout Title 35 into Indiana Code sections 35-31.5-2(1)-(554). No substantive changes were made to the definitions, and the decisional law interpreting each would therefore remain controlling. However, finding those cases will become increasingly difficult, as the old citations now simply note the repeal and the annotations for at least many of the statutes were not moved. Therefore, a person researching one of these definitions may have to locate the previous citations and then consult a 2011 bound annotated Indiana Code volume to discover the helpful cases. Alternatively, a researcher could run an online search using the old statutory citations to find the cases, which will often yield “more chaff than wheat.”<sup>37</sup>

## II. DECISIONAL LAW DEVELOPMENTS

The Indiana Supreme Court and Indiana Court of Appeals issued decisions on a wide variety of issues that affect criminal cases from before their filing through sentencing and collateral proceedings. This section summarizes the most significant of those decisions, focusing primarily on Indiana Supreme Court opinions.

### *A. Vouching*

Before 2012, Indiana was among the minority of jurisdictions that permit “vouching of child witness testimony in child molestation cases.”<sup>38</sup> Specifically, since 1984 the court had allowed “some accrediting of the child witness in the form of opinions from parents, teachers, and others having adequate experience with the child, that the child is not prone to exaggerate or fantasize about sexual matters.”<sup>39</sup> The court explained its rationale as “facilitat[ing] an original credibility assessment of the child by the trier of fact, so long as they do not take

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36. *Id.* § 35-46-5-3(d).

37. See Marcia Oddi, *Table of Title 35 Definitions Repealed and Reenacted Under a New Citation* (Sept. 1, 2012, 8:08 PM), [http://indianalawblog.com/archives/2012/09/ind\\_law\\_table\\_o.html](http://indianalawblog.com/archives/2012/09/ind_law_table_o.html); see also Marcia Oddi, *More On: Table of Title 35 Definitions Repealed and Reenacted Under a New Citation* (Nov. 15, 2012, 9:27 AM), [http://indianalawblog.com/archives/2012/11/ind\\_law\\_more\\_on\\_350.html](http://indianalawblog.com/archives/2012/11/ind_law_more_on_350.html).

38. *Hoglund v. State*, 962 N.E.2d 1230, 1235 (Ind. 2012), *vacating* 945 N.E.2d 166 (Ind. Ct. App. 2011).

39. *Id.* at 1237 (quoting *Lawrence v. State*, 464 N.E.2d 923, 925 (Ind. 1984)).

the direct form of ‘I believe the child’s story,’ or ‘In my opinion the child is telling the truth.’”<sup>40</sup>

In *Hoglund v. State*, the supreme court revisited and partially overruled that precedent, concluding that testimony about whether a child is “prone to exaggerate or fantasize about sexual matters is an indirect but nonetheless functional equivalent of saying the child is ‘telling the truth.’”<sup>41</sup> Moreover, the court declined to carve out an exception to Rule 704(b) in the prohibition of vouching, citing the decreased need for accrediting the testimony of a child due to the sad, yet common, frequency of child molestation allegations and a “shift in public attitudes” toward the general belief of children.<sup>42</sup>

The court concluded the specific testimony in *Hoglund*—responses to questions about whether adult witnesses believed the child fabricated allegations “out of some need”—was impermissible because it “necessarily requires the witness to pass judgment on [the child]’s allegations, or ‘story.’ The question thus invites direct vouching of the child witness’ allegations regardless of the child’s motives.”<sup>43</sup> Nevertheless, based on the “substantial evidence of Hoglund’s guilt apart from the erroneously admitted vouching testimony,” the supreme court found the error was harmless and affirmed the convictions.<sup>44</sup>

A few months later, in *Kindred v. State*,<sup>45</sup> the court of appeals applied *Hoglund* to evidence about coaching a child witness. The court of appeals concluded that under *Hoglund*, “[T]estimony about whether a child has been coached amounts to the same improper commentary on the child’s truthfulness as testimony about whether a child is prone to exaggerate or fantasize about sexual matters.”<sup>46</sup> The court permitted “general testimony about the signs of coaching, as well as the presence or absence of those signs in the child victim at issue,” which “preserves the ultimate credibility determination for the jury and therefore does not constitute vouching.”<sup>47</sup> However, “where a witness opines as to whether the child victim was coached—offering an ultimate opinion, as [the witness] did here—the witness invades the province of the jury and vouches for the child.”<sup>48</sup>

Even before the Indiana Supreme Court issued the *Hoglund* decision, the court of appeals reversed convictions in two other cases based on improper vouching testimony. First, in *Bradford v. State*,<sup>49</sup> a Child Protective Services investigator testified, over the defendant’s objection, that “I substantiated sexual

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40. *Id.* at 1233 (quoting *Lawrence*, 464 N.E.2d at 925).

41. *Id.* at 1236 (citation omitted) (quoting *Lawrence*, 464 N.E.2d at 925) (internal quotation marks omitted).

42. *Id.* at 1236-37.

43. *Id.* at 1238.

44. *Id.* at 1238-40.

45. 973 N.E.2d 1245 (Ind. Ct. App. 2012), *trans. denied*, 982 N.E.2d 298 (Ind. 2013).

46. *Id.* at 1258.

47. *Id.*

48. *Id.*

49. 960 N.E.2d 871 (Ind. Ct. App. 2012).



abuse, meaning our office feels that there was enough evidence to conclude that sexual abuse occurred.”<sup>50</sup> The court of appeals concluded this testimony was an “opinion of the truth or falsity of the allegations” of molestation, which improperly “invaded the province of the jury in violation of Indiana Evidence Rule 704(b).”<sup>51</sup>

Next, in *Gutierrez v. State*,<sup>52</sup> a caseworker “testified that she ‘absolutely’ believed [the victim]’s testimony.”<sup>53</sup> Furthermore, “the deputy prosecutor contemporaneously inserted his own opinion that he [also] believed [the victim].”<sup>54</sup> Even in the absence of an objection from defense counsel at trial, the court of appeals found fundamental error and reversed and remanded for “a new trial free of prohibited matters.”<sup>55</sup>

### B. Bail Appeals

Previous Survey articles have discussed the seldom-brought challenges to excessive bail.<sup>56</sup> With two more published reversals from the court of appeals during this Survey Period, the issue may be gaining traction or, perhaps, trial judges will take heed and obviate such appeals through more reasonable bail decisions grounded in the statutory factors.

First, in *Winn v. State*,<sup>57</sup> a defendant charged with thirteen counts of burglary challenged his \$25,000 cash bail as excessive.<sup>58</sup> The court of appeals reiterated the statutory factors “relevant to the risk of nonappearance” that trial courts must consider in setting bail.<sup>59</sup> Although one of those factors is “the nature and gravity of the offense,” that factor alone is not sufficient to refuse to reduce bail.<sup>60</sup> Relying on another recent case, the court of appeals held the trial court should have granted the defendant’s request to post a 10% bond.<sup>61</sup>

Defendants who seek to appeal a bail issue would be well-advised to pursue an expedited appeal under Appellate Rule 21(B). If they do not, and the normal time periods for record preparation and briefing are followed, the court of appeals is unlikely to issue an opinion in less time than the eight month period in *Winn*.

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50. *Id.* at 875.

51. *Id.* at 876-77.

52. 961 N.E.2d 1030 (Ind. Ct. App. 2012).

53. *Id.* at 1035.

54. *Id.*

55. *Id.*

56. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 44 IND. L. REV. 1135, 1136 (2011) [hereinafter, Schumm, *2010 Developments*] (citing Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 42 IND. L. REV. 937, 953-55 (2009)).

57. 973 N.E.2d 653 (Ind. Ct. App. 2012).

58. *Id.* at 654.

59. *Id.* at 655-56.

60. *Id.* (citing IND. CODE § 35-33-8-4(b)(7) (2013)).

61. *Id.* at 656 (citing IND. CODE § 35-33-8-3.2(a) (2013)).

A similar delay—more than eleven months between the filing of the notice of appeal and certification of the court of appeals opinion—occurred in *Shuai v. State*,<sup>62</sup> a high-profile murder case involving a woman who swallowed rat poison and killed her fetus.<sup>63</sup> There, the court of appeals reversed the trial court’s refusal to set bail, concluding that “[t]he defense presented sufficient evidence to rebut the presumption that Shuai is guilty.”<sup>64</sup> Although “the State presented evidence Shuai ingested rat poison when she was thirty-three weeks pregnant” and introduced “Shuai’s suicide note in which she documented her intention to kill herself and her fetus,” the defense presented expert witnesses to “support alternate explanations for the intraventricular hemorrhage that led to [the child]’s death.”<sup>65</sup> Specifically, (1) a neonatologist testified that a number of other conditions could have caused the child’s blood not to clot; (2) a deputy coroner admitted he was “not medically trained to know whether or not rat poisoning would cause the demise of anybody”; and (3) the autopsy report was submitted “before [the forensic pathologist] received the toxicology report that would indicate if the chemicals from the rat poison were in [the child]’s body.”<sup>66</sup>

### C. Admission of Blood Test Evidence

The court of appeals resolved important issues regarding the admissibility of a blood test in a highly publicized case, *State v. Bisard*,<sup>67</sup> involving a police officer who was allegedly driving drunk when he was involved in a fatal traffic accident.<sup>68</sup> The court began from the premise that defendants are afforded greater protections in the admission of breath samples under Indiana Code section 9-30-6-5 than blood samples under section 9-30-6-6.<sup>69</sup> The court concluded that the medical assistant who drew the blood followed physician-approved protocols and that the statutes did not evince an intent “to suppress blood evidence taken in a medical facility by a trained operator in the presence of the suspect’s lawyer.”<sup>70</sup> Specifically, the court concluded that Indiana Code section 9-30-6-6(j) allows admission of blood “drawn at a licensed hospital or by certain people if not at a

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62. 966 N.E.2d 619 (Ind. Ct. App.), *trans. denied*, 967 N.E.2d 1035 (Ind. 2012).

63. According to the Indiana Supreme Court Clerk of Court’s online docket, the notice of appeal was filed on June 6, 2011, and the opinion was certified as final on May 14, 2012. *Litigant Inquiry: Shuai, Bei Bei v. State of Indiana, Case Number: 49 A 02 - 1106 - MR - 00486*, CLERK CTS. ONLINE DOCKET, <http://hats.courts.state.in.us/ISC3RUS/ISC2detail.jsp?row=0> (last visited June 10, 2013).

64. *Shuai*, 966 N.E.2d at 625.

65. *Id.* at 624.

66. *Id.* at 624-25.

67. 973 N.E.2d 1229 (Ind. Ct. App.), *trans. denied*, 980 N.E.2d 323 (Ind. 2012).

68. *Id.* at 1230.

69. *Id.* at 1235-36 (explaining that “the greater the level of expertise involved, the more that procedural particulars are left to the expert’s discretion” (quoting *Hopkins v. State*, 579 N.E.2d 1297, 1303 (Ind. 1991))).

70. *Id.* at 1230.

licensed hospital. To the extent that someone else draws blood, the evidence must show that the person is properly trained and performed the draw in a medically acceptable manner.”<sup>71</sup>

#### *D. Speedy Trial*

Both the Indiana Supreme Court and Indiana Court of Appeals issued opinions regarding the right to a speedy trial, which is principally enforced through Indiana Criminal Rule 4.<sup>72</sup> In *Cundiff v. State*,<sup>73</sup> the Indiana Supreme Court revisited language from its 1997 opinion in *Poore v. State*,<sup>74</sup> which had generated conflicting opinions in the court of appeals regarding “whether an incarcerated defendant has the right to be tried within seventy days under Criminal Rule 4(B) when he is being held for an unrelated offense and not on the charges for which [a] speedy trial is demanded.”<sup>75</sup> The supreme court concluded that the most reasonable interpretation of *Poore*’s language on Criminal Rule 4(B)’s availability—“incarceration due to the pending charge at issue need not be the *only* reason the defendant is in jail”—is the following: for Rule 4(B) to apply, the defendant must be incarcerated on the charge for which he seeks a speedy trial, and as long as that requirement is met, the availability of Rule 4(B) is not affected if the defendant is also incarcerated on other grounds.<sup>76</sup>

The defendant in *Cundiff* had posted bond in the case at issue and was later incarcerated on a separate probation revocation case before requesting a speedy trial.<sup>77</sup> Because he was not incarcerated on the case at issue, he could not avail himself of the seventy-day deadline for a trial under Criminal Rule 4(B).<sup>78</sup>

The courts of appeals’s decisions Criminal Rule 4 involved issues of extending time based on vacation plans of State’s witnesses and the requirement of timely and specific objections. First, in *Otte v. State*,<sup>79</sup> the defendant moved for a speedy trial on March 15, which was set within the seventy-day deadline for May 19.<sup>80</sup> The State moved for a continuance on April 29 because two of its witnesses would be on vacation outside the state for the May 19 trial date.<sup>81</sup> At a hearing, the prosecutor noted the vacation plans were non-refundable and cited Criminal Rule 4(D) as a basis for providing additional time.<sup>82</sup> That rule allows a continuance when “(1) there is evidence for the State that cannot then be had;

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71. *Id.* at 1238.

72. IND. R. CRIM. P. 4.

73. 967 N.E.2d 1026 (Ind. 2012).

74. 685 N.E.2d 36 (Ind. 1997).

75. *Cundiff*, 967 N.E.2d at 1028-29.

76. *Id.* at 1030-31 (quoting *Poore*, 658 N.E.2d at 40) (internal quotation marks omitted).

77. *Id.* at 1027.

78. *Id.* at 1028, 1030-31.

79. 967 N.E.2d 540 (Ind. Ct. App.), *trans. denied*, 972 N.E.2d 668 (Ind. 2012).

80. *Id.* at 543.

81. *Id.*

82. *Id.*

(2) reasonable effort has been made by the State to procure the evidence; and (3) there is just ground to believe that such evidence can be had within ninety days.”<sup>83</sup> The trial court continued the trial until June 2, which exceeded the seventy-day deadline of Rule 4(B) but was nevertheless affirmed on appeal based on Rule 4(D).<sup>84</sup> The court relied on precedent that had “permit[ed] Rule 4(D) extensions for witnesses who are out of State and/or on long-planned vacations” and observed the State had discovered the officers would be out of state when it issued subpoenas and “was entitled to rely upon their representations that they would be unable to comply.”<sup>85</sup>

Although the delay in *Otte* was brief, and it is unclear precisely when the State’s subpoenas were issued, the potential for abuse exists under Rule 4(D). If the State issues subpoenas near the beginning of the seventy-day period, any need to reschedule a trial because of vacation plans may be accommodated within the seventy-day period. If the State does not issue subpoenas until near the trial date, however, a lengthy continuance may be required because of the court’s crowded docket, which would seem to frustrate Criminal Rule 4’s purpose of ensuring early trials except in truly narrow and unavoidable circumstances.

*Todisco v. State*,<sup>86</sup> offers a useful reminder of the importance of defense counsel making objections that are both timely and specific. There, counsel did not object when a trial date was reset on July 12, one day after the one-year period allowed by Criminal Rule 4(C).<sup>87</sup> On June 22, the State requested a continuance based on the unavailability of a witness, and the trial was further continued.<sup>88</sup> Although defense counsel immediately made a general objection, he did not offer the specific basis of the objection until he cited Criminal Rule 4(C) in a motion for discharge filed in August.<sup>89</sup> The court of appeals affirmed the denial of his motion for discharge because the defendant (1) “did absolutely nothing” regarding the July 12 setting, and (2) “objected to the continuance without specifying any basis.”<sup>90</sup>

### *E. Plea Agreements*

In *Cain v. State*,<sup>91</sup> the defendant was one of four who had provided statements to police and was separately charged with the same murder.<sup>92</sup> The prosecutor secured agreements with two defendants in exchange for their trial testimony, but

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83. *Id.* at 545.

84. *Id.* at 543, 546.

85. *Id.* at 546.

86. 965 N.E.2d 753 (Ind. Ct. App. 2012), *trans. denied*, 969 N.E.2d 604 (Ind. 2012).

87. *Id.* at 754-55.

88. *Id.* at 756.

89. *Id.*

90. *Id.*

91. 955 N.E.2d 714 (Ind. 2011).

92. *Id.* at 716-17.

one later moved to withdraw his guilty plea.<sup>93</sup> On the first evening of Cain's trial, the State secured an agreement from the third defendant to testify "in exchange for a drastically lower charge in his own case."<sup>94</sup> The defense sought to exclude his testimony, claiming unfair surprise and the denial of a fair trial.<sup>95</sup> The Indiana Supreme Court affirmed the conviction, emphasizing the broad discretionary power of prosecutors and the absence of any evidence that the mid-trial plea was secured "with the deliberate or intentional aim" of denying a fair trial or otherwise made in "bad faith or otherwise-reprehensible conduct."<sup>96</sup>

In *Jackson v. State*,<sup>97</sup> the court of appeals reiterated that trial courts imposing a sentence under a plea agreement may impose "administrative or ministerial conditions" of probation but may not include conditions that impose "substantial obligations of a punitive nature."<sup>98</sup> Because "[c]ommunity service . . . add[s] to the punitive obligation," it cannot "be imposed in the absence of a plea agreement provision" that allows community service or grants "the trial court discretion to impose conditions of probation."<sup>99</sup> The court of appeals rejected the State's argument that the defendant "invited the error" of performing community service by agreeing to do the work and concluded that plea agreements require strict adherence.<sup>100</sup>

Finally, *Allen v. State*,<sup>101</sup> provides an important lesson to prosecutors about their charging and plea agreement decisions. After the defendant visited an apartment where police had earlier investigated a "double drug overdose," the State charged him with visiting a common nuisance, a Class B misdemeanor.<sup>102</sup> While the misdemeanor case was pending, prosecutors also charged him under a separate cause number with a Class A felony for dealing the heroin that led to the two overdoses within 1000 feet of a public park.<sup>103</sup> Allen pleaded guilty to the misdemeanor charge and promptly moved to dismiss the felony charge based on Indiana's Successive Prosecution Statute.<sup>104</sup> The trial court denied the motion, but the court of appeals reversed, reasoning the separate "charges were based on a series of acts so connected that they constituted parts of a single plan."<sup>105</sup> Allen went to the apartment with the intent to sell heroin, and the prosecutors thus

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93. *Id.* at 719.

94. *Id.* at 718.

95. *Id.*

96. *Id.* at 719.

97. 968 N.E.2d 328 (Ind. Ct. App. 2012).

98. *Id.* at 332 (quoting *Bennett v. State*, 802 N.E.2d 919, 921 (Ind. 2004)).

99. *Id.* (third alteration in original) (quoting *Freije v. State*, 709 N.E.2d 323, 325 (Ind. 1999)) (internal quotation marks omitted).

100. *Id.* at 332-33.

101. 956 N.E.2d 195 (Ind. Ct. App. 2011).

102. *Id.* at 196.

103. *Id.*

104. *Id.* at 196-97 (citing IND. CODE § 35-41-4-4 (2013)).

105. *Id.* at 198.

should have charged him with both offenses in a single prosecution.<sup>106</sup>

#### F. *Crime or Not a Crime?*

The appellate courts confronted a number of challenges to the sufficiency of evidence, with the supreme court rejecting most of them during the Survey Period while defendants fared better in the court of appeals.

1. *Criminal Trespass*.—In *Lyles v. State*,<sup>107</sup> the supreme court affirmed a conviction for criminal trespass against a man who refused to leave a bank where he had an account and had requested a free “‘print out’ of his account.”<sup>108</sup> Among other elements, a conviction for criminal trespass requires proof that the defendant “lacked a contractual interest in the real property,” which the supreme court explained “is a right, title, or legal share of real property arising out of a binding agreement between two or more parties.”<sup>109</sup> The majority reasoned that the State’s evidence at trial “refuted each of the most reasonably apparent sources from which a person in the defendant’s circumstances might have derived a contractual interest in the bank’s real property: as an owner, as an employee, and as an account holder.”<sup>110</sup> Justice Rucker dissented, noting that the State had conceded in the court of appeals that the defendant’s accountholder status gave him a contractual right to be inside the bank, and then it “switched gears” on transfer by arguing that a line of court of appeals cases were “wrongly decided.”<sup>111</sup> Because the majority did not overrule or attempt to distinguish those cases,<sup>112</sup> the law in this area remains somewhat unsettled.

2. *Fast Zumas Are Motorized Vehicles*.—In *Lock v. State*,<sup>113</sup> a four-justice majority easily dispatched with a Zuma-riding defendant’s challenge to his conviction for operating a vehicle as “a habitual traffic violator” when he argued that his “motorized bicycle” was exempted because it had “[a] *maximum design speed* of not more than twenty-five (25) miles per hour” even though he was clocked traveling forty-three miles per hour.<sup>114</sup> The court reasoned “that the statutory provision looks initially to the original manufacturer’s maximum design speed, but also encompasses any subsequent modifications or redesigns.”<sup>115</sup> The court equated Lock’s vagueness argument that being pulled over was the first time he knew the maximum design speed to “a drunk driver asserting a constitutional vagueness challenge because he didn’t know how many beers

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106. *Id.*

107. 970 N.E.2d 140 (Ind. 2012).

108. *Id.* at 141, 143.

109. *Id.* at 142-43 & 143 n.2.

110. *Id.* at 143.

111. *Id.* at 144 (Rucker, J., dissenting).

112. *Id.*

113. 971 N.E.2d 71 (Ind. 2012).

114. *Id.* at 73-75, 78.

115. *Id.* at 76.

would render him impaired.”<sup>116</sup> As to the sufficiency of evidence claim, based on the “stipulation that the Zuma was traveling forty-three miles per hour—and in the face of *no* rebuttal evidence at all,” the court concluded it was “impossible to claim that *no* reasonable fact-finder could find beyond a reasonable doubt that the Zuma had a maximum design speed in excess of twenty-five miles per hour.”<sup>117</sup>

3. *Inferences for Burglary.*—In *Baker v. State*,<sup>118</sup> the supreme court addressed the element of “intent to commit a specific felony therein” required for a burglary conviction.<sup>119</sup> Reiterating that burglars rarely announce their intent when they enter a building, the court explained that “[t]he inference of intent must not derive from or be supported by the *inference* of breaking and entering[,]” although the same piece of evidence could support both inferences.<sup>120</sup> Evidence that the defendant was in a church kitchen where he “opened several cupboards and drawers” allowed “a reasonable inference of . . . felonious intent at the time of entry.”<sup>121</sup> Because the crime of theft does not require a minimum value of property, the conviction was supported based on “an inference that he was searching for something to steal, no matter the value.”<sup>122</sup>

4. *Non-Support of a Dependent Enhancements.*—Indiana Code section 35-46-1-5(a) provides a Class D felony penalty for a person who “fails to provide support to the person’s dependent child.” The statute provides an enhancement of the offense to a Class C felony “if the *total amount* of unpaid support that is due and owing for *one (1) or more children* is at least fifteen thousand dollars (\$15,000).”<sup>123</sup> In *Sanjari v. State*,<sup>124</sup> the defendant had “accumulate[ed] a gross arrearage well in excess of \$15,000” for his two daughters and was convicted of two Class D felonies, both enhanced to Class C felonies; the trial court entered judgment only on the Class C felonies.<sup>125</sup> The Indiana Supreme Court reversed in part, interpreting the statute to “permit[] a separate class D felony conviction for nonsupport of each dependent child, but only one such offense may be enhanced to a class C felony where the unpaid support for one or more of such children is \$15,000 or more.”<sup>126</sup> Accordingly, the case was remanded for entry of one Class D felony and one Class C felony.<sup>127</sup>

5. *Inferences and Weight for Drug Offenses.*—Defendants fared better in sufficiency claims before the court of appeals, including a drug case that

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116. *Id.*

117. *Id.* at 78.

118. 968 N.E.2d 227 (Ind. 2012).

119. *Id.* at 229 (citing IND. CODE § 35-43-2-1 (2013)).

120. *Id.* at 230.

121. *Id.* at 231.

122. *Id.*

123. *Sanjari v. State*, 961 N.E.2d 1005, 1007 (Ind. 2012) (court’s emphases).

124. *Id.* at 1005.

125. *Id.* at 1006.

126. *Id.*

127. *Id.* at 1009.

reiterated not all inferences in sufficiency cases are reasonable. Several years ago, in *Halsema v. State*,<sup>128</sup> the Indiana Supreme Court placed limits on the manner in which the State may prove the weight element of drug offenses, concluding that jurors lack the expertise to make inferences about the weight of drugs based solely on in-court observations.<sup>129</sup> Rather, “the State must either offer evidence of its actual, measured weight or demonstrate that the quantity of the drugs or controlled substances is so large as to permit a reasonable inference that the element of weight has been established.”<sup>130</sup>

Applying *Halsema*, the court of appeals in *Harmon v. State*,<sup>131</sup> reduced a Class A felony conviction for dealing in methamphetamine to a Class B felony.<sup>132</sup> There, a police officer compared the weight of drug evidence to “a vial holding the contents of three packets of artificial sweetener,” acting as a “human scales” to determine weight.<sup>133</sup> The majority observed that *Halsema* provided “virtually no guidance” about the quantity of a drug necessary to permit a reasonable inference before concluding that “the State failed to present evidence of the actual, measured weight of the liquid methamphetamine base or to demonstrate that the quantity of the liquid was so large as to permit a reasonable inference that the weight element of the offense had been met.”<sup>134</sup>

Judge Vaidik concurred in the result and wrote separately to address weighing methods for cases where the methamphetamine manufacturing process has not been completed.<sup>135</sup> She emphasized the importance of an experts witness “to testify to the conversion ratio and how it applies in each case,” noting the difficulty in determining yield because of the prevalence of ingredients and factors.<sup>136</sup> “When the difference of such a small amount can have such a profound effect on a potential sentence, the trial court needs to be sure that the yield is accurate.”<sup>137</sup>

6. *Reasonable Teacher Discipline.*—*Littleton v. State*<sup>138</sup> is the most recent in a string of cases finding criminal charges inappropriate for efforts to discipline children. *Willis v. State*<sup>139</sup> reversed a battery conviction against a mother who used an extension cord or belt to swat her son’s buttocks “five to seven times[,]” leaving bruises.<sup>140</sup> *State v. Fettig*<sup>141</sup> upheld the trial court’s dismissal of charges

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128. 823 N.E.2d 668 (Ind. 2005).

129. *Id.* at 673-74.

130. *Id.* at 674.

131. 971 N.E.2d 674 (Ind. Ct. App.), *trans. denied*, 974 N.E.2d 1020 (Ind. 2012).

132. *Id.* at 682.

133. *Id.* at 678-79.

134. *Id.* at 680.

135. *Id.* at 682-83 (Vaidik, J., concurring in result).

136. *Id.* at 685.

137. *Id.*

138. 954 N.E.2d 1070 (Ind. Ct. App. 2011).

139. 888 N.E.2d 177 (Ind. 2008).

140. *Id.* at 179, 184.

141. 884 N.E.2d 341 (Ind. Ct. App. 2008).



against a teacher who slapped the face of a high school student,<sup>142</sup> and *Barocas v. State*<sup>143</sup> reversed a battery conviction against a teacher who “flicked” the tongue of a student with Down Syndrome.<sup>144</sup> Building on those cases, the court of appeals in *Littleton* found a teacher was entitled to qualified immunity from criminal charges in disciplining an autistic student by placing him in a Rifton chair and using “a series of escalating measures” to calm the child, including confinement to the chair.<sup>145</sup> The court reasoned the child “bore no physical injuries” as in *Willis*, suffered no “resounding physical blow” as in *Fettig*, and “displayed no distress,” but was instead calm—unlike the child in *Barocas*.<sup>146</sup>

7. “*School Property*” Enhancement Fails.—As summarized in previous Survey articles,<sup>147</sup> defendants who possess or deal drugs within 1000 feet of school property, parks, family housing complexes, or youth program centers face severe enhancements of their offenses, such as a Class B felony possession charge being elevated to a Class A felony.<sup>148</sup> In *Baker v. State*,<sup>149</sup> the court of appeals considered whether the State proved that the “ETC Learning Center” qualified as “school property,” which is defined under Indiana Code section 35-41-1-24.7 to include buildings “owned or rented by a school corporation.”<sup>150</sup> The court of appeals had previously held that “school property” does not extend to colleges and universities because the statute was intended to extend “special protection to children from the perils of drug trafficking.”<sup>151</sup> Because the State failed to prove in *Baker* that the ETC was owned or rented by a school, or that “students enrolled in any program at the ETC, including those seeking their high school diplomas, were school-age children and not adults or college-age individuals[,]” the B felony conviction for possession of methamphetamine was reduced to a D felony.<sup>152</sup>

8. *Single Witness Without Corroboration is Still Enough—But Not for Judge Baker*.—Challenging the credibility of witnesses is widely thought to be a hopeless appellate claim. Hundreds of appellate opinions recite the standard that an appellate court cannot “judge the credibility of witnesses” and that the “testimony of a single eyewitness is sufficient to support a conviction.” Indiana cases may reverse a conviction in rare instances when “the testimony is so incredibly dubious or inherently improbable that no reasonable person could

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142. *Id.* at 342, 346.

143. 949 N.E.2d 1256 (Ind. Ct. App. 2011).

144. *Id.* at 1257-58, 1261.

145. *Littleton v. State*, 954 N.E.2d 1070, 1079 (Ind. Ct. App. 2011).

146. *Id.* at 1079-80.

147. *See, e.g.*, Schumm, *2010 Developments, supra* note 56, at 1148 (summarizing cases under the heading “Enhancing Drug Offenses Within 1,000 Feet of . . . Anything”).

148. IND. CODE § 35-48-4-2 (2013).

149. 967 N.E.2d 1037 (Ind. Ct. App. 2012).

150. *Id.* at 1039-40, 1042.

151. *Id.* at 1042-43 (quoting *Pridgeon v. State*, 569 N.E.2d 722, 724 (Ind. Ct. App. 1991)).

152. *Id.* at 1042-44.

believe it,” but rarely does that occur.<sup>153</sup>

In *Leyva v. State*,<sup>154</sup> the court of appeals affirmed a conviction for child molesting because it could not say an eleven-year-old victim’s “testimony that she awoke and felt Leyva insert more than one of his fingers into her vagina while Leyva’s wife [and son] slept on the floor after watching a movie, was so inherently improbable that no reasonable person could believe it.”<sup>155</sup> Judge Baker dissented, finding the child’s testimony incredibly dubious: (1) the victim failed to recall many of the events of the weekend, especially “events that do not reflect positively on her”; (2) “the circumstances surrounding the alleged molestation run counter to human experience,” particularly that the first and only time her father touched her was in “the living room where the entire family had gathered to watch a movie”; and (3) the victim had “a motive to fabricate,” specifically that she was angry with her father for refusing to buy her a Blackberry.<sup>156</sup> Judge Baker cited Lord Hale’s comments on the difficulty of defending a rape charge, as well as cases from other states that require corroborating evidence when the victim is a child.<sup>157</sup> In light of “the advent of modern technology, including DNA testing and analysis,” he concluded “it is not unreasonable to require some form of corroborating evidence before convicting a defendant when the sole witness is the victim.”<sup>158</sup>

Finally, and somewhat relatedly, longstanding Indiana precedent has upheld convictions based on the unequivocal identification of the defendant by a sole eyewitness, while cases involving equivocal identifications have required corroboration by circumstantial evidence.<sup>159</sup> In *Gorman v. State*,<sup>160</sup> the court of appeals acknowledged recent reports of wrongful convictions based on inaccurate identification and reiterated “that there is no correlation between a witness’s stated confidence in his or her identification of a defendant and the actual

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153. As the court of appeals explained in *Watkins v. State*,

[T]he cases in which we have found testimony of a witness to be inherently improbable or of incredible dubiousity, and hence insufficient to induce a belief of the defendant’s guilt beyond a reasonable doubt, have either involved situations where the facts as alleged could not have happened as described by the victim and be consistent with the laws of nature or human experience, or the witness was so equivocal about the act charged that his uncorroborated and coerced testimony was riddled with doubt about its trustworthiness.

571 N.E.2d 1262, 1265 (Ind. Ct. App.), *aff’d in part, vacated in part*, 575 N.E.2d 624 (Ind. 1991) (citations omitted).

154. 971 N.E.2d 699 (Ind. Ct. App. 2012).

155. *Id.* at 702.

156. *Id.* at 704-05 (Baker, J., dissenting).

157. *Id.* at 705-06.

158. *Id.* at 706.

159. *Gorman v. State*, 968 N.E.2d 845, 848 (Ind. Ct. App. 2012) (citing *Richardson v. State*, 388 N.E.2d 488, 491 (Ind. 1979); *Scott v. State*, 871 N.E.2d 341, 344-45 (Ind. Ct. App. 2007)).

160. 968 N.E.2d at 845.

accuracy of that identification.”<sup>161</sup> Nevertheless, the court declined to recommend the supreme court reconsider its precedent, concluding the reliability of eyewitness testimony “must be gauged by the fact-finder, not this court,” and any “errors in eyewitness identification must be resolved during trial, not on appeal.”<sup>162</sup>

#### *G. A Trademark Infringement Case in the Criminal Law Survey?*

*Yao v. State*,<sup>163</sup> is an unusual criminal prosecution for trademark infringement. The case involved “conduct concerning toy semi-automatic weapons that were look-alikes of real weapons for which a gun manufacturer allegedly owned a federally protected trademark,” which sounds a lot like a civil case.<sup>164</sup> But a county prosecutor charged the defendants with theft, counterfeiting, and corrupt business influence, and the defendants pursued an interlocutory appeal after the trial court denied their motion to dismiss.<sup>165</sup> The court of appeals dismissed all counts on the basis that “the trial court lacked territorial jurisdiction because there is no evidence any conduct that is an element of the alleged offenses occurred in Indiana.”<sup>166</sup>

The Indiana Supreme Court rejected all the defense arguments and affirmed the trial court. First, emphasizing the procedural posture of a motion to dismiss, the court concluded it could not “conclude that as a matter of law the Defendants engaged in no conduct nor effected any result in Indiana that was an element of either the theft or the counterfeiting charge.”<sup>167</sup> The court also rejected separate arguments that the facts alleged failed to establish the offenses, noting that questions of facts precluded resolving the case on a motion to dismiss.<sup>168</sup>

Whether the conduct ultimately results in felony convictions remains to be seen. The court’s rejection of the claim that “there cannot be a more expansive understanding of jurisdiction under the criminal law than under the civil law,”<sup>169</sup> however, could encourage similar prosecutions in the future. Companies that might normally file a civil suit for a variety of conduct need only find one of Indiana’s ninety-one prosecutors to save a lot of litigation expense by instead becoming a victim in a criminal case litigated by the State.

#### *H. Jury Issues*

Although the number of jury trials in criminal cases has declined in Indiana

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161. *Id.* at 848-49 (citing *Scott*, 871 N.E.2d at 345 n.7).

162. *Id.* at 850.

163. 975 N.E.2d 1273 (Ind. 2012).

164. *Id.* at 1275.

165. *Id.* at 1275-76.

166. *Id.* at 1276 (quoting *Yao v. State*, 953 N.E.2d 1236, 1237 (Ind. Ct. App. 2011), *opinion vacated*, 975 N.E.2d 1273 (Ind. 2012)).

167. *Id.* at 1278.

168. *Id.* at 1282.

169. *Id.* at 1278.

in recent years—for example, there were barely 1000 in 2011<sup>170</sup>—those resulting in a conviction usually are appealed, and Indiana’s appellate courts decided a number of cases involving the conduct of jury trials.

1. *Batson Challenges.*—*Addison v. State*,<sup>171</sup> offers important lessons for both defense lawyers and prosecutors in addressing *Batson* challenges: (1) for those without a photographic memory, take careful notes, and (2) make sure arguments and objections are specific and accurate. There, in a case in which the defendant had raised an insanity defense, an African-American prospective juror stated during voir dire, “I guess you just would have to go by what the professionals say and kind of interpret all the facts and take it all in,” including the facts surrounding the crime and information about the defendant’s history of mental illness.<sup>172</sup> When the State used a peremptory challenge to strike the juror and the defense raised a *Batson* challenge, the prosecutor characterized the juror’s answer as: “Well, I’d just go with the doctors.”<sup>173</sup> The supreme court found “[t]his mischaracterization of [the juror’s] voir dire testimony is troubling and undermines the State’s proffered race-neutral reason for the strike.”<sup>174</sup>

Moreover, “non-African American venirepersons . . . gave answers strikingly similar to those given by [the juror] and were not peremptorily challenged.”<sup>175</sup> “If a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination . . . .”<sup>176</sup> This inquiry is not easily done because

a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable.<sup>177</sup>

Although defense counsel made a broad *Batson* objection, he offered no “substantive rebuttal argument in response to the State’s facially race-neutral reason for the removal.”<sup>178</sup> Therefore, the court reviewed for fundamental error, which was established based on the collective effect of “the State’s mischaracterization of [the juror’s] voir dire testimony, its failure to engage [the

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170. Joel Schumm, *The Disappearing Jury Trial in Indiana: Some Thoughts (and Stats) on the Past Five Years* (Dec. 18, 2012, 9:17 AM), [http://indianalawblog.com/archives/2012/12/ind\\_courts\\_the\\_36.html](http://indianalawblog.com/archives/2012/12/ind_courts_the_36.html).

171. 962 N.E.2d 1202 (Ind. 2012).

172. *Id.* at 1215.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 1216 (quoting *Miller-El v. Dretke*, 545 U.S. 231, 232 (2005)) (internal quotation marks omitted).

177. *Id.* (quoting *Snyder v. Louisiana*, 552 U.S. 472, 483 (2008)).

178. *Id.* at 1213.

juror] in any meaningful voir dire examination to explore his alleged undue reliance on the testimony of professionals, and the comparative juror analysis,” which demonstrated the strike “was a mere pretext based on race, making a fair trial impossible.”<sup>179</sup>

Although *Addison* reversed for fundamental error, the supreme court made clear months later that the bar is very high one. In *Whiting v. State*,<sup>180</sup> the court adhered to the “well settled” requirement that a defendant show he either removed a juror using a peremptory challenge “or had already exhausted” all peremptory challenges in order to preserve for appeal a claim that the trial judge erred by denying a for-cause challenge.<sup>181</sup> Moreover, the court declined to apply the fundamental-error doctrine to the claim, concluding that

the fundamental-error doctrine asks whether the error was so egregious and abhorrent to fundamental due process that the trial judge should or should not have acted, irrespective of the parties’ failure to object or otherwise preserve the error for appeal. A finding of fundamental error essentially means that the trial judge erred either by not acting when he or she should have or by acting in a manner that grossly exceeded the role of an impartial judge.<sup>182</sup>

The court concluded the claim must instead be brought “as one of ineffective assistance of trial counsel because it provides the incentive to exhaust peremptory challenges that is lacking under the fundamental-error doctrine.”<sup>183</sup>

2. *Muzzling Defendants.*—In *Vaughn v. State*,<sup>184</sup> a defendant complained while testifying to the jury about his lawyer’s strategy and kept speaking when instructed “four times to stop speaking.”<sup>185</sup> The trial court directed that the jury be removed and instructed the bailiff to cover the defendant’s mouth so he would stop talking.<sup>186</sup> The supreme court suggested “the better practice would have to be to warn the defendant” in advance of his testimony and to have adequate

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179. *Id.* at 1217. In a case decided the same day as *Addison*, though, the court found “all of the State’s proffered reasons . . . were race-neutral, and none were demeanor-based.” *Cartwright v. State*, 962 N.E.2d 1217, 1223 (Ind. 2012). There, the prospective juror

volunteered on voir dire examination that he did not wish to serve on the jury[.] . . . stated that he was taking a diuretic which caused him “a frequent problem of going to the restroom[.]” . . . stated, “I’m not a good listener, but . . . but that’s from all my life even school[.]” [a]nd on his juror questionnaire, he responded “Yes conversion,” to the question “Have you or any of your immediate family members been charged with or convicted of a crime.”

*Id.* (fifth alteration in original) (citations omitted).

180. 969 N.E.2d 24 (Ind. 2012).

181. *Id.* at 29-30.

182. *Id.* at 34 (citations omitted).

183. *Id.* at 34-35.

184. 971 N.E.2d 63 (Ind. 2012).

185. *Id.* at 64.

186. *Id.*

security in place but nevertheless concluded the denial of a mistrial was not an abuse of discretion.<sup>187</sup> “It would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes.”<sup>188</sup>

3. *Sleeping Jurors*.—In *Hardin v. State*,<sup>189</sup> defense counsel alerted the trial court in a sidebar conference during the second day of a jury trial of “a sleeping juror in the back row[,]” and the prosecutor responded, “That’s the same one that slept through everything yesterday.”<sup>190</sup> The trial court proposed sending the juror “a cup of coffee or a glass of water without embarrassing them too much[,]” and the matter was never again addressed during trial.<sup>191</sup> The court of appeals found the defendant’s claim that he was denied a fair and impartial jury waived because defense counsel “could have requested that the juror be removed and replaced or requested permission to voir dire the juror” about the specifics of his somnolence.<sup>192</sup> Nevertheless, the court emphasized that both defense counsel and prosecutors share “not only the duty to notify the trial court when they suspect juror inattentiveness, but also the duty to preserve the integrity of the trial by requesting corrective action that involves a factual determination on the record concerning the behavior.”<sup>193</sup>

4. *Misdemeanor Cases*.—In a pair of cases, the court of appeals confronted issues concerning jury trials in misdemeanor cases. Criminal Rule 22 addresses requests for jury trials in misdemeanor cases, and decisional law has previously held a valid waiver will be found if (1) the record is devoid of a request for a jury trial; (2) “the defendant was fully advised of the right to a trial by jury and of the consequences for failing to timely request the right”; and (3) the record shows “the defendant was able to understand the advice.”<sup>194</sup> In *Duncan v. State*,<sup>195</sup> the court of appeals reversed six misdemeanor convictions entered after a bench trial because the defendant had not been “fully advised of the consequences of failing to timely request a jury trial.”<sup>196</sup> The court reiterated that being represented by counsel is not a substitute for an advisement by the court.<sup>197</sup> The court of appeals rejected the State’s arguments that Duncan was not prejudiced, had consented to his counsel’s trial strategy, and never stated he “wanted, requested, or was denied

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187. *Id.* at 69-70.

188. *Id.* at 70 (quoting *Illinois v. Allen*, 397 U.S. 337, 346 (1970)).

189. 956 N.E.2d 160 (Ind. Ct. App. 2011).

190. *Id.* at 162-63.

191. *Id.* at 163.

192. *Id.*

193. *Id.* at 164.

194. *Eldridge v. State*, 627 N.E.2d 844, 848 (Ind. Ct. App. 1994), *trans. denied, abrogated by* *Poore v. State*, 666 N.E.2d 415 (Ind. Ct. App. 1996).

195. 975 N.E.2d 838 (Ind. Ct. App. 2012).

196. *Id.* at 843.

197. *Id.*

a jury trial.”<sup>198</sup> Even if he was “only raising the issue now because he simply wants a new trial,” the court of appeals found it was obliged to reverse in the absence of a valid waiver.<sup>199</sup>

In *Levels v. State*,<sup>200</sup> the court of appeals reiterated the obligation of trial courts to advise defendants in misdemeanor cases “of the consequences of [failing] to demand a jury trial no later than ten days [before] the trial date.”<sup>201</sup> Without the trial court’s affirmative advisement and a personal waiver from the defendant, a trial court commits fundamental error by denying a jury trial.<sup>202</sup> In *Levels*, the trial court advised the defendant of the right to a jury trial but did not advise him of the consequences of failing to demand a jury trial; nor was the defendant advised of the necessary timing of the request or the requirement that it be in writing.<sup>203</sup> Because the advisement was insufficient, the purported waiver was invalid, and the court reversed the defendant’s convictions.<sup>204</sup>

### *I. Jury Instructions*

The Indiana Supreme Court addressed jury instruction issues in three cases.

In *Jones v. State*,<sup>205</sup> the court took the unusual step of adopting, in full, an opinion from the court of appeals involving a defendant’s challenge of the trial court’s refusal to instruct the jury on lesser included offenses in a murder trial.<sup>206</sup> The appellate courts first upheld the refusal of a reckless homicide instruction because “the protracted nature of the conduct [was] such that Jones could not have been without an awareness that his actions could result in [the victim]’s death.”<sup>207</sup> The opinion also held the State’s omission of any reference to a battery in the charging information foreclosed an instruction on the “factually lesser included offense” of involuntary manslaughter.<sup>208</sup>

In *Webb v. State*,<sup>209</sup> however, a majority of the Indiana Supreme Court reversed a murder conviction because the trial court refused to give a reckless homicide instruction in the face of “a serious evidentiary dispute [regarding] whether [the defendant] acted knowingly or recklessly.”<sup>210</sup> Even though the defendant testified and denied that he was even present when the shooting took place, the supreme court reiterated that a lesser included offense instruction must

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198. *Id.* at 843-44.

199. *Id.* at 844.

200. 972 N.E.2d 972 (Ind. Ct. App. 2012).

201. *Id.* at 973.

202. *Id.* (citing *Vukadinovich v. State*, 529 N.E.2d 837, 838 (Ind. Ct. App. 1988)).

203. *Id.* at 974.

204. *Id.*

205. 966 N.E.2d 1256 (Ind. 2012).

206. *Id.* at 1257.

207. *Id.* at 1257-58.

208. *Id.* at 1258.

209. 963 N.E.2d 1103 (Ind. 2012).

210. *Id.* at 1107-09.

be given when supported by either the State's or defendant's evidence, and "the State's evidence concerning [the defendant]'s state of mind [was] at best ambiguous."<sup>211</sup> Justice David, joined by Chief Justice Shepard, dissented. They reasoned after the defendant chose to testify that he was not present, he should not have been "allowed to make a mockery out of the state's burden of proof and argue to a jury he was not there, but if he was, he didn't have the necessary intent."<sup>212</sup>

In *Hampton v. State*,<sup>213</sup> the supreme court held "that an instruction on the requirement of proof beyond a reasonable doubt does not obviate the necessity, where the conduct of the defendant constituting the commission of a charged offense is proven exclusively by circumstantial evidence, of an additional jury instruction."<sup>214</sup> The court determined that the jury instruction should state, "In determining whether the guilt of the accused is proven beyond a reasonable doubt, you should require that the proof be so conclusive and sure as to exclude every reasonable theory of innocence."<sup>215</sup> The supreme court found the instruction necessary "[t]o preserve [the] historic recognition that juries in criminal cases should be reminded to use particular caution when considering whether to find guilt based solely on crucial circumstantial evidence."<sup>216</sup> Because the law on this issue was unfavorable to the defendant at the time of his trial and direct appeal, though, the supreme court affirmed the denial of post-conviction relief because "appellate counsel did not fail to raise a strongly availing appellate issue."<sup>217</sup>

The court of appeals issued a noteworthy opinion about additional jury instructions after deliberations have begun. In *Dowell v. State*,<sup>218</sup> the jury was instructed about the elements of robbery, but the court told them nothing about accomplice liability.<sup>219</sup> Not surprisingly, the jurors submitted a note during deliberations asking questions about the extent to which the defendant must have been involved in the offense.<sup>220</sup> The trial court did not call the jurors back into the courtroom or re-read the instructions but rather returned a note with the following message: "Indiana law provides that a person who aids another person to commit an offense commits that offense."<sup>221</sup>

The jury returned a conviction, and the court of appeals reversed, relying on a previous case that explained

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211. *Id.* at 1108.

212. *Id.* at 1110 (David, J., dissenting).

213. 961 N.E.2d 480 (Ind. 2012).

214. *Id.* at 482.

215. *Id.* at 491 (emphasis omitted).

216. *Id.*

217. *Id.* at 495.

218. 973 N.E.2d 58 (Ind. Ct. App. 2012).

219. *Id.* at 59.

220. *Id.*

221. *Id.* at 59-60.



when the trial court instructed the jury on accomplice liability, without re-reading the entire set of final instructions, it not only placed special significance on the particular issue of [the defendant's] culpability with regard to the charge of robbery, but also the lone, additional instruction suggests a resolution to the jury's predicament evidenced by their note.<sup>222</sup>

Although the court of appeals acknowledged recent supreme court authority explaining that "trial courts have greater leeway to facilitate and assist jurors in the deliberative process" as part of the relatively recent adoption of jury rules, the court concluded that leeway does not permit courts to subject defendants to the prejudice of mid-deliberation special instructions.<sup>223</sup> The court appeared to suggest that trial courts could avoid reversible error by re-reading all the instruction and inserting the additional instruction in a "natural and logical position amongst the other [previously read] instructions."<sup>224</sup> Although not discussed in the opinion, Indiana Jury Rule 26(a) requires that jurors "retain the written instructions during deliberations," which suggests adding an instruction—regardless of the placement of it—will "stand out" and may therefore be impermissible.<sup>225</sup>

#### *J. Appellate Review of Sentences*

For the past several years, this Survey discussed cases in which the Indiana Supreme Court reduced a sentence under its power to review and revise sentences under Article 7, Section 4 of the Indiana Constitution. Appellate Rule 7(B) provides the legal standard, allowing the revision of sentences that are "inappropriate in light of the nature of the offense and the character of the offender."<sup>226</sup>

*I. A Few Statistics.*—Last year's Survey included statistics on appellate sentence review in the court of appeals, including that nearly 30% of criminal cases included a claim for sentence revision while less than 7% of those claims were successful.<sup>227</sup> Although most county prosecutors include explicit sentencing waiver provisions in plea agreements, some still do not, as nearly 30% of those sentencing claims were in cases involving a plea agreement.<sup>228</sup>

During this Survey Period, a similar percentage of court of appeals' cases included sentencing claims: 29% of the 1337 criminal appellate opinions. During the Survey Period, the court of appeals granted sentencing relief in only sixteen cases (a mere 4.5%).<sup>229</sup> Most of the claims were raised after a jury or bench trial

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222. *Id.* at 61 (quoting *Graves v. State*, 714 N.E.2d 724, 726-27 (Ind. Ct. App. 1999)).

223. *Id.* at 61 n.4.

224. *Id.* at 61-62 (citing *Hero v. State*, 765 N.E.2d 599, 603 (Ind. Ct. App. 2002)).

225. IND. JURY R. 26(a).

226. IND. R. APP. P. 7(B).

227. Schumm, *supra* note 1, at 1093.

228. *Id.*

229. This data from Westlaw searches of the Indiana Court of Appeals database are on file

(66%), with eleven reversals in cases that went to trial, four in cases involving a plea agreement that did not include a sentencing waiver provision,<sup>230</sup> and one case involving a guilty plea without an agreement. The most notable distinction from prior years, though, was the Attorney General's decision to seek transfer in some of those cases. Transfer was sought in three cases, and granted in all three. The only opinion issued during the Survey Period is discussed in Part 2, below.<sup>231</sup>

2. *Supreme Court Reinstates Trial Court's Sentence.*—*Bushhorn v. State*<sup>232</sup> marks the first time the Indiana Supreme Court has taken away a sentence reduction ordered by the court of appeals under Appellate Rule 7(B). There, the trial court imposed a forty-seven year sentence (with three years suspended) for kidnapping a corrections officer, confining two other officers, and attempting to escape from jail.<sup>233</sup> As part of the offense, the inmate took and sprayed a chemical agent at officers who came to help the female officer a co-defendant had stabbed with a jail-made shank.<sup>234</sup> Because he had pleaded guilty and was only twenty-years-old, the court of appeals reduced the sentence to thirty-five years.<sup>235</sup> The supreme court reinstated the forty-seven year sentence in a per curiam opinion that recited the facts and concluded the court's "collective judgment is that the trial court's sentence is not inappropriate."<sup>236</sup>

A forty-seven year sentence is not surprising based on the facts of the case, but the case may have greater significance. The opinion came in Justice Sullivan's final days on the court, and he voted to deny transfer.<sup>237</sup> For many years, the Attorney General's office rarely asked for transfer in reduction of sentence cases, presumably because it knew transfer was unlikely with the two leading proponents for reductions, Chief Justice Shepard and Justice Sullivan, on the court. Although Justice Rucker often joined in reducing sentences, (now Chief) Justice Dickson frequently dissented, and Justice David agreed with some reductions and disagreed with others.<sup>238</sup>

3. *Reductions and the Changing Supreme Court.*—What remains to be seen is how frequently the court of appeals will reduce sentences, whether the Attorney

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with the author. The author thanks Brian Karle, Indiana University Robert H. McKinney School of Law Class of 2013, for his invaluable research assistance.

230. The supreme court upheld the enforceability of plea provisions that waive a right to challenge a sentence on appeal in *Creech v. State*, 887 N.E.2d 73 (Ind. 2008). Although those provisions are now standard in many counties, they appear to be never or rarely used in other counties or before certain judges.

231. The other two cases were *Kucholick v. State*, 977 N.E.2d 351 (Ind. 2012), and *Kimbrough v. State*, 979 N.E.2d 625 (Ind. 2012), which will be discussed in next year's Survey.

232. 971 N.E.2d 80 (Ind. 2012).

233. *Id.* at 81.

234. *Id.* at 80-81.

235. *Id.* at 81.

236. *Id.*

237. *Id.* at 82.

238. See, e.g., *Horton v. State*, 949 N.E.2d 346, 349 (Ind. 2011); *Knight v. State*, 930 N.E.2d 20, 23 (Ind. 2010).

General will increasingly seek transfer in cases where sentences are reduced, and how the newer members of the Indiana Supreme Court will resolve those issues. Perhaps the justices who were formerly most reluctant to reduce sentences will nevertheless apply existing precedent. A few cases highlight the range of possibilities.

In an opinion authored by Chief Justice Shepard early in the Survey Period, a maximum sentence of fifty years for one count of child molesting was reduced to thirty-five years in *Hamilton v. State*.<sup>239</sup> The court quoted an earlier opinion that noted the “main purposes” of sentence review “are to ‘leaven the outliers[] and identify some guiding principles for trial courts . . . but not to achieve a perceived ‘correct’ result in each case.’”<sup>240</sup> The court synthesized and applied several sentencing principles, which should prove useful to counsel and trial courts in future cases. These include: (1) “Although a defendant’s criminal history is certainly relevant in sentencing, the chronological remoteness of convictions should factor into determining the appropriateness of a harsher sentence.”<sup>241</sup> (2) “Like a defendant’s criminal history, the victim’s age also suggests a sliding scale in sentencing, as younger ages of victims tend to support harsher sentences.”<sup>242</sup> (3) “A harsher sentence is also more appropriate when the defendant has violated a position of trust that arises from a particularly close relationship between the defendant and the victim, such as parent-child or stepparent-child relationship.”<sup>243</sup> (4) “[T]he nature of a threat to coerce a victim or obtain her silence varies based on the target of the threat and the severity of the threatened harm.”<sup>244</sup> In reducing the maximum sentence of fifty years to thirty-five years, the court reasoned that the defendant had engaged in a single act rather than a long-term pattern of abuse, had a modest criminal history of only two convictions far removed in time and unrelated to sexual misconduct, had violated a position of trust but not in a parental-type relationship, and molested a victim who, “although still young, was not of tender years.”<sup>245</sup> The reduction was “a necessary part of maintaining the proportionality between sentences and offenses, and of treating like cases alike.”<sup>246</sup> Justice Dickson dissented, reiterating his “cautious resistance to appellate sentence revision” and concluding the case was “not an exceptional or rare case justifying appellate intrusion into the trial court’s sentencing determination to which we must accord ‘due consideration’ under

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239. 955 N.E.2d 723 (Ind. 2011).

240. *Id.* at 726 (alterations in original) (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008)).

241. *Id.* at 727.

242. *Id.*

243. *Id.*

244. *Id.* at 728.

245. *Id.*

246. *Id.* The opinion also observed that *Hamilton* was a credit-restricted felon, which means he will have to serve nearly 85% of his sentence instead of merely half, assuming good behavior in prison. *Id.* at 725 (citing IND. CODE § 35-41-1-5.5(1) (repealed 2012) (current version at IND. CODE § 35-31.5-2-72 (2013)); *id.* § 35-50-6-3 to -4).

Indiana Appellate Rule 7(B).<sup>247</sup>

A few months later, the court reduced a sentence in a drug possession case that had been enhanced because the vehicle was stopped within 1000 feet of school property in *Abbott v. State*.<sup>248</sup> Although the defendant in *Abbott* had a lengthy criminal history that warranted no relief on the basis of his character, the majority focused on the nature of the offense: a Class B felony for possession of cocaine within 1000 feet of a church that houses a private school, which elevated the offense from a Class D felony.<sup>249</sup> In reducing the sentence from twenty years to twelve, the majority emphasized that “but for the police officer’s choice of location in stopping the car in which Abbott was a passenger, he would have received no more than the maximum three-year sentence for his possession of less than three grams of cocaine.”<sup>250</sup>

Justice David was joined by Justice Dickson in dissent. They acknowledged that “although sympathy may arise when a defendant who commits a Class D felony suddenly finds himself facing a Class B felony sentence, the trial court here adequately justified the sentence imposed.”<sup>251</sup> The drugs were found “along with plastic baggies that are commonly used to package illicit drugs for sale,” and the defendant’s history of ten prior convictions demonstrated he “has not reformed his criminal behavior despite his numerous prior contacts with the criminal justice system.”<sup>252</sup>

Several weeks later, though, the court relied heavily on *Abbott* in reducing another sentence based on similar facts in *Walker v. State*.<sup>253</sup> The analysis in the per curiam opinion included only a citation to *Walker* with the following parenthetical: “but for the police officer’s choice of location in stopping the car in which Abbott was a passenger, he would have received no more than the maximum three-year sentence for his possession of less than three grams of cocaine.”<sup>254</sup> With the addition of Justice Massa, who dissented in *Walker*, now-Chief Justice Dickson and Justice David could have easily voted to overrule *Abbott* but instead adhered to and applied that precedent.

Perhaps more surprisingly, although Chief Justice Dickson has long been the most frequent dissenter in cases that reduced sentences, he wrote the majority opinion a few weeks after *Walker* in *Castillo v. State*,<sup>255</sup> which reduced a life without parole sentence to sixty-five years.<sup>256</sup> Although Appellate Rule 7(B) looks both to the nature of the offense and character of the offender, reductions

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247. *Id.* at 728 (Dickson, J., dissenting) (quoting *Serino v. State*, 798 N.E.2d 852, 856 (Ind. 2003)).

248. 961 N.E.2d 1016, 1019 (Ind. 2012).

249. *Id.* at 1017-19.

250. *Id.* at 1019.

251. *Id.* (David, J., dissenting).

252. *Id.* at 1020 (quoting *Abbott v. State*, 950 N.E.2d 357, 364-65 (Ind. Ct. App. 2011)).

253. 968 N.E.2d 1292 (Ind. 2012) (per curiam).

254. *Id.* at 1292 (quoting *Abbott*, 961 N.E.2d at 1017-19).

255. 974 N.E.2d 458 (Ind. 2012).

256. *Id.* at 461, 467.

often focus largely on the defendant's character, *e.g.*, acceptance of responsibility through a guilty plea, young age, mental illness, or lack of criminal history.<sup>257</sup> In *Castillo*, though, the majority made clear the reduction was grounded in the nature of the offense, specifically that the defendant was an accomplice rather than the principal in the "heinous death" of her two-year-old cousin when "none [of] the acts of physical abuse inflicted by the defendant [were] associated with a high probability of death."<sup>258</sup> Justice David concurred in the result, concluding that *Castillo*'s actions "viewed in the aggregate" qualified her as a principal, but he agreed to reduce the sentence "for a host of other reasons: *Castillo*'s difficult upbringing, her boyfriend's participation in the murder, the terms of the boyfriend's plea agreement, and the prosecutorial misconduct."<sup>259</sup> Finally, Justice Massa dissented, taking a markedly different view of

the nature of the offense (a vicious litany of abuse on a defenseless and utterly innocent victim followed by a deliberate, planned attempt to conceal the crime, deny involvement, and deceive law enforcement) and the character of the offender (a drug-abusing teenager with a troubled childhood who exhibited hostility to authority and callous disregard for her victim and was hardly the manipulated accomplice she now claims to be).<sup>260</sup>

In another life without parole case, seventeen-and-a-half-year-old Andrew Conley pleaded guilty to strangling his ten-year-old brother.<sup>261</sup> In a rare case that divided the court's Republican and Democratic appointees, the majority concluded the sentence was appropriate under Appellate Rule 7(B) and did not violate the Eighth Amendment or Article 1, Sections 16 and 18 of the Indiana Constitution.<sup>262</sup> Although the U.S. Supreme Court recently held mandatory life without parole sentences unconstitutional for those under eighteen at the time of their crimes,<sup>263</sup> the majority in *Conley* emphasized the discretionary nature of LWOP for juveniles in Indiana.<sup>264</sup> As to the state constitutional analysis, the court reiterated that LWOP "is reserved for use in only the most heinous of crimes that so shock our conscience as a community," placing this case among

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257. *See id.* at 467.

258. *Id.* at 461, 467. Another example of a case focusing on the nature of the offense is *Davis v. State*, 971 N.E.2d 719, 722, 726 (Ind. Ct. App. 2012), where the court of appeals rejected a challenge under IND. R. APP. P. 7(B) to a 245-year sentence for four counts of felony murder and other offenses. Acknowledging the defendant "had a horrific childhood and suffers from mental illness and brain damage[.]" the court found the offense—the shooting of two women and their two babies while the women pleaded for their lives—was "among the most heinous in Indiana's history." *Id.* at 725.

259. *Castillo*, 974 N.E.2d at 470-71 (David, J., concurring).

260. *Id.* at 473 (Massa, J., dissenting).

261. *Conley v. State*, 972 N.E.2d 864, 869-70 (Ind. 2012).

262. *Id.* at 876-80.

263. *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012).

264. 972 N.E.2d at 879.

only three others in Indiana history to warrant the punishment.<sup>265</sup>

Justice Rucker, joined by Justice Sullivan in dissent, provided a lengthy analysis of U.S. Supreme Court precedent but ultimately resolved the case based on Appellate Rule 7(B).<sup>266</sup> Based on Conley's youth, diagnosed mental illness, and absence of any convictions or juvenile adjudications, they would have reduced the sentence to the maximum term of sixty-five years.<sup>267</sup>

4. *Credit Restricted Felon Status*.—Although defendants usually serve 50% of their sentence by earning one day of good time credit for each day served in prison for good behavior, defendants who are at least twenty-one and commit a Class A felony child molesting offense against victims under age twelve after June 30, 2008, are classified as “credit restricted felons.” Such felons must serve nearly 85% of their sentences, earning only one day of credit for each six days served.<sup>268</sup> In *Sharp v. State*,<sup>269</sup> the supreme court held its Appellate Rule 7(B) review must focus on “whether the totality of the penal consequences imposed by the trial court was appropriate[,]” which allows consideration of the defendant's credit time status.<sup>270</sup> Nevertheless, the court affirmed the defendant's forty-year sentence “with a minimum possible sentence of 34.29 years” based primarily on the nature of the offense—multiple instances of the same deviate sexual conduct against the victim “over a period of years.”<sup>271</sup>

5. *Magnitude of Reductions*.—Although sentence reductions are typically in the range of 35%, as in *Hamilton*, or more,<sup>272</sup> the court of appeals, in *Laster v. State*,<sup>273</sup> ordered only a slight revision. There, the defendant was sentenced to consecutive, advisory terms of ten years for robbing four separate victims.<sup>274</sup> Although the court found the offenses “fairly typical class B felonies,” it noted the defendant had “exhibited some positive character traits, and the [presentence report] and prosecutor both recommended that Laster receive a partially suspended sentence.”<sup>275</sup> The court ordered two years of each count suspended to probation for an aggregate sentence “of thirty-two years executed and eight [years] suspended.”<sup>276</sup>

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265. *Id.* at 880.

266. *Id.* at 886 (Rucker, J., dissenting).

267. *Id.* at 885-88.

268. *Upton v. State*, 904 N.E.2d 700, 704-05 (Ind. Ct. App. 2009); IND. CODE § 35-50-6-3(d) (2013).

269. 970 N.E.2d 647 (Ind. 2012).

270. *Id.* at 650-51.

271. *Id.* at 651.

272. *See, e.g., Carpenter v. State*, 950 N.E.2d 719, 719, 721-22 (Ind. 2011) (reducing a sentence from forty years to twenty years); *Horton v. State*, 949 N.E.2d 346, 347-49 (Ind. 2011) (reducing a sentence from 324 years to 110 years).

273. 956 N.E.2d 187 (Ind. Ct. App. 2011).

274. *Id.* at 189-91.

275. *Id.* at 194.

276. *Id.*

*K. Credit Time for Home Detention Not Retroactive*

Until July 1, 2010, defendants placed on home detention did not earn good time credit, but that changed with a 2010 amendment to Indiana Code section 35-38-2.6-6. Although the amendment was certainly welcome news for those sentenced after July 1, 2010, in *Cottingham v. State*,<sup>277</sup> the supreme court held the reach is limited “only to those persons who ‘are placed’ on home detention on or after” July 1, 2010—and not retroactively to those placed on home detention before that date.<sup>278</sup>

*L. Restitution Claims*

Uncertainty surrounds the proper timing of criminal appeals in which the issue of restitution has been taken under advisement. Appellate Rule 9(A)(1) requires a notice of appeal be filed within thirty days of entry of a final judgment, which is defined in Rule 2(H)(1) as “dispos[ing] of all claims as to all parties[.]”<sup>279</sup> Sentencing has long been regarded as the final judgment from which the thirty-day deadline runs. In *Haste v. State*,<sup>280</sup> however, the trial court imposed sentence on August 17 but took “the issue of restitution under advisement.”<sup>281</sup> The defendant filed a Notice of Appeal on August 23, but the restitution order was not filed until October 24.<sup>282</sup> The court of appeals dismissed the appeal, concluding the restitution order was “never made part of the record on appeal” because it was filed over two months after the Notice of Completion of the Clerk’s Record.<sup>283</sup> The court suggested that “another notice of appeal” should have been filed within thirty days after the restitution order and that Haste might seek to “file a belated notice of appeal under Post-Conviction Rule 2.”<sup>284</sup>

In *Kays v. State*,<sup>285</sup> the supreme court reiterated that trial courts must engage in “at least a minimal inquiry into the defendant’s ability to pay restitution.”<sup>286</sup> There, the presentence report included no information about the defendant’s education, work history, asserts, or other financial information, and the trial judge

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277. 971 N.E.2d 82 (Ind. 2012).

278. *Id.* at 86.

279. IND. R. APP. P. 2(H)(1), 9(A)(1).

280. 967 N.E.2d 576 (Ind. Ct. App. 2012), *aff’d* by 982 N.E.2d 30 (Ind. 2013).

281. *Id.* at 576.

282. *Id.* at 576-77.

283. *Id.* at 577.

284. *Id.* Although not discussed in the opinion, the Indiana Rules of Criminal Procedure further complicate the issue. Criminal Rule 11 requires sentencing “within thirty (30) days of the plea or the finding or verdict of guilty, unless an extension for good cause is shown.” IND. R. CRIM. P. 11. Criminal Rule 15, however, notes the time limitation for holding an issue under advisement from Trial Rule 53.2 also applies in criminal cases, which allows ninety days from when an issue is taken under advisement before a case may be withdrawn for appointment of a special judge. *Id.* at R. 15; IND. R. TRIAL P. 53.2(A).

285. 963 N.E.2d 507 (Ind. 2012).

286. *Id.* at 510.

asked no questions at sentence about any of those topics.<sup>287</sup> Therefore, the case was remanded for the trial court to determine her ability to pay and to affix a manner of payment.<sup>288</sup>

The supreme court, however, concluded that ignoring the defendant's social security disability benefits in that determination could "paint a distorted picture of her ability to pay restitution."<sup>289</sup> Consistent with the reasoning from federal cases, the court concluded that 42 U.S.C. § 407(a), the anti-attachment provision of the Social Security Act, does not prohibit trial courts from considering social security income in ordering restitution.<sup>290</sup>

#### *M. Limitations on Habitual Offender Enhancements*

In *Dexter v. State*,<sup>291</sup> the Indiana Supreme Court reiterated its longstanding view "that the State *must* introduce into evidence proper certified and authenticated records of the defendant's prior felony convictions in order to prove beyond a reasonable doubt the existence of those prior convictions."<sup>292</sup> An "unsigned order of judgment" of a 2000 conviction was insufficient to establish that prior conviction in the habitual offender proceeding against Dexter.<sup>293</sup> Moreover, a rules-of-probation form from 2000, a 2005 pre-sentence report that listed the 2000 conviction, and the testimony of the chief probation officer were inadequate to fill the void because "[p]arol evidence alone is not sufficient evidence to support a habitual-offender finding, and the State made no showing that proper documentary evidence was unavailable."<sup>294</sup> Nevertheless, the Double Jeopardy Clause does not bar retrial in order to prove the sentencing enhancement, should the State want to try again.<sup>295</sup>

In *White v. State*,<sup>296</sup> the supreme court reviewed its precedent regarding the late filing of an habitual offender enhancement. According to statute, the enhancement must be filed no later than ten days after the omnibus date, although trial courts "may permit the filing of a habitual-offender charge at any time before the commencement of trial 'upon a showing of good cause.'"<sup>297</sup> Although the State offered no grounds for its late filing, and the trial court did not hold a hearing or make any explicit finding of good cause for the late filing, the supreme court found the issue waived.<sup>298</sup> Specifically, the court reiterated that

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287. *Id.*

288. *Id.* at 511.

289. *Id.* at 510.

290. *Id.* at 510-11.

291. 959 N.E.2d 235 (Ind. 2012).

292. *Id.* at 238.

293. *Id.* at 239.

294. *Id.* at 240.

295. *Id.*

296. 963 N.E.2d 511 (Ind. 2012).

297. *Id.* at 514 (quoting IND. CODE § 35-34-1-5(e) (2013)).

298. *Id.* at 517-18.



“defendant[s] must request a continuance” after a late filing to preserve the issue for appellate review.<sup>299</sup> If the defendant moves for a continuance, “the burden lies with the State to make a showing of good cause to the trial court, and such a showing should be reflected in the record.”<sup>300</sup>

Finally, the Indiana Supreme Court has long held that double enhancements are not permissible without “explicit legislative direction authorizing them.”<sup>301</sup> In *Dye*, the Court concluded (1) the possession of a firearm by a serious violent felon (“SVF”) statute was “a progressive-penalty statute[,]” and (2) “the general habitual offender statute does not include explicit legislative direction” allowing a double enhancement for the two offenses.<sup>302</sup>

#### *N. Post-Conviction Relief Issues*

1. *Standard for Failing to Pursue an Appeal.*—In *Hill v. State*,<sup>303</sup> the Indiana Supreme Court considered what standard to apply in reviewing the performance of counsel who failed to timely appeal the denial of permission to file a belated notice of appeal.<sup>304</sup> The Court declined to apply the *Strickland* standard, which applies to performance of trial and direct appeal counsel, because “the lesser responsibility of P-C.R. 2 counsel parallels the less cumbersome *Baum* standard governing collateral review counsel.”<sup>305</sup> The *Baum* standard merely requires counsel appear and represent the defendant “in a procedurally fair setting which resulted in a judgment of the court.”<sup>306</sup>

Emphasizing that the *Baum* standard is “highly deferential” and more difficult to prove than a *Strickland* claim, the Court found no violation based on P-C.R. 2 counsel’s performance “as a whole.”<sup>307</sup> Justice Sullivan concurred in the result, expressing the view that the *Strickland* standard should have been applied.<sup>308</sup> Justice Rucker dissented, agreeing that *Baum* was the correct standard but finding it was satisfied because the defendant merely sought review of his sentence, “something he has thus far been denied.”<sup>309</sup>

2. *A Rare Reversal for Newly Discovered Evidence.*—In *Bunch v. State*,<sup>310</sup> the court of appeals reversed a trial court’s denial of post-conviction relief in a high profile arson/murder case.<sup>311</sup> Defendants must prove nine separate

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299. *Id.* at 518.

300. *Id.*

301. *Dye v. State*, 972 N.E.2d 853, 856 (Ind. 2012) (collecting cases).

302. *Id.* at 858 (citing *Mills v. State*, 868 N.E.2d 446, 449, 452 (Ind. 2007)).

303. 960 N.E.2d 141 (Ind. 2012).

304. *Id.* at 143.

305. *Id.* at 147.

306. 533 N.E.2d 1200, 1201 (Ind. 1989).

307. 960 N.E.2d at 149-50.

308. *Id.* at 151-52 (Sullivan, J., concurring).

309. *Id.* at 153 (Rucker, J., dissenting).

310. 964 N.E.2d 274 (Ind. Ct. App.), *trans. denied*, 971 N.E.2d 1215 (Ind. 2012).

311. *Id.* at 279.

requirements to secure a new trial based on newly discovered evidence, and the post-conviction court rejected Bunch's claim as to several factors regarding scientific advances in both "fire victim toxicology" and "fire investigation techniques."<sup>312</sup> The court of appeals, however, found each of the nine elements satisfied.<sup>313</sup> In addressing the seventh element—"the evidence is worthy of credit"—the court of appeals departed from usual appellate deference to trial court findings, concluding it would not defer to the trial "court's assessment of an expert's scientific evidence."<sup>314</sup> The court reasoned it could assess the testimony itself based on the expert's "credentials and the basis for her opinion" that were in the record because "the post-conviction court did not rely on her demeanor."<sup>315</sup>

Judge Crone dissented, agreeing generally that the appellate court was "in as good a position as the post-conviction court to assess the validity of the foundation for [the expert]'s opinions" because the same information was before it, but concluded the appellate court was not equally positioned "to make the substantive determination of whether a witness's opinions are sufficiently credible to merit a new trial."<sup>316</sup>

3. *Immigration Consequences.*—Finally, in *Clarke v. State*,<sup>317</sup> the court of appeals addressed yet another post-conviction challenge to a guilty plea in which the defendant alleged that his attorney had not advised him of the possibility of deportation.<sup>318</sup> An ineffective assistance claim requires proof of both deficient performance and prejudice.<sup>319</sup> In the context of a guilty plea, prejudice requires "specific facts indicating that a reasonable defendant would have rejected the petitioner's plea had the petitioner's trial counsel performed adequately."<sup>320</sup> The court affirmed the denial of post-conviction relief based on the nature and strength of the evidence, as well as the substantial benefit of the plea, a reduction from a Class A to a Class B felony.<sup>321</sup> The court concluded the opinion by encouraging criminal defense lawyers "to ascertain the citizenship of their clients and to advise them of the implications attending convictions with respect to the risk of deportation."<sup>322</sup> Although such advisements would "obviate the need for post-conviction" and some appeals,<sup>323</sup> the attorneys who have not long been offering such advisements are probably not the ones reading recent opinions or

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312. *Id.* at 283.

313. *Id.* at 297.

314. *Id.* at 292-93.

315. *Id.* at 293.

316. *Id.* at 306 (Crone, J., dissenting).

317. 974 N.E.2d 562 (Ind. Ct. App. 2012).

318. *Id.* at 563-64.

319. *Id.* at 564.

320. *Id.* at 565.

321. *Id.* at 568-69.

322. *Id.* at 568.

323. *Id.*

this Article.<sup>324</sup>

### O. Probation Revocation

1. *Failure to Pay Support*.—As summarized in last year’s Survey, “the State ‘has the burden to prove (a) that a probationer violated a term of probation and (b) that, if the term involved a payment requirement, the failure was reckless, knowing, or intentional.’”<sup>325</sup> “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.’”<sup>326</sup> “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.’”<sup>327</sup>

Applying *Runyon*, the supreme court affirmed the revocation of probation in *Smith v. State*,<sup>328</sup> despite the defendant’s testimony that he had “various medical problems, hospital stays, required treatments, and lack of health insurance.”<sup>329</sup> The supreme court noted the defendant “made no explicit argument concerning his inability to pay support,” quoting the trial court’s observation about the absence of any evidence “from a physician or a doctor indicating that he’s not capable of working.”<sup>330</sup>

2. *Violation of No-Contact Orders*.—No-contact orders are frequently issued as conditions of probation, and the Indiana Court of Appeals has defined “contact” as occurring when a person “makes something known or transmits information to another,” which “*may be either direct or indirect and is not limited by the means in which it is made known to another person.*”<sup>331</sup> In *Alford v.*

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324. Also during the Survey Period, in *Suarez v. State*, the court of appeals rejected a defendant’s ineffective assistance of counsel claim that arose from the failure to advise of the possibility of deportation before pleading guilty. 967 N.E.2d 552, 557 (Ind. Ct. App. 2012). The court acknowledged “that deportation can be a very serious penal consequence” especially for the defendant whose wife was blind, in poor health, and depended on him as her primary caregiver, but nevertheless concluded Suarez had received an “extraordinarily large benefit” from pleading guilty (through reduction of an A felony charge to a C felony), and the probability of success at trial was low based on the evidence of the crime and testimony from the post-conviction hearing. *Id.* at 556-57.

325. Schumm, *supra* note 1, at 1098-99 (quoting *Runyon v. State*, 939 N.E.2d 613, 617 (Ind. 2010)).

326. *Id.* at 1099 (quoting *Runyon*, 939 N.E.2d at 617).

327. *Id.* (quoting *Runyon*, 939 N.E.2d at 618 (italics added)).

328. 963 N.E.2d 1110 (Ind. 2012).

329. *Id.* at 1114.

330. *Id.*

331. *Alford v. State*, 965 N.E.2d 133, 135 (Ind. Ct. App. 2012) (quoting *Wright v. State*, 688 N.E.2d 224, 226 (Ind. Ct. App. 1997)).

*State*,<sup>332</sup> the probationer was prohibited from contact with his father, but he nonetheless submitted a false report to Angie's List about his father's cleaning company, which alleged, "They did a good job cleaning, but they stole my wife's diamond earrings."<sup>333</sup> The court of appeals upheld the revocation of probation based on violation of the no-contact order because, even though the contact was indirect and not immediately known to the father, the defendant "used Angie's List as an intermediary through which to communicate with [his father] in an effort to harass him."<sup>334</sup>

3. *Reversal of Revocation—and Immediate Release.*—*Ripps v. State*<sup>335</sup> is an unusual case where a defendant's argument so resonates with appellate judges—or the State's argument so repels them—that they take immediate action, ordering the defendant's release the same day they heard oral argument.<sup>336</sup> There, the court of appeals held the trial court abused its discretion in revoking the probation of a sixty-nine year old man with terminal cancer who had attempted to comply with his sex offender conditions of probation by (1) registering his address with the sheriff and (2) attempting to find a new residence because he lived within 1000 feet of a public library, although "this was only so by about twenty feet and some ambiguity exists in how this distance was measured."<sup>337</sup> The court also noted the defendant had "wrongly served time in prison for an offense that violated ex post facto principles, and the sheriff's department . . . learned of his living arrangements only because Ripps reported [the] location,"<sup>338</sup> which suggests a narrow holding that might be difficult to apply in future cases.

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332. *Id.* at 133.

333. *Id.* at 134.

334. *Id.* at 135.

335. 968 N.E.2d 323 (Ind. Ct. App. 2012).

336. The court of appeals issued an order the same day it held oral argument directing the trial court to order the defendant's immediate release from prison. *Id.* at 326 n.6.

337. *Id.* at 328.

338. *Id.*