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TRIBUTES

IN MAJORITY AND DISSENT: JUSTICE DICKSON'S CONTRIBUTIONS TO INDIANA CRIMINAL LAW

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Over the course of thirty years, Justice Brent E. Dickson's tenure on the Indiana Supreme Court overlapped with significant changes to Indiana criminal law and jurisprudence. During this time, Indiana adopted a uniform set of evidence rules, moving from a patchwork array of common law rules to a system patterned after the Federal Rules of Evidence. The Indiana Constitution received renewed attention due to a separate and independent construction apart from the Federal Constitution.[1] The Indiana Supreme Court saw considerable changes in the landscape of death penalty cases and more broadly grappled with appellate review of sentences. Finally, technology and the quest for an open and just system shaped both decisional law and court rules and procedures.

In the midst of all this change, Justice Dickson remained a tireless and respected advocate of impartial justice and enabling juries to properly accomplish their constitutional role within the system. He also championed civility within and respect for the legal profession.[2] His high view of the role of lawyers could be summed up by this apt quote from John Adams: "No civilized society can do without lawyers."[3]

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1. *See generally* Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989); *see also* Brent E. Dickson, *A Tribute to Randall T. Shepard: Justice, Indiana Supreme Court, 1985-2012; Chief Justice of Indiana, 1987-2012*, 45 IND. L. REV. 585 (2012), https://mckinneylaw.iu.edu/ilr/pdf/vol45p585.pdf [https://perma.cc/95MR-XFQA].

2. Kristine Guerra, *Brent Dickson to Leave Indiana Supreme Court After Three Decades*, INDYSTAR (Nov. 9, 2015), http://www.indystar.com/story/news/politics/2015/11/09/brent-dickson-leave-indiana-supreme-court-after-three-decades/75446742/ [https://perma.cc/6XKH-6M7Z].

3. DAVID MCCULLOUGH, JOHN ADAMS 591 (2001).

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Over those thirty years, Justice Dickson wrote nearly nine hundred opinions, most of them in criminal cases.[4] Obviously, this Article can only select a few of those cases to highlight. The topics cover both constitutional and non-constitutional areas of his criminal opinions. Readers might well ask, "Well why didn't you choose this case or that one?" But like watching a sports show where the hosts pick the top ten running backs of all time, we are the host and get to choose our top ten criminal law topics from Justice Dickson's vast jurisprudence. Those outside watching can always say, "Well, I would have included so and so. I can't believe they didn't choose so and so." Our apologies in advance.

The selected topics are as follows: (1) jury instructions, including the jury's right to determine law and fact;[5] (2) ex post facto;[6] (3) double jeopardy;[7] (4) the inalienable right to pursue happiness;[8] (5) scientific evidence;[9] (6) corpus delicti;[10] (7) search and seizure under article 1, section 11;[11] (8) death penalty cases;[12] (9) appellate sentence review;[13] and, finally, (10) use of the Indiana Supreme Court's rule-making authority and technology to ensure fairness.[14]

I. JURY INSTRUCTIONS

Justice Dickson has written much about the topic of jury instructions. These cases have covered both constitutional and general criminal law issues. As one reads those decisions, it becomes clear that one of Justice Dickson's primary concerns has been to ensure that everyday people, the citizens who fulfill the important role of sitting on juries, are given the right instructions to help them do their job. He has voiced concern to make sure that courts avoid giving them instruction on topics not relevant to their job. He has also attempted to avoid emphasizing one particular piece or type of evidence over the others. Part of his concern for helping jurors do their job includes a recognition that most people do not understand legal jargon. They need instructions that make sense to them. His focus on jury instructions comes from a deep respect for the ordinary citizens who take part in our court system and the importance of their job.

A. General Instructions

In *Winegeart v. State*, Justice Dickson confronted the debate about how

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4. *See generally* Guerra, *supra* note 2.
5. *See infra* Part I.
6. *See infra* Part II.
7. *See infra* Part III.
8. *See infra* Part IV.
9. *See infra* Part V.
10. *See infra* Part VI.
11. *See infra* Part VII.
12. *See infra* Part VIII.
13. *See infra* Part XI.
14. *See infra* Part X. Mr. Welliver focused on the first six topics while Professor Schumm authored the final four.

criminal juries are instructed on the concept of proof beyond a reasonable doubt.[15] The issue of instructing jurors about this standard has been the subject of much controversy over the years.[16] The opinion discussed at some length the differing views, noting that some jurisdictions favor not even giving an instruction that attempts to define the concept because they fear all the legal jargon will confuse the issue further.[17]

Justice Dickson noted that the instruction at issue used "300 words in eleven sentences" and was typical of instructions at the time "which often appear to be a conglomeration of phrases providing supplemental or alternative explication."[18] The opinion recognized that often instructions have been crafted not for the sake of clarity for average citizens but instead have been a hodgepodge of language from previous cases that avoided reversal by a higher court.[19] The numerous variations of instructions on the issue over the years have been pretty convoluted and, frankly, hard for jurors to understand.[20]

However, he also noted the danger of not giving an instruction at all "because the meaning of reasonable doubt is not self-evident to the lay juror."[21] Rather than give in to the despair of those who favor no instruction at all, he turned to research, which showed the possibility of giving more comprehensible instructions.[22] Erring on the side of trying to help jurors, Justice Dickson then took on the task of analyzing linguistic principles and previous criticisms of different formulations in trying to determine what instruction would be more comprehensible.[23] In the end, the opinion recommended that the federal instruction be given.[24]

We see then Justice Dickson, faced with the issue about an instruction on one of the core standards in criminal cases, spending a good bit of time balancing the concerns. He favored giving the jurors proper tools to help make decisions, including some kind of explanation to help them understand the concept. But he also engaged in a significant effort to discern what kind of instruction would be helpful without being too wordy or full of legal doublespeak, of which we

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15. 665 N.E.2d 893, 895 (Ind. 1996).

16. *Id.*

17. A sampling of these cases was ably discussed in *Winegeart*, 665 N.E.2d at 898-99.

18. *Id.* at 898. The federal pattern recommended by contrast, consisted of 171 words in eight sentences. The trial court judges, in an apparent rejection of this recommendation, have written their own, less clear, instruction. Although arguably better than the one at issue in *Winegeart*, it still weighs in at 204 words spread across thirteen sentences and uses repetitive multiple sentences at different points attempting to characterize the burden and explain what does or does not meet the burden. IND. JUDGES ASS'N, INDIANA PATTERN JURY INSTRUCTIONS—CRIMINAL, Instruction No. 13.1000 (4th ed. 2015).

19. *Winegeart*, 665 N.E.2d at 898.

20. *Id.*

21. *Id.* at 900.

22. *Id.* at 899.

23. *Id.* at 900-02.

24. *Id.* at 902-03.

lawyers have become too fond.

In the opinion, we also see Justice Dickson's basic nature of civility expressed toward his fellow justices. Chief Justice Shepard and Justice DeBruler separately concurred in result and went on to voice criticism of the federal instruction and express a preference for the then-current Indiana pattern on the issue.[25] Instead of trying to ramrod a mandate that the federal instruction be given, the opinion just recommended that trial courts use the federal pattern and afforded deference to the minority.[26] It is a recommendation that was affirmed in later cases and is still good law today.[27]

In another case concerning a different aspect of the burden of proof, Justice Dickson authored *Hampton v. State*.[28] Indiana has long followed a rule that when the State relies solely on circumstantial evidence to establish its case, then the defendant is entitled to an instruction that says the State's evidence must overcome every reasonable theory of innocence.[29] This is based on a rationale that "circumstantial evidence is inherently less reliable."[30] Therefore, a jury should take special caution when it relies on circumstantial evidence.[31] *Hampton* upheld the long line of cases holding in this manner.[32] However, the application of that line of cases has not been without problems. One problem in particular was confusion over whether this rule applies when the whole of the State's case is proven by circumstantial evidence or when only some elements of the State's case is so proven.

Hampton addressed this issue and clarified long-standing case law in Indiana about circumstantial evidence.[33] Justice Dickson gave clear direction to trial courts that it is only when circumstantial evidence is used exclusively to prove

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25. *Id.* at 904-05 (DeBruler, J., concurring in result, joined by Shepard, C.J.).

26. *Id.* "We therefore authorize and recommend (but, acknowledging that two of the five members of this Court find the present Indiana Pattern Jury Instruction preferable, do not mandate) that Indiana trial courts henceforth instruct regarding reasonable doubt by giving the . . . [federal pattern], preferably with no supplementation or embellishment." *Id.* at 902.

27. Albrecht v. State, 737 N.E.2d 719, 731 n.5 (Ind. 2000) (all five justices concurring).

28. 961 N.E.2d 480 (Ind. 2012).

29. One early, if not the earliest, case supporting this proposition is *Sumner v. State*, 5 Blackf. 579 (Ind. 1841).

30. *Hampton*, 961 N.E.2d at 485.

31. *Id.* at 486.

32. Justice Dickson's rationale was that cases relying on circumstantial evidence need more careful evaluation because the quality of the evidence is different. *Id.* This author would disagree with this rationale. Often circumstantial evidence, such as finding the defendant's fingerprint at a burglary scene or the defendant's DNA in the sexual assault exam kit taken from the victim of a stranger rape case, is more reliable and powerful than the direct evidence in the case.

33. *See id.* Note that the earlier case of *Kirby v. State*, 774 N.E.2d 523 (Ind. Ct. App. 2002), *reh'g denied*, 774 N.E.2d 523 (Ind. Ct. App. 2002), *trans. denied*, 46 N.E.3d 446 (Ind. 2016), *petition for cert. filed*, 43 N.E.3d 272 (U.S. May 25, 2016) (No. 55A01-1503-PC-85), basically reached the same result by differentiating between the act and the mens rea elements, although it took *Hampton* to lay out the authoritative and clear analysis to bring the issue to finality.

the actual conduct (actus reus), but not the mental state (mens rea), that the defendant is entitled to receive the special instruction requiring the State to disprove every reasonable theory of innocence.[34]

In the opinion, one sees a similar concern like that expressed in *Winegeart* about the wording of the jury instruction.[35] Realizing that trying to describe the difference between direct and circumstantial evidence vexes even legal professionals, Justice Dickson reviewed the language for clarity.[36] He concluded that it would make sense to exclude a section that tried to explain the difference between the two types of evidence.[37] This determination is a legal one that the trial court should sort out to decide whether the evidentiary situation justified the instruction.[38] Then only the language about the State's special burden would need to be included in appropriate cases, thus shortening the instruction and avoiding confusion.[39] It would also prevent the jury from being tasked with an additional duty—trying to determine whether evidence was direct or circumstantial—and instead allow them to focus their energies on more relevant concerns.

Another area of continued concern for Justice Dickson has been jury instructions that emphasize one particular piece of evidence. The general trend in Indiana is that jury instructions emphasizing only one particular piece or aspect of evidence should be disfavored because they might unduly focus the jury's attention on that evidence, causing the jury to accord more weight to it than to other pieces of evidence.[40] In *Ludy v. State*, the instruction at issue was an oft-

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34. *Hampton*, 961 N.E.2d at 491.

35. *Id.* at 487.

36. *Id.* at 489-90.

37. *Id.* at 489.

38. *Id.* at 490.

39. *Id.* at 490-91.

40. *See, e.g.*, Keller v. State, 47 N.E.3d 1205, 1209 (Ind. 2016) (providing instruction as to what specific facts might satisfy the meaning of "dwelling" in a burglary statute, although note there are two dissenters from this opinion); Washington v. State, 840 N.E.2d 873, 888-89 (Ind. Ct. App. 2006) (finding an instruction that highlighted testimony of a witness who received a benefit from the State should be treated cautiously to be improper); Ham v. State, 826 N.E.2d 640, 642 (Ind. 2005) (finding instruction that refusal to take a breath test is evidence of intoxication to be improper); Dill v. State, 741 N.E.2d 1230, 1232-33 (Ind. 2001) (finding instruction concerning flight as evidence of guilt to be improper); Emerson v. State, 724 N.E.2d 605, 608-09 (Ind. 2000) (stating specific instruction on eyewitness identification places undue emphasis on the testimony of specific witnesses and should be rejected in favor of the general instruction on witness credibility); McDowell v. State, 885 N.E.2d 1260, 1261 (Ind. 2008) (finding instruction telling the jury they may infer intent to kill from the intentional use of a deadly weapon in a manner calculated to produce death not permissible because it "authorized the jury to infer an intent to kill simply because a death resulted from a deadly weapon in the hands of the defendant"). *But see* Fowler v. State, 900 N.E.2d 770, 774 (Ind. Ct. App. 2009) (finding instruction that did not highlight evidence as to a particular crime, but instead concerned evidence about how to establish accomplice liability to be permissible).

This criticism is contradicted by other cases describing the presumption that juries follow the

used and long-standing instruction that told the jury a conviction could be based on the uncorroborated testimony of a single witness.[41] In *Ludy*, Justice Dickson stated that he had three concerns with this instruction: it unduly emphasized the testimony of a single witness; it stated an appellate standard "irrelevant" to the jury;[42] and it used the confusing legal term "uncorroborated."[43] Continuing the trend in Indiana, and consistent with his earlier criticism of the instruction,[44] Justice Dickson disapproved this instruction.[45]

As each of the above cases demonstrate, Justice Dickson has been a consistent voice on the court for jurors. He has gone to great lengths to draft instructions that are more understandable to lay people on juries. He has also worked hard to help juries avoid hearing instructions that discuss confusing or irrelevant legal standards. Likewise, he has been concerned about keeping juries' focus on the whole of the case by limiting admonitions that could emphasize one piece of evidence over the others.

B. Right to Determine Law and Fact

Justice Dickson has been a consistent proponent of an originalist view of the Indiana Constitution. His opinions have helped set a pattern of careful historical evaluation of the origins of those clauses and strengthened an independent construction separate from the United States Constitution. He has imbued meaning in not only the provisions of the Indiana Constitution, but in so doing, his decisions have also given meaning to the Ninth and Tenth Amendments to the United States Constitution.

The Indiana Constitution contains an interesting clause that states the jury has the power to determine the law and the facts.[46] One can well imagine the

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instructions given them, Wisehart v. State, 693 N.E.2d 23, 60 (Ind. 1998), and by the fact that instructions are normally given to jurors that they are not to single out any particular instruction to give it any more weight than the others. IND. JUDGES ASS'N, *supra* note 18, at 1.0500.

41. 784 N.E.2d 459, 460 (Ind. 2003).

42. Based on this author's experience prosecuting sex crimes and crimes against children, this instruction often becomes relevant in those specific types of cases. Often defense counsel suggests in these cases that a jury cannot convict where it is merely a "he said/she said" case, implying that the jury cannot convict where it is the uncorroborated testimony of a single witness, thus causing a misunderstanding of the law. In addition, some jurors have preconceived religious beliefs based on an interpretation of Biblical scriptures such as Deuteronomy 19:15, Matthew 18:16, and 1 Timothy 5:19 that preclude finding someone guilty only on the basis of a single witness. Therefore, the standard is often relevant to the very kinds of struggles prosecutors face in the trials of these cases.

43. 784 N.E.2d at 461.

44. Carie v. State, 761 N.E.2d 385, 385-86 (Ind. 2002).

45. *Ludy*, 784 N.E.2d at 462. However, the error in giving the instruction was found to be harmless in this particular case because the defendant's testimony was substantially corroborated by other witnesses and physical evidence. *Id.* at 462-63.

46. IND. CONST. art. 1, § 19.

controversy over the precise meaning of this phrase. The topic of jury nullification has received a great deal of talk over the years and seemingly experienced a renewed attention in various media outlets.[47] In this author's personal experience, nullification has been a recurring issue. More than once, I have talked to a jury after a verdict and jurors have said something to the effect of, "Well, we believed the guy did it, but we weren't sure if he deserved to be convicted, so . . . ," implying they were considering nullification. Additionally, a recent case gives a fascinating peek into deliberations.[48] In the case, which involved a claim of improper jury influence, a woman juror asked other jurors what would happen to the defendant if convicted because she did not want to put the defendant on the sex offender registry. In response to this woman's question, another juror, who was a correctional officer, said it would not.[49] This shows a thought process that considers whether to convict, not in light of evidence of guilt, but rather based on whether the juror perceived the punishment to be just, which is often at the heart of the nullification impulse.

Some people popularly refer to this as the right of nullification, but the cases establish that there is no right of nullification in Indiana.[50] Justice Rucker made this abundantly clear in *Holden v. State*.[51] Justice Rucker had earlier authored a law review article discussing this principle, and the article could be considered to advocate a broader right of nullification.[52] However, using a more restrained judicial analysis in *Holden*, he affirmed the contrary, namely that Indiana case law does not grant a broad right of nullification.[53]

Justice Dickson has discussed the meaning of this clause since near the beginning of his career, taking the position that the clause does give the jury a certain amount of latitude to enter a finding in favor of the defendant in the face of contrary evidence.[54] In an opinion written by Justice Sullivan, the full court

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47. *See, e.g.*, Kevin Mathews, *Jury Nullification: Why Every American Needs to Learn This Taboo Verdict*, TRUTHOUT (May 25, 2014, 10:56 AM), http://www.truth-out.org/opinion/item/23929-jury-nullification-why-every-american-needs-to-learn-this-tabooverdict [perma.cc/2LHL-FWCR]; *see also* Ilya Somin, *Rethinking Jury Nullification*, WASH. POST (Aug. 7, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/07/rethinking-jurynullification/ [perma.cc/BM3G-G264].

48. Pribie v. State, 46 N.E.3d 1241 (Ind. Ct. App. 2015), *trans. denied*, 46 N.E.3d 1241(Ind. 2016).

49. *Id.* at 1252.

50. Walden v. State, 895 N.E.2d 1182, 1184 (Ind. 2008); Holden v. State, 788 N.E.2d 1253, 1255 (Ind. 2003); Bivins v. State, 642 N.E.2d 928, 948 (Ind. 1994); Walker v. State, 445 N.E.2d 571, 575 (Ind. 1983); Blaker v. State, 130 Ind. 203, 204-05 (1892).

51. 788 N.E.2d 1253.

52. *See generally* Honorable Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 VAL. U. L. REV. 449 (1999).

53. 788 N.E.2d at 1253-55.

54. Duff v. State, 508 N.E.2d 17, 23-24 (Ind. 1987) (Dickson, J., concurring and dissenting); Hensley v. State, 497 N.E.2d 1053, 1058 (Ind. 1986) (Dickson, J., concurring and dissenting); Mers v. State, 496 N.E.2d 75, 79 (Ind. 1986).

some years later addressed this issue in *Seay v. State*.[55] In *Seay*, the issue presented itself in a habitual offender proceeding.[56]

In Indiana, when the State adds a habitual offender enhancement to a charge, if the case goes to jury trial, the case is bifurcated into a guilt phase and then a separate penalty phase.[57] After trying the underlying charge, if the defendant is found guilty, the jury is reconvened to consider evidence at the habitual phase and they receive a new set of jury instructions.[58] In *Seay*, the defendant argued that he was entitled to an instruction about the jury's right to determine law and fact during the habitual phase.[59] The court found that the jury's constitutional right to determine law and fact applies to this habitual phase and that thus an instruction was required.[60] Of course, Justice Dickson did not write the majority opinion, but it was his prior writings about that concept that influenced the court in *Seay* to finally adopt Dickson's view.[61]

This discussion would not be complete without mentioning *Walden v. State*,[62] which was issued a decade later. In *Walden*, the instructional issue was revisited and this time the court retreated on *Seay*.[63] The opinion, again written by Justice Sullivan, described that there was a mandate to provide an instruction about the jury's right to determine law and fact, but that it was covered by a separate statute, so the court should not have decided the issue on broader constitutional grounds earlier.[64] That drew an impassioned dissent by Justice Dickson, who had been striving to give effect to "a historic right of American juries" and one specifically granted under the Indiana Constitution.[65] Once more, we see Justice Dickson's emphasis on civility within the profession lived out. While certainly passionate about his position, Justice Dickson exercised a great deal of restraint in his dissent.[66]

In all of this, he was trying to give meaning to the Indiana Constitution. Especially with a provision like this, interpretation requires a real dance and can be quite difficult. That dance is seen by acknowledging that the constitution clearly provides the jury the right to determine law and fact, but, simultaneously,

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55. 698 N.E.2d 732 (Ind. 1998).
56. *Id.* at 732-33.
57. IND. CODE § 35-50-2-8(a) (2016).
58. *Id.* § 35-50-2-8(h).
59. 698 N.E.2d at 733.
60. *Id.* at 736-37.
61. *Id.* at 736.
62. 895 N.E.2d 1182 (Ind. 2008).
63. *Id.* at 1186-87.
64. *Id.* at 1185 (citing IND. CODE §§ 35-37-2-2(5) (2016) and 35-50-2-8 (2016)).
65. *Id.* at 1190.
66. This author notes that one should not confuse the strength of wording with the amount of passion. Although Justice Dickson did not invoke "jiggery-pokery" or images of justices hiding their collective heads under a paper bag, certainly statements such as "the resulting obfuscation and secrecy is inconsistent with the Rule of Law," *id.*, are not, in their essence, timid proclamations.

that it does not provide a right to nullify.[67] But if it is not nullification, it still has to mean something. Justice Dickson sought to find what that meaning was.[68] In so doing, he recognized that constitutional provisions are not just dead letters or relics, but that they have continued meaning and vitality.[69]

II. EX POST FACTO

Indiana has had a number of cases involving the Indiana constitutional prohibition against ex post facto laws[70] in relation to the ever-changing sex offender registry statutes, dating back to 1999.[71] Although the initial challenges involved other aspects of the statute, a number of the later cases dealt with additional or enhanced registration requirements imposed after the defendant's original sentencing.[72]

Gonzalez v. State is one of those cases.[73] In *Gonzalez*, the defendant was convicted of a Class D felony sex offense and was required to register as a sex offender for a period of ten years.[74] After serving his full sentence, the Indiana General Assembly yet again changed the provisions for sex offense registry, this time in such a way that the defendant would be required to register for his lifetime.[75] The statute additionally provided no way for the defendant to petition for any kind of review or relief from that requirement.[76]

In these cases, the court has adopted the "intent-effects" test, which contains seven factors, to determine whether the challenged statute is primarily punitive.[77] If the statue is found to be more punitive in nature, then it may violate the ex post facto clause.[78] It appears that the lack of any recourse for the defendant was the deciding factor in *Gonzalez*.[79] After looking at the other factors in the test, which split between being punitive and non-punitive, it came down to whether the statute appeared to be excessive in relation to its allegedly non-punitive purpose.[80]

Justice Dickson noted, although the defendant was unable to have the trial court review rehabilitation or future dangerousness, such an evaluation was "integral to [the court's] evaluation of whether an extension of the ten-year

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67. *See Walden*, 95 N.E.2d at 1189-90 (Dickson, J., dissenting).

68. *See id.*

69. *See id.*

70. IND. CONST. art. 1, § 24.

71. Spencer v. O'Connor, 707 N.E.2d 1039 (Ind. Ct. App. 1999).

72. *See, e.g.*, Jensen v. State, 905 N.E.2d 384, 389 (Ind. 2009).

73. 980 N.E.2d 312 (2013).

74. *Id.* at 315.

75. *Id.*

76. IND. CODE § 11-8-8-19(c) (2013).

77. Wallace v. State, 905 N.E.2d 371, 378-79 (Ind. 2009). Note that this standard, although similar to the federal approach, is not entirely in lock-step with it either. *Id.* at 378 n.7.

78. *Id.* at 378.

79. 980 N.E.2d at 319-20.

80. *Id.* at 321.

registration requirement [was] reasonable in relation to . . . public protection."[81] This caused the court to view the statute, on the whole, as punitive in nature.[82]

Essentially, Justice Dickson recognized it was punitive for there to be a lack of any fair process to determine, on an individual basis, who should be placed on the registry. Although not explicitly stated in the opinion, this essential requirement of fairness has characterized Justice Dickson's jurisprudence. While recognizing a legitimate purpose in protecting the public from dangerous sex offenders, Justice Dickson's opinion also struck a balance by not punishing those who may well have been rehabilitated and were no longer a danger, but who were precluded from proving the same by the new statute.

III. DOUBLE JEOPARDY

There is probably no criminal law topic in Indiana that receives more appellate review than double jeopardy, unless perhaps it is sentence revision, as discussed ably by my colleague in Part IX of this Article. Hardly an advance sheet goes by my desk that there is not some case dealing with the Indiana double jeopardy clause.[83] And it is an area that has much to do with Justice Dickson's work on the court.

By way of review, prior to its watershed decision regarding the Indiana Constitution, the Indiana Supreme Court had clarified some long-standing confusion with regard to its analysis of double jeopardy claims under the Federal Constitution.[84] In another opinion authored by Justice Dickson, the court righted itself and found that the test, under federal precedent, focused solely on whether the legal elements of the two offenses were the same, by analyzing whether each of the crimes required proof of a fact that the other did not.[85] This is often referred to as the *Blockburger* test, named after the United States Supreme Court case which set it forth, *Blockburger v. United States*.[86]

That case did not make any pronouncement on its Indiana counterpart.[87] However, it was not too long until the court had the opportunity to squarely decide the meaning of the Indiana double jeopardy clause in *Richardson*.[88] Justice Dickson wrote the majority opinion in *Richardson*,[89] which is the seminal case in the area.

In *Richardson*, the defendant and others had robbed the victim and, as a part

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81. *Id.* at 320.

82. *Id.* at 321.

83. IND. CONST. art. 1, § 14. A LexisAdvance search reveals that, as of October 23, 2016, 762 opinions have cited *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999).

84. *See, e.g.*, Grinstead v. State, 684 N.E.2d 482, 485-86 (Ind. 1997).

85. Games v. State, 684 N.E.2d 466, 477 (Ind. 1997).

86. 284 U.S. 299, 304 (1932).

87. *Id.*

88. 717 N.E.2d at 55.

89. Richardson v. State, 687 N.E.2d 241, 242 (Ind. Ct. App. 1997), *vacated*, 717 N.E.2d 32 (Ind. 1999).

of the robbery, had physically assaulted the victim.[90] The State had charged the defendant with both battery, for the physical attack, and robbery, which could be proven by evidence of force used to accomplish the taking.[91] Although there were different types of physical force used against the victim over the course of the whole incident, the State had not clearly distinguished at trial which was the basis for the battery and which for the robbery.[92]

The issue squarely raised, *Richardson* then engaged in a thorough historical analysis of what the state constitutional provision meant.[93] Indiana has a strong tradition of focusing its state constitutional analysis on discerning the intent of the framers, a practice some refer to as originalism.[94] Justice Dickson paid very careful attention to historical analysis in *Richardson*. In *Richardson*, there was little discussion surrounding the adoption of this clause to provide guidance in the Journal and Debates of the Indiana constitutional convention, which took place from 1850 to 1851. Thus, Justice Dickson turned to an extensive review of old case law.[95] The court then analyzed a number of cases dating back to 1859, just eight years after the adoption of Indiana's 1851 constitution.[96] After rummaging through the English common law, old treatises, and a stack of old cases, Justice Dickson concluded that the Indiana double jeopardy clause added significant protection that the federal clause does not.[97]

Under Indiana constitutional law then, the historical analysis reveals that "two or more offenses are the 'same offense' . . . if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense."[98] Thus, the Indiana analysis incorporates the federal approach by looking at the statutory elements. But it also reviews what the actual evidence was at the trial.[99] Therefore, in this case, because the State had not delineated which factual aspects of the physical attack it was using to establish which elements, there was a reasonable possibility that the jury could have used the same evidence to establish both crimes and the convictions violated the Indiana double jeopardy provision.[100]

The impact of this decision would be difficult to understate. From a prosecution standpoint this changed how cases are screened and charged, how trial decisions are made about which evidence goes to which count, and how cases are argued to juries. Theoretically, the State should have the ability to

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90. *Id.* at 242.
91. *Richardson*, 717 N.E.2d at 54.
92. *Id.*
93. *Id.* at 38-41.
94. For a good start to understanding Indiana's approach, see *id.* at 38.
95. *Id.* at 43 (citing Collins v. Day, 644 N.E.2d 72, 76 (Ind. 1994)).
96. *Id.* at 44.
97. *Id.* at 53.
98. *Id.* at 49.
99. *Id.*
100. *Id.* at 52.

prevent violations by thinking these matters through carefully. Initially, there were a number of reversed cases in the first few years after *Richardson* due to the need to wring out the details in subsequent cases. By now, however, when there are violations of the Indiana double jeopardy provision, it is largely because prosecutors did not think through the issue clearly enough. For defense counsel, it has become fertile ground for appellate issues.

Spivey v. State followed *Richardson*.[101] As one can imagine, a new type of double jeopardy analysis created a host of novel issues. In *Spivey*, the court had to clarify what was sufficient overlap to violate double jeopardy.[102] Although *Richardson* had used the phrase "essential elements," as often happens when you get lawyers involved, there was some contention over just what those words mean.[103] *Spivey* stated that the evaluation is "whether the evidentiary facts used to establish one of the essential elements of one offense may also have been used to establish one of the essential elements of a second challenged offense."[104] It clarified that it is not merely whether the facts that establish one of the elements of one offense may also have been used to establish one of the elements of a second offense.[105] *Spivey* established the rubric for all later cases when evaluating the amount of overlap that constitutes a violation of the Indiana double jeopardy clause.

Both *Richardson* and *Spivey* stem from Justice Dickson's emphasis on giving full treatment and recognition to the Indiana Constitution and its rich history.

IV. INALIENABLE RIGHT TO PURSUE HAPPINESS

Article 1, section 1 of the Indiana Constitution provides that Hoosiers have the inalienable right to pursue happiness.[106] From the lofty heights of that ideal down to the streets of Indianapolis comes the curious case of *Moore v. State*.[107] In *Moore*, the defendant was intoxicated and became the passenger in someone else's car.[108] When the car was stopped for a traffic infraction, her intoxication drew the attention of the police.[109] After being convicted for the heinous crime of public intoxication, a Class B misdemeanor, she argued on appeal to the Indiana Supreme Court that her choice of beverages should be protected under the Indiana Constitution's guarantee of the inalienable right to pursue life, liberty, and happiness.[110] In a creative piece of lawyering, her attorneys cited to a case from

101. 761 N.E.2d 831 (Ind. 2002).
102. *Id.* at 834.
103. *Id.* at 832-33.
104. *Id.* at 833.
105. *Id.*
106. IND. CONST. art. 1, § 1.
107. 949 N.E.2d 343 (Ind. 2011).
108. *Id.* at 344-45.
109. *Id.*
110. *Id.* at 345.

1855 in support of this contention.[111] However, Justice Dickson aptly noted that the defendant's conviction was not based on her choice of beverages, but on her conduct after consuming the same.[112]

This decision came amid a strain of thought in the courts at the time that viewed the then-current public intoxication statute in light of a presumed rationale that it was to protect the public against the poor behavior of intoxicated persons who might cause disturbances or otherwise breach the peace. Some judges, like Justice Rucker in his dissent in *Moore*, discussed construing the statute not strictly according to its elements, which at the time mentioned nothing about breaching the peace, but instead according to this particular view of the public policy rationale behind the statute.[113] Justice Rucker seemed willing to overlook the strict legal elements, and instead focused on the perceived policy behind the statute, namely the annoyance or other bad behavior of drunks in public places.[114] The dissent then asked whether that purpose would be served by finding Moore guilty, stating, "It is difficult to perceive how this purpose is advanced by declaring that the inside of a closed vehicle traveling along a highway is a public place."[115]

In contrast, Justice Dickson wrote, "Whether conduct proscribed by a criminal law should be excused under certain circumstances on grounds of public policy is a matter for legislative evaluation and statutory revision if appropriate. The judicial function is to apply the laws as enacted by the legislature."[116]

Now, what does this case mean in the larger scheme? The precedential impact on the day-to-day practice in the trenches of criminal law is likely very little,[117] although it provides some levity among the weightier matters often discussed in legal opinions. However, *Moore* is illustrative of Justice Dickson's commitment to the separation of powers, his respect for co-ordinate branches of government, and his belief in having a restrained appellate jurisprudential view.

V. SCIENTIFIC EVIDENCE

One area Justice Dickson has written about in both civil and criminal contexts is the use of scientific evidence. Although civil case law is beyond the purview

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111. Herman v. State, 8 Ind. 545, 558 (1855). Apparently, the lawyers thought that the historical "analysis" of this case might win the day. Although the lawyers should receive an "A" for effort, their argument was of course ultimately unavailing.

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

113. *Id.* at 345-46 (Rucker, J., dissenting). Justice Rucker cited language from an earlier Court of Appeals case discussing the policy stance Rucker advocated here. That case was *Jones v. State*, 881 N.E.2d 1095, 1098 n.2 (Ind. Ct. App. 2008).

114. *Moore*, 949 N.E.2d at 346 (Rucker, J., dissenting).

115. *Id.*

116. *Id.* at 345 (majority opinion).

117. With the 2014 criminal code revisions, the offense of Public Intoxication, IND. CODE § 7.1-5-1-3 (2016), now includes an element that the intoxicated person either endanger their life or the life of another person; breach the peace; or harass, annoy, or alarm another person.

of this Article and the expertise of this author, it is of note that Justice Dickson wrote an important civil case in which the court recognized that all reliable scientific evidence should be admitted instead of applying an overly-restrictive or mechanistic approach to scientific reliability.[118] Thus, he is certainly not against the admission of scientific evidence and, in fact, he took a relatively liberal approach to scientific evidence admission.[119]

But he has also been careful to keep out scientific testimony that is either unreliable, or simply insufficiently proven to warrant its admission in court. *Steward v. State* illustrates this assertion.[120] In *Steward*, at issue was the use of Child Sexual Abuse Accommodation Syndrome ("CSAAS") evidence.[121] The State had introduced evidence of behaviors the victim exhibited consistent with CSAAS, with the intent of proving that it meant that the victim had been molested.[122]

Justice Dickson engaged in an analysis of CSAAS and the current state of research concerning it.[123] The opinion referred not only to scientific articles but also undertook an extensive review of the state of the law in other jurisdictions.[124] He discovered that CSAAS was not intended to be diagnostic of sexual abuse and thus, for that purpose, should not be considered scientifically reliable to prove that abuse occurred.[125]

However, when looked at for other purposes, CSAAS can be used.[126] Because CSAAS was designed to treat victims and to help explain the behaviors of those who were reportedly abused, the court considered that it was sufficiently reliable to use in rebuttal.[127] Therefore, if a defendant attacked the victim's credibility by pointing to behavior believed to be inconsistent with abuse, the State would be permitted to introduce CSAAS or other similar syndrome evidence to show why the victim's behavior is consistent with abuse.[128]

Indiana courts continue to follow this balanced approach today[129] and it has affected countless child abuse cases. Justice Dickson's approach recognized a defendant's right to have only reliable scientific evidence admitted for the purpose for which it was designed, in an effort to prevent convictions based on

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118. Sears Roebuck, Inc. v. Manuilov, 742 N.E.2d 453, 460 (Ind. 2001).

119. *See id.*

120. 652 N.E.2d 490 (Ind. 1995).

121. *Id.* at 492.

122. *Id.*

123. *Id.* at 492-94.

124. *Id.* at 494-95.

125. *Id.* at 499.

126. *Id.* at 496-98.

127. *Id.* at 499.

128. *Id.*

129. *See* Sampson v. State, 38 N.E.3d 985 (Ind. 2015) (holding that testimony by an expert witness regarding observations of whether the victim of child molestation had been coached, as well as questioning during cross-examination, was not "so prejudicial . . . as to make a fair trial impossible," especially given defense counsel's attempt to attack the witness's conclusion).

unreliable evidence. On the other hand, it also preserved the State's right to present reliable evidence to rebut misleading defense assertions. Finally, both this case and Justice Dickson's approach preserve the integrity of the criminal justice system as a whole, allowing testimony that is considered reliable no matter whose side it favors and improving public confidence in jury verdicts.

VI. CORPUS DELICTI

The corpus delicti[130] rule has a long and interesting history warranting law review articles of its own,[131] the breadth of which is beyond the scope of this Article. However, to summarize, the rule applies to cases where there is a confession by the defendant.[132] It requires the State to have some amount of independent evidence that a crime was actually committed before a confession can be used against a defendant to convict him.[133] Indiana's specific formulation requires that "the corpus delicti of the crime must be established by independent evidence of 1) the occurrence of the specific kind of injury and 2) someone's criminal act as the cause of the injury."[134]

The main purpose of the rule is to prevent false confessions.[135] Imagine a scenario where an attention-seeking person, or a person with some type of mental illness, or a person with some other type of psychological issue, might confess to a crime they did not commit.[136] They may have even "confessed" to a crime that did not occur. By requiring that there be independent evidence of the commission of a crime, there is clearly an increased measure of confidence in the conviction.

Justice Dickson addressed the corpus delicti rule in *Willoughby*.[137] In *Willoughby*, the defendant was charged with murder, felony murder, robbery, and confinement for the disappearance and death of an off-duty police officer.[138] Due to a two-year lapse of time between the victim's disappearance and the discovery

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130. Black's Law Dictionary defines "corpus delicti" as "body of the crime; the fact of a transgression; actus reus. The phrase reflects the simple principle that a crime must be proved to have occurred before anyone can be convicted for having committed it." *Corpus delicti*, BLACK'S LAW DICTIONARY (10th ed. 2014).

131. *See, e.g.*, David A. Moran, *In the Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817 (2003).

132. *See* Workman v. State, 716 N.E.2d 445 (Ind. 1999).

133. *Id.* at 447.

134. Willoughby v. State, 552 N.E.2d 462, 466 (Ind. 1990).

135. *Id.* at 466 (citing Cambron v. State, 322 N.E.2d 712, 715 (Ind. 1975)).

136. One might also posit a situation where police coercion may be involved. Although this can certainly occur, the corpus delicti rule provides less protection here. Often the police become involved where there is a report of or at least a modicum of evidence a crime has already been committed. With the way the rule works, that might often be sufficient to corroborate and justify the use of the confession, even if coerced. The other situations above are more likely to be the case where someone comes in and "confesses" to some alleged crime that never in fact occurred.

137. 552 N.E.2d at 465-68.

138. *Id.* at 464.

of her body, gathering evidence was a challenge.[139] The defendant did ultimately confess and was convicted, but he claimed on appeal there was insufficient evidence as to each of the charged crimes to support the introduction of his confession.[140]

Prior to *Willoughby*, Indiana had required strict adherence to the proof of the corpus delicti.[141] Justice Dickson noted that, in light of other increased procedural safeguards, there was a "declining utility" in strict adherence to the rule.[142] However, where other jurisdictions had altogether dispensed with the corpus delicti requirement in favor of a "trustworthiness" test, the court retained the corpus delicti rule, albeit modified.[143] The court softened Indiana's version of the rule to provide that, where multiple crimes are committed within a single episode of criminal conduct, proof of the corpus delicti for the principal crime or crimes provides the corroboration necessary to secure confidence in the reliability of a conviction.[144]

This case shows the high importance Justice Dickson placed on pursuing a balanced approach. Although concern about the reliability of confessions is part of the opinion's thrust, it also shows Justice Dickson's willingness to depart from a strict adherence to accommodate a common sense view of the corpus delicti rule and its utility in the modern age. It serves little purpose to require strict adherence to the rule for every crime where there is evidence of the main crime, which provides sufficient reliability of the confession.

VII. SEARCH AND SEIZURE UNDER ARTICLE 1, SECTION 11

During his three decades of service on the bench, Justice Dickson wrote more than fifty opinions relating to search and seizure protections for criminal defendants, grounded in either the Fourth Amendment to the U.S. Constitution, its analog in article 1, section 11 of the Indiana Constitution, or both. These opinions offer a continuous reminder to lower courts, attorneys, and the general public that, although both protect Hoosiers, their interpretations and applications can vary significantly.[145]

The Fourth Amendment focuses on a two-part test looking to identify "(1) whether a person has 'exhibited an actual (subjective) expectation of privacy;'

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139. *Id.* at 466-67.

140. *Id.* at 466.

141. *See* Jones v. State, 252 N.E.2d 572 (Ind. 1990).

142. *Willoughby*, 552 N.E.2d at 466.

143. *Id.*

144. *Id.* at 467.

145. *See* Holder v. State, 847 N.E.2d 930, 940-41 (Ind. 2006) (holding that the search of defendant's home and seizure of drugs, laboratory materials, and precursor ingredients did not violate the Fourth Amendment to the U.S. Constitution because "exigent circumstances" permitted officers to dispense with the obtainment of a warrant, nor did the search violate section 11 of the Indiana Constitution because "clear and substantial evidence" outweighed any intrusion upon the defendant).

and (2) whether 'the expectation [is] one that society is prepared to recognize as 'reasonable.'"'[146] Despite nearly identical language, section 11 of the Indiana Constitution "places the burden on the State to demonstrate that each relevant intrusion was reasonable in light of the totality of the circumstances."[147] Although a summary of every opinion is not feasible, this section highlights several in which Justice Dickson played a prominent role in fleshing out the application of section 11 in particular.

A. Early Cases

Much of Justice Dickson's jurisprudence regarding search and seizure in the late 1980's and early 1990's centered on the Fourth Amendment and not a separate analysis under section 11.[148] Lawyers and the justices began to focus more on the unique provisions of the Indiana Constitution in the early 1990s, and Justice Dickson's dissent in *Moran v. State* in 1994 is especially significant to section 11.[149] *Moran* considered the search of several plastic trash bags outside the residence of a suspected cultivator of marijuana.[150] The trash cans were emptied by Indiana State Police into the back of a pickup truck where they were moved to the station and searched.[151] Marijuana plant clippings were found among the trash, and this evidence was used to issue a warrant for the search of the residence where the cans were confiscated.[152] Writing for the majority, Justice DeBruler noted that the defendant's Fourth Amendment claim was foreclosed by the United States Supreme Court's decision in *California v. Greenwood*,[153] but a separate claim was raised under article 1, section 11 of the Indiana Constitution.[154] The majority found the search reasonable under section 11 for several reasons: those who place trash bags on the curb expect them to be picked up, the police did not trespass to get the bags, the officers' actions were discrete and did not cause a disturbance, and ultimately, "The police here conducted themselves in the same manner as would be appropriate for those whose duty it

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146. *Id.* at 936 (quoting Katz v. U.S., 389 U.S. 347, 361 (1967)).

147. *Id.* at 940.

148. *See*, *e.g.*, Shepard v. State, 500 N.E.2d 1172, 1174 (Ind. 1986) (holding that the threshold for analyzing the probable cause is at the time an arrested defendant is taken into custody and interrogated); *see also* Paschall v. State, 523 N.E.2d 1359, 1362 (Ind. 1988) (looking to reasonableness of law enforcement in determining whether the initial search of a zipped gym bag is reasonable and finding that although the initial search was reasonable, the subsequent search of a suitcase was not; evidence of criminal activity had been found and no exception to the warrant requirement applied).

149. 644 N.E.2d 536, 543 (Ind. 1994) (Dickson, J., concurring and dissenting).

150. *Id.* at 538.

151. *Id.*

152. *Id.*

153. 486 U.S. 35 (1988).

154. *Moran*, 644 N.E.2d at 540.

was to pick up."[155]

Justice Dickson disagreed with the majority's conclusion and stated, "I remain convinced that Indiana citizens should be able to dispose of their trash without relinquishing their privacy."[156] Similar to Justice Dickson's early cases,[157] his concern focused on the rights of Indiana residents to be protected against the intrusion of law enforcement into protected areas without judicial authorization.[158] In his dissent, Justice Dickson articulated a rule that would allow police to obtain a warrant to search and seize a person's trash if there is reasonable cause to believe that the trash will provide evidence of criminal activity.[159] This language would prove prudential eleven years later in *Litchfield v. State*.[160]

The search of an individual's trash resurfaced in 2005 with Justice Boehm's opinion in *Litchfield*.[161] Building on the analysis in Justice Dickson's dissent in *Moran*, the unanimous opinion in *Litchfield* explained:

> [A] search of trash recovered from the place where it is left for collection is permissible under the Indiana Constitution, but only if the investigating officers have an articulable basis justifying reasonable suspicion that the subjects of the search have engaged in violations of law that might reasonably lead to evidence in the trash[162]

In reaching this conclusion, the court identified three factors to be balanced when evaluating the reasonableness of a search or seizure under article 1, section 11: "1) the degree of concern, suspicion or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs."[163] Applying the *Litchfield* factors to a number of situations formed the basis of Justice Dickson's section 11 analysis in his final decade of service. Four of those opinions are summarized below.

B. Applying Litchfield

Nine months after *Litchfield* was decided, Justice Dickson wrote *Myers v. State*, upholding an officer's warrantless search of a defendant's vehicle in his driveway.[164] The defendant in *Myers* was pulled over for a traffic violation.[165] The

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155. *Id.* at 541.

156. *Id.* at 543 (Dickson, J., dissenting).

157. *See*, *e.g.*, Shepard v. State, 500 N.E.2d 1172, 1174 (Ind. 1986); *see also* Paschall v. State, 523 N.E.2d 1359, 1362 (Ind. 1988).

158. *Moran*, 644 N.E.2d at 543.

159. *Id.*

160. 824 N.E.2d 356 (Ind. 2005).

161. *Id.* at 357-58.

162. *Id.* at 357.

163. *Id.* at 361.

164. 839 N.E.2d 1146, 1148 (Ind. 2005).

165. *Id.*

defendant's erratic behavior outside of his vehicle and the officer's knowledge that this individual was suspected of drug activity led police to summon a canine unit.[166] Once the narcotics dog reacted to the vehicle, the two officers performed a warrantless search of the vehicle, finding methamphetamine and marijuana.[167] The defendant claimed that once the initial traffic stop was complete, the canine sweep and subsequent search of the vehicle violated his rights under both the Fourth Amendment and section 11.[168] Justice Dickson disagreed on both counts.[169]

Under *Myers*, "a canine sweep of the exterior of a vehicle does not intrude upon a Fourth Amendment privacy interest."[170] In *Myers*, the canine sweep took place *before* the traffic stop itself was completed.[171] Moreover, the automobile exception to the warrant requirement *did* apply, even though the car was boxed in by police vehicles,[172] because the court took "the 'ready mobility' requirement of the automobile exception to mean that all operational, or potentially operational, motor vehicles are inherently mobile, and thus a vehicle that is temporarily in police control or otherwise confined is generally considered to be readily mobile."[173]

Under section 11, applying the three factors from *Litchfield* compelled finding that the search was reasonable under the circumstances.[174] To the first factor, Justice Dickson found significant indicators available for the police to believe that the car contained contraband including the defendant's behavior and the canine's reaction to the exterior of the vehicle.[175] Although the search was intrusive, "the intrusion, at least as to public notice and embarrassment, was somewhat lessened because of the hour and place of the search."[176] Third, law enforcement needs were prioritized because the defendant was not under arrest and "in the absence of police seizure of the car by blocking it, it could be driven away."[177]

Two years later, in *Grier v. State*, Justice Dickson's unanimous opinion adopted a categorical rule prohibiting the application of force to a defendant's throat by law enforcement.[178] There, an officer conducted a traffic stop, and after erratic behavior by the driver, the officer asked him to open his mouth.[179] The

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166. *Id.* at 1148.
167. *Id.* at 1149.
168. *Id.*
169. *Id.* at 1152, 1154.
170. *Id.* at 1149.
171. *Id.*
172. *Id.* at 1152.
173. *Id.*
174. *Id.* at 1154.
175. *Id.*
176. *Id.* The search took place around 1:30 a.m. and in the defendant's driveway. *Id.* at 1148.
177. *Id.* at 1154.
178. 868 N.E.2d 443, 445 (Ind. 2007).
179. *Id.* at 444.

defendant obliged and the officer could see a clear plastic bag in the defendant's mouth covered in saliva and blood.[180] The defendant refused to spit it out.[181] Believing the bag contained cocaine, the officer applied pressure to the defendant's throat until he was forced to spit it out.[182] Focusing on the second and third factors from *Litchfield*, the opinion broadly held that "application of force to a detainee's throat to prevent swallowing of suspected contraband violates the constitutional prohibitions against unreasonable search and seizure."[183] Although decided on section 11 grounds, the opinion relied heavily on an Indiana Court of Appeals opinion decided on Fourth Amendment grounds[184] before concluding the same rule "is equally compelled under Section 11."[185]

A year later, in *State v. Washington*,[186] Justice Dickson authored a 3-2 decision allowing a police officer to ask a motorist if he had any drugs or guns on him during a routine traffic stop.[187] The defendant in *Washington* was initially stopped because he was driving a moped left of center, and the officer believed the defendant was under eighteen and thus violating the Indiana Code by not wearing goggles or a helmet.[188] The officer quickly realized the defendant was in fact over eighteen, and during the stop, due to the defendant's nervous behavior, the officer asked him if "he had any guns, drugs, or anything that may harm [the officer] on [the defendant's] person."[189] The defendant told the officer he had some marijuana on him, and he then consented to the officer removing the marijuana from his pockets.[190] In seeking to suppress the evidence, the defendant claimed violations of both the Fourth Amendment and section 11 because "the traffic stop constituted a seizure, . . . the officer's question was an improper interrogation lacking in reasonable, articulable suspicion of criminal activity, and . . . there was little risk to officer safety because the defendant was completely visible sitting on an open moped."[191]

Justice Dickson quickly dispatched the Fourth Amendment claim because the United States Supreme Court had made clear "[d]uring a lawful detention, police do not need a reasonable suspicion to ask questions of the detainee."[192] Under section 11, however, Justice Dickson was unconvinced by the defendant's argument that such police conduct cannot be allowed "because of the important

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180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 445.
184. *Id.* (citing Conwell v. State, 714 N.E.2d 764, 768 (Ind. Ct. App. 1999)).
185. *Id.*
186. 898 N.E.2d 1200 (Ind. 2008).
187. *Id.* at 1202, 1208.
188. *Id.* at 1203.
189. *Id.*
190. *Id.*
191. *Id.* at 1203-04.
192. *Id.* at 1204.

value of individual privacy."[193] The defendant had no obligation to respond to the officer's question, which "was consistent with the officer's concern for his own safety and law enforcement's responsibilities to deter crime, to intercept criminal activity, and to apprehend its perpetrators."[194]

In 2011, Justice Dickson authored *Lacey v. State*,[195] which addressed whether express judicial authorization is needed for a no-knock warrant under section 11.[196] There, the police executed a no-knock warrant on a home in Fort Wayne.[197] The exigent circumstances asserted by the State to justify the no-knock entry were known at the time the warrant was obtained, but the officers did not seek explicit authorization for a no-knock entry when going before the magistrate to obtain the warrant.[198]

Only one jurisdiction that has addressed no-knock warrants, Minnesota, "require[s] police to inform the issuing magistrate of the circumstances believed to justify an unannounced entry and to obtain specific advance authorization for such entry."[199] In declining that path, Justice Dickson wrote: "Whatever arguably exigent factors may be known by police when a warrant is obtained, their significance at the moment the warrant is executed may vary considerably due to the then-existing circumstances."[200] The reasonableness of knocking upon entry "must be evaluated in light of the totality of the circumstances at the time of such entry."[201] The focus is not on what is known when the warrant is obtained, but rather the circumstances surrounding the situation at the time the warrant is served.[202]

Although Justice Dickson's opinion concluded it would be much better practice for police officers to obtain explicit authorization for a no-knock entry from a magistrate, such authorization is not always necessary.[203]

C. Standing and Section 11

In the time between Justice Dickson's dissent in *Moran* and its application by Justice Boehm in *Litchfield*, Justice Dickson authored *Peterson v. State*, which highlighted the expanding protection section 11 offers for a "defendant's interest in the property seized" as opposed to the federal counterpart, which looks to the "privacy expectation in the premises searched."[204] Therefore, although the

193. *Id.* at 1205.
194. *Id.* at 1206.
195. 946 N.E.2d 548 (Ind. 2011).
196. *Id.*
197. *Id.*
198. *Id.* at 549.
199. *Id.* at 551.
200. *Id.* at 552.
201. *Id.*
202. *Id.* at 552-53.
203. *Id.*
204. 674 N.E.2d 528, 534 (Ind. 1996).

defendant in *Peterson* lacked standing under the Fourth Amendment to challenge the search of his room and closet located in his mother's apartment, he did have standing under section 11 because he established ownership in the shotgun seized from the closet.[205] Nevertheless, the shotgun was admitted into evidence because it was in open view.[206]

In sum, as in many other cases, *Peterson* highlights the breadth of section 11 protection to challenge a search or seizure when a Fourth Amendment challenge would fail. Justice Dickson's section 11 standing analysis has been applied in more than fifteen cases since: "to challenge evidence as the result of an unreasonable search or seizure under article 1, section 11, a defendant must establish ownership, control, possession, or interest in either the premises searched or the property seized."[207]

VIII. DEATH PENALTY CASES

Although the death penalty is rarely pursued and even less frequently imposed in Indiana,[208] the irrevocable consequence makes capital cases the most serious ones facing an Indiana Supreme Court justice. Article 7, section 4 of the Indiana Constitution requires direct appeal of capital cases to the Indiana Supreme Court.[209]

Justice Dickson authored several opinions in capital cases during his three decades of service. Each was important, but the following three cases had especially broad impact.[210] Although the General Assembly has considerable discretion in establishing eligibility for a death sentence through a list of statutory aggravating factors, these cases refine that scope as a matter of statutory interpretation or state and federal constitutional law.

A. Limits on Non-Statutory Aggravators

Two of Justice Dickson's opinions placed significant limitations on the use

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205. *Id.* at 533-35.

206. *Id.* at 535.

207. *Id.* at 534; *see, e.g.*, Fox v. State, 983 N.E.2d 1165 (Ind. Ct. App. 2013); Mays v. State, 719 N.E.2d 1263 (Ind. Ct. App. 1999); Allen v. State, 893 N.E.2d 1092 (Ind. Ct. App. 2008); Best v. State, 821 N.E.2d 419 (Ind. Ct. App. 2005).

208. *Death Penalty Facts*, IND. PUB. DEF. COUNCIL (July 8, 2015), http://www.in.gov/ipdc/public/dp_links/indianadpfactsheet.pdf [https://perma.cc/YL7U-RJ4Y].

209. IND. CONST. art. 7, § 4.

210. Although not discussed below, Justice Dickson's cautious approach in death penalty cases is also evidenced in the Norman Timberlake case. Timberlake v. State, 858 N.E.2d 625 (Ind. 2006). Justice Dickson was initially part of the three-justice majority that declined to authorize the filing of a successive petition for post-conviction relief to litigate Timberlake's competence to be executed. *Id.* at 630. Months later, he joined the two dissenting justices in a per curiam opinion holding Timberlake's petition for rehearing in abeyance pending a decision from the U.S. Supreme Court on the issue raised in a pending case. Timberlake v. State, 859 N.E.2d 1209, 1213 (Ind. 2007).

of non-statutory aggravating circumstances in death penalty cases. Indiana Code section 35-50-2-9 has long listed an ever-expanding list of circumstances that prosecutors may allege and, if proven beyond a reasonable doubt, qualify an individual for a death sentence in Indiana.[211]

The defendant sentenced to death in *Bellmore v. State* argued that the trial court erred in considering a tattoo he received in jail after his trial as an aggravating circumstance.[212] The tattoo showed a knife with dripping blood, which the trial court viewed as demonstrating the defendant's "contemptible and callous attitude" in symbolically "thumb[ing] his nose at the law and at the [victim's] family."[213]

Justice Dickson's opinion began by noting, unlike the mitigation portion of the capital sentencing statute, the absence of an "open-ended" authorization to consider aggravating circumstances in imposing death.[214] Moreover, he noted the "strong dissenting opinion by Justice DeBruler"[215] in *Minnick v. State*,[216] a capital case decided three years earlier, which had opined that "aggravating circumstances other than those enumerated in the death sentence statute" could not be considered.[217]

With his usual approach to judicial restraint, however, Justice Dickson's opinion distinguished, rather than overruled, *Minnick*.[218] The trial judge in *Minnick* had merely considered a non-statutory aggravating circumstance, unlike in *Bellmore* where the trial court found the fact "*determinative*" in imposing death.[219] The opinion declined to extend *Minnick* to authorize "unlimited resort to non-statutory aggravators in *capital* sentencing proceedings" because allowing "the open-ended authorization for general felony aggravators" in capital sentence proceedings would render the procedure unconstitutionally vague.[220]

Thus, because the trial court relied on an improper aggravating circumstance, the death sentence was vacated and the case remanded to allow the trial court to re-determine the appropriate penalty without considering the tattoo aggravator.[221] The trial court ultimately imposed a term of sixty years instead of death.[222]

Just two years later, a defendant sentenced to death raised federal and state constitutional arguments against use of non-statutory aggravators. In *Bivins v.*

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211. IND. CODE § 35-50-2-9(a)-(b) (2016).

212. 602 N.E.2d 111, 127 (Ind. 1992).

213. *Id.* at 129.

214. *Id.* at 128.

215. *Id.*

216. 544 N.E.2d 471 (Ind. 1989).

217. *Bellmore*, 602 N.E.2d at 128 (quoting *Minnick*, 544 N.E.2d at 483).

218. *Id.*

219. *Id.* at 129.

220. *Id.*

221. *Id.* at 129-30.

222. *No Longer on Indiana's Death Row*, IND. PUB. DEF. COUNCIL, http://www.in.gov/ipdc/public/dp_links/offindianadeathrow.pdf [https://perma.cc/9QVE-8DDC] (last visited Sept. 18, 2016).

State, Justice Dickson authored an opinion that found no Eighth Amendment violation but was instead grounded in the Indiana Constitution: "Because of the ultimate gravity of the punishment, Indiana's death sentence procedure must be cautiously restrained to assure maximum compliance with the proportionality concerns of article 1, section 16 of our state constitution."[223] Specifically, allowing trial courts to consider "the more general statutory criteria that authorize enhancing non-capital sentences" would pose "a serious risk that the resulting aggravating circumstances, when weighed against mitigating circumstances, will present a significant possibility of disproportionate sentencing."[224]

Although grounded in state constitutional law, the opinion in *Bivins* acknowledged that its holding was consistent with legislative intent, because unlike the use of "any" before mitigating circumstances, the statute uses "the definite article 'the' to identify authorized aggravating circumstances."[225]

B. Sorting Through Statutory Amendments After Ring

Justice Dickson's tenure included a dance between significant United States Supreme Court death penalty opinions and statutory amendments, often in anticipation or response to those opinions. In *Barker v. State*, Justice Dickson's opinion for the court reaffirmed a recent opinion holding that *Ring v. Arizona*[226] requires only that a statutory aggravating circumstance be found by a jury beyond a reasonable doubt; the reasonable doubt standard does not apply to the weighing of aggravating and mitigating circumstances.[227]

Barker also discussed the 2002 statutory amendment, which retained the longstanding language that a jury makes a sentencing "recommendation" but made that "recommendation" binding on the trial court: "If the jury reaches a sentencing recommendation, the court shall sentence the defendant accordingly."[228] A separate provision required trial courts to "discharge the jury and proceed as if the hearing had been to the court alone" when the jury did not agree on a sentencing recommendation.[229] *Barker* concluded that the latter provision was not unconstitutional as written but could "not be constitutionally applied to permit a judge to impose a sentence where a jury has been unable to decide whether the aggravating circumstance or circumstances have been proven beyond a reasonable doubt."[230]

As to the somewhat odd use of "recommendation," Justice Dickson's opinion in *Barker* expressed confidence that jury instructions will make clear the binding

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223. 642 N.E.2d 928, 955 (Ind. 1994).

224. *Id.*

225. *Id.* at 956.

226. 536 U.S. 584 (2002).

227. 809 N.E.2d 312, 315 (Ind. 2004) (citing Ritchie v. State, 809 N.E.2d 258, 266 (Ind. 2004)).

228. *Id.* at 314 (quoting IND. CODE § 35-50-2-9(e) (2002)).

229. *Id.* at 315, n.1 (quoting IND. CODE § 35-50-2-9(f) (2002)).

230. *Id.* at 317.

nature of the jury's decision.[231] Finally, "once a penalty phase jury reaches a recommendation against the death penalty . . . , a trial court may not thereafter enter judgment providing for a greater sentence."[232]

IX. APPELLATE REVIEW OF SENTENCES

Although most provisions of the Indiana Constitution were adopted in 1851 as part of a constitution that is fairly difficult to amend, some provisions have been added or altered in the ensuing 165 years. Granting appellate courts the power to review and revise sentences is one notable addition. Added by constitutional amendment in 1970, article 7, section 4 provides "The [Indiana] Supreme Court shall have, in all appeals of criminal cases, the power . . . to review and revise the sentence imposed."[233] Article 7, section 6 similarly provides that the "[j]urisdiction of [the Indiana] Court of Appeals" shall include "to the extent provided by rule, review and revision of sentences for defendants in all criminal cases."[234]

A. Early History: "Manifestly Unreasonable"

In 1975, the Indiana Supreme Court made clear it would not exercise the sentence revision power until a program of policies and procedures governing this authority could be established.[235] In 1978, the court promulgated the following appellate rule:

> (1) The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.
> (2) A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed.[236]

Applying that rule and its seemingly demanding standard, the court of appeals first reduced a sentence in 1984 in *Cunningham v. State*,[237] and the Indiana Supreme Court did so two years later in *Fointno v. State*, decided shortly before Justice Dickson joined the court.[238]

Claims of manifestly unreasonable sentences arose frequently over the next decade and a half, especially near the turn of the century when the court's docket was inundated with direct appeals in which a defendant received a sentence of

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231. *Id.* at 318.
232. *Id.*
233. IND. CONST. art. 7, § 4.
234. *Id.* § 6.
235. Beard v. State, 323 N.E.2d 216, 219 (Ind. 1975).
236. Fointno v. State, 487 N.E.2d 140, 149 (Ind. 1986) (quoting IND. APP. REV. SENTENCES R. 2).
237. 469 N.E.2d 1, 9 (Ind. Ct. App. 1984).
238. 487 N.E.2d at 149.

more than fifty years on a single count.

1. Reductions.—Justice Dickson authored two opinions reducing sentences as manifestly unreasonable, applying sentencing principles that had been applied in earlier cases and could be applied in the future to ensure some degree of consistency in the usually high-deference-to-trial-courts realm of sentencing. First, the defendant in *Winn v. State* was sentenced to fifty years for rape enhanced by thirty years for being a habitual offender.[239] Both of his prior offenses were low-level, Class D felonies.[240] Justice Dickson's unanimous opinion reduced that thirty-year enhancement to ten years, thus reducing the aggregate sentence from eighty years to sixty years.[241]

Second, the next year in *Buchanan v. State*, Justice Dickson's opinion for the court recited the familiar principle that "the maximum possible sentences are generally most appropriate for the worst offenders."[242] There, the "offense was not part of a protracted episode of molestation but a one-time occurrence."[243] Moreover, the fifty-eight-year-old defendant had maintained gainful employment through his adult life, suffered from health problems, and had family support to aid in his rehabilitation.[244] Based on the nature of the offense and the defendant's character, the maximum fifty-year sentence was reduced to forty years.[245]

2. Dissents from Reductions.—More common from Justice Dickson during this period were dissenting opinions that emphasized the importance of deference to trial courts, especially under the exacting "manifestly unreasonable" standard of appellate review. For example, in 1999 the majority reduced a sixty-year sentence for murder committed by fourteen-year-old defendant to fifty years.[246] Justice Dickson dissented, including a string citation of cases that had emphasized appellate sentence review is "very deferential to the trial court: The issue is not whether in our judgment the sentence is unreasonable, but whether it is clearly, plainly, and obviously so."[247]

B. Change to "Inappropriate"

Effective January 1, 2003, the Indiana Supreme Court revised the appellate rules to change the "manifestly unreasonable" standard to a seemingly lower

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239. 748 N.E.2d 352, 360 (Ind. 2001).

240. *Id.* at 359.

241. *Id.* at 361. Although not cited in *Winn*, which was based on the review and revise power of article 7 as implemented by Appellate Rule 7(B), the reduction is consistent with earlier proportionality clause cases that reduced lengthy habitual offender enhancements when the predicate offense or prior offenses were low-level felonies. *See, e.g.*, Clark v. State, 561 N.E.2d 759 (Ind. 1990).

242. 767 N.E.2d 967, 973 (Ind. 2002).

243. *Id.*

244. *Id.*

245. *Id.*

246. Carter v. State, 711 N.E.2d 835, 843 (Ind. 1999).

247. *Id.* (Dickson, J., dissenting) (internal quotation marks omitted).

"inappropriate" standard: "The Court ~~shall not~~ may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate ~~unless the sentence is manifestly unreasonable~~ in light of the nature of the offense and the character of the offender."[248] Although an easier-to-meet standard better reflected the Indiana Supreme Court's recent practice, the addition of "due consideration of the trial court's decision" language was consistent with Justice Dickson's longstanding concern in sentence revision cases.

1. Principles of Dissent.—From 2003 to his retirement in 2016, Justice Dickson would sometimes join a majority opinion reducing a sentence,[249] but more frequently he would dissent, noting at times that his "cautious resistance to appellate sentence revision has been explained in several dissenting opinions."[250]

The dissenting opinions often cited to previous dissents, although the facts of each case sometimes dictated emphasis of some points over others. All considered, five principles were commonly recited by Justice Dickson's dissents:

- Article 7, section 4 power is "merely a permissive option. It is implemented by Indiana Appellate Rule 7(B), which also uses permissive language to state that an appellate court 'may revise a sentence;'"[251]
- "'[D]ue consideration of the trial court's decision' required by Rule 7(B) should restrain appellate revision of sentences to only extremely rare, exceptional cases;"[252]
- Trial judges are "in a far superior position" at sentencing;[253]
- "[F]requent appellate revision of criminal sentences may induce and foster reliance" on appellate courts to reduce sentences rather than trial courts imposing the correct sentence at the outset;[254] and
- Finally, in cases of small revisions, "an appellate court's sentencing review and revision capacity and authority does not warrant such minor adjustments."[255]

2. A Rare Reduction.—Once during these thirteen years, however, Justice Dickson wrote an opinion reducing a sentence—over the dissenting opinion of one of his colleagues. In *Castillo v. State*, a young woman babysitting for her two-year-old niece was sentenced to life imprisonment without parole after fatal

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248. *Order Amending Appellate Rules*, http://www.in.gov/judiciary/files/rule-amends-2002-july-appellate.pdf [https://perma.cc/XP5F-XS54] (last visited Sept. 4, 2016).

249. *See, e.g.*, Brown v. State, 10 N.E.3d 1, 8 (Ind. 2014).

250. Hamilton v. State, 955 N.E.2d 723, 728 (Ind. 2011).

251. Parks v. State, 22 N.E.3d 552, 556 (Ind. 2014) (Dickson, J., dissenting).

252. Hollin v. State, 877 N.E.2d 462, 466 (Ind. 2007) (Dickson, J., dissenting).

253. *Id.*

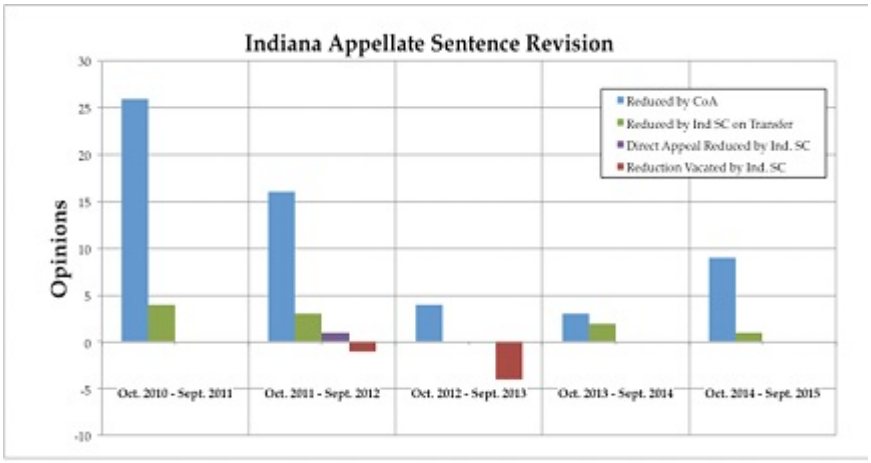
254. *Id.*

255. *Parks*, 22 N.E.3d at 556 (reducing a forty-year sentence, with twenty-six years in Department of Correction ("DOC") to thirty years, with twenty in DOC).

injuries inflicted by the woman's boyfriend took the young girl's life.[256] Because "the defendant was merely complicit in her boyfriend's conduct but did not actively participate in or plan the killing," Justice Dickson's opinion concluded she was entitled to "a similar degree of leniency to defendants whose role in a murder was substantially less blameworthy than the principal's."[257] The life without parole sentence was reduced to sixty-five years.[258]

C. Shaping the New Court

Justice Dickson's influence in the realm of sentence revision was noteworthy during his final few years as the Indiana Supreme Court's membership changed with the retirements of Justice Boehm in 2010 and Chief Justice Shepard and Justice Sullivan in 2012. Correlation is not causation, but between 2010 and 2015, the court of appeals began reducing far fewer sentences, and for the first time in its history, the Indiana Supreme Court reinstated sentences imposed by the trial court that had been reduced by the court of appeals.[259] This change occurred largely in per curiam opinions, but Justice Dickson's "cautious resistance" noted above largely carried the day and persuaded his new colleagues.[260]



256. 974 N.E.2d 458, 461 (Ind. 2012).

257. *Id.* at 467.

258. *Id.*

259. The chart below is based on data compiled as part of the annual criminal law survey article. *See generally* Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 49 IND. L. REV. 1023 (2016).

260. *See supra* note 259 and accompanying text. *See generally* Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 47 IND. L. REV. 1043, 1055-57 (2014) (collecting cases).

D. Increasing Sentences on Appeal

For more than two decades, appellate sentence revision was a one-way street in which only reduction was a possibility, but that understanding changed in 2009. In *McCullough v. State*, Justice Dickson wrote for the majority that the power to review and revise sentences included the ability to increase a sentence on appeal.[261] As a textual matter, "'revise' is not synonymous with 'decrease,' but rather refers to any change or alteration" and could include increases.[262] However, Indiana appellate courts do not have an unfettered right to increase sentences on appeal.[263] Rather, only when a defendant seeks revision of the sentence will the court consider "whether to affirm, reduce, or increase the sentence."[264] In responding to such a challenge, the State may present reasons for an increased sentence,[265] but the State may not initiate a sentencing challenge on appeal or cross-appeal.[266]

That power was exercised by a panel of the court of appeals just a year after *McCullough*. In *Akard v. State*, the court of appeals increased a ninety-three-year sentence for several sex and confinement convictions in an egregious sexual assault case to 118 years.[267] The court relied on Justice Boehm's concurring opinion in *McCullough*, which limited increases under Rule 7(B) to "the most unusual case[s]."[268] The court found the case "most unusual" because of the defendant's "demented purpose in attempting to satisfy his prurient interests in child bondage-style rape by performing similar acts on a homeless woman who possessed physical characteristics akin to those of a child."[269]

Just a few weeks after granting transfer and hearing oral argument in *Akard*, Justice Dickson wrote for a unanimous supreme court in vacating the increased sentence, emphasizing that the prosecutor had requested a ninety-three-year sentence in the trial court and the Indiana Attorney General had argued that sentence was appropriate on appeal.[270]

As this Article was sent to press in the summer of 2016, *Akard* is the only sentence increased on appeal by the court of appeals. Justice Dickson's view of great deference to the trial court when reviewing sentences for revision downward

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261. 900 N.E.2d 745 (Ind. 2009).

262. *Id.* at 749-50.

263. *Id.* at 750.

264. *Id.*

265. *Id.* at 751.

266. *Id.*

267. 924 N.E.2d 202 (Ind. Ct. App.), *aff'd in part*, 937 N.E.2d 811 (Ind. 2010).

268. *Id.* at 211.

269. *Id.* In denying a rehearing, the court of appeals found it inconsequential that the prosecutor had requested ninety-three years in the trial court and that the attorney general had not requested an increase because the statutory range is the only limitation on the appellate court in reviewing a sentence on appeal. Akard v. State, 928 N.E.2d 623, 624-25 (Ind. Ct. App. 2010).

270. 937 N.E.2d at 814.

(or upward), at times a dissenting view, has largely carried the day.

E. Fine-Tuning Sentence Review

Beyond the many cases that presented bottom-line questions of whether to revise a sentence, Justice Dickson authored two significant opinions about the parameters of that review. First, *Davidson v. State* resolved a split in the court of appeals regarding 7(B) review of suspended sentences.[271] The unanimous opinion held that "appellate courts may consider all aspects of the penal consequences imposed by the trial judge in sentencing the defendant."[272] Second, after the Indiana General Assembly amended the sentencing statutes to allow some incarcerated defendants the ability to earn one day of credit only after serving six days (while most continued to earn one day credit for each day served), Justice Dickson's opinion in *Sharp v. State* explained that "appellate sentence review may take into consideration the potential consequences of an offender's status as a credit restricted felon."[273]

X. USING THE COURT'S RULE-MAKING AUTHORITY AND TECHNOLOGY TO ENSURE FAIRNESS

The previous nine sections of this Article focused on cases, the work product that most lawyers and law students think of when reflecting on the work of a judge. But state supreme court justices spend much of their time as leaders of the judicial branch, which includes supervisory authority over lower courts and adopting rules that apply to lawyers and litigants throughout the state. Three of those initiatives are highlighted below, and the importance of these administrative efforts is reinforced by Justice Dickson's post-retirements plans. Rather than serving as a senior judge who drafts opinions at the Indiana Court of Appeals, Justice Dickson will be working on administrative initiatives of the Indiana Supreme Court.

A. Recording Confessions

In 2009, Justice Dickson led an effort supported by Justices Boehm and Rucker to require the audio-video recording of statements to police.[274] Although many states had adopted statutes to require such recordings, the three-justice majority (over dissents by Chief Justice Shepard and Justice Sullivan) instead used their supervisory authority to adopt Indiana Evidence Rule 617.[275]

Unlike many court rules that are proposed by lawyers or judges throughout

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271. 926 N.E.2d 1023 (Ind. 2010).

272. *Id.* at 1025.

273. 970 N.E.2d 647, 651 (Ind. 2012).

274. Order Amending Rules of Evidence, No. 94S00-0901-MS-4 (Ind. Sept. 15, 2009), http://www.in.gov/judiciary/files/rule-amends-2009-0909-evid617.pdf [https://perma.cc/CGS2-P5DE].

275. *Id.* at 1 (citing IND. CONST. art. 7, § 4).

proposals to the Indiana Supreme Court Committee on Rules of Practice and Procedure, the justices directed the Committee "to draft and publish for public comment a proposed Rule of Evidence relating to the admission in criminal cases of unrecorded statements made during custodial interrogation."[276] The proposed rule generated more than three hundred comments from a wide variety of individuals, including law enforcement, judges, prosecutors, public defenders, other lawyers, and members of the public.[277] The adopted rule provides as follows:

> (a) In a felony criminal prosecution, evidence of a statement made by a person during a Custodial Interrogation in a Place of Detention shall not be admitted against the person unless an Electronic Recording of the statement was made, preserved, and is available at trial, except upon clear and convincing proof of any one of the following:
>
> (1) The statement was part of a routine processing or "booking" of the person; or
>
> (2) Before or during a Custodial Interrogation, the person agreed to respond to questions only if his or her Statements were not Electronically Recorded, provided that such agreement and its surrounding colloquy is Electronically Recorded or documented in writing; or
>
> (3) The law enforcement officers conducting the Custodial Interrogation in good faith failed to make an Electronic Recording because the officers inadvertently failed to operate the recording equipment properly, or without the knowledge of any of said officers the recording equipment malfunctioned or stopped operating; or
>
> (4) The statement was made during a custodial interrogation that both occurred in, and was conducted by officers of, a jurisdiction outside Indiana; or
>
> (5) The law enforcement officers conducting or observing the Custodial Interrogation reasonably believed that the crime for which the person was being investigated was not a felony under Indiana law; or
>
> (6) The statement was spontaneous and not made in response to a question; or
>
> (7) Substantial exigent circumstances existed which prevented the making of, or rendered it not feasible to make, an Electronic Recording of the Custodial Interrogation, or prevent its preservation and availability at trial.[278]

The order adopting the rule explained its many advantages while forthrightly addressing the objections raised. The cited advantages include: (1) serving as a "potent law enforcement tool" by providing "strong evidence of guilt" and the

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276. *Id.*
277. *Id.*
278. *Id.*

ability to refute claims "that police failed to give [suspects] required warnings or otherwise engaged in unlawful behavior"; (2) assisting courts by saving "time and resources determining what took place in the interrogation room"; and (3) providing "important evidence to help resolve claims of false confessions."[279]

The success of this rule is perhaps best evidenced by the absence of case law citing it in the ensuing seven years. Its clarity has allowed its application to meet the desired goals without need of litigation about its terms. Many cases with confessions to police, by virtue of their recording, are more readily resolved by plea agreements or perhaps dismissal, while the remaining cases in which a challenge to the confession is raised may be more fairly and efficiently addressed by providing trial and appellate courts a much better vantage point to assess such claims as incomplete advisements or coercion.

B. Bail Reform

During his tenure as chief justice, Dickson spearheaded the creation of the Committee to Study Evidence-Based Pretrial Release.[280] That group, which included judges, legislators, prosecutors, public defenders and probation officers, was "tasked with examining and evaluating risk-assessment tools used by courts around the country to determine which defendants to release before trial."[281] Justice Dickson explained that it was not fair to require people of limited means to be held in the county jail awaiting trial longer than they would be sentenced to serve if convicted of the crime: "We have a presumption of innocence and yet we keep people in jail because they're not paying money. That's wrong."[282]

In his State of the Judiciary speech in 2014, then-Chief Justice Dickson touted the value of risk assessment tools, such as the one used to help courts and the Indiana Department of Correction to apply individualized strategies for offender rehabilitation.[283] Those "tools, based on the scientific principles of

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279. *Id.*

280. Marilyn Odendahl, *Dickson: Only Judges to Decide Pretrial Release*, IND. LAWYER (Aug. 27, 2014), http://www.theindianalawyer.com/dickson-only-judges-to-decide-pretrial-release/PARAMS/article/34979 [https://perma.cc/AA5G-SUB9].

281. *Id.*

282. *Id.*

283. *State of the Judiciary*, http://www.in.gov/judiciary/supreme/2499.htm [https://perma.cc/7ZCC-BHQM] (last visited Sept. 4, 2016). In *Malenchik v. State*, 928 N.E.2d 564 (Ind. 2010), an opinion authored by Justice Dickson, the Indiana Supreme Court acknowledged that scoring models like the Level of Service Inventory-Revised (LSI-R) "can be significant sources of valuable information for judicial consideration in deciding whether to suspend all or part of a sentence, how to design a probation program for the offender, whether to assign an offender to alternative treatment facilities or programs, and other such corollary sentencing matters." *Id.* at 573. The scores do not, however, function as aggravating or mitigating circumstances or "substitute for the judicial function of determining the length of sentence appropriate for each offender." *Id.* Moreover, defendants (and presumably the State) "may seek to diminish the weight to be given such test results by presenting contrary evidence or by challenging the administration or usefulness of the

'evidence-based practices,' are also a key element of the [Indiana Supreme] Court's new initiative to explore, develop, and if possible, to implement significant improvements in the way Indiana judges make determinations about the pre-trial release of citizens charged with non-violent offenses."[284] Specifically, the new initiative sought to "empower judges with solid tools to make the process more fair and equitable, to enhance public safety, to assure that people will appear for their scheduled trials, and to reduce reliance on expensive jail beds."[285]

C. Electronic Filing and Access to Court Records

As a final point, Indiana has not been on the cutting edge of electronic filing of or access to court documents. But during his tenure as chief justice, Dickson continued important efforts, to ensure "all our trial courts are equipped with effective electronic case management and data sharing technology," which included restoration of some funding for technology upgrades, establishing a Judicial Technology Oversight Committee, and implementing the Odyssey case management system more broadly to ensure information can be shared between courts.[286] His efforts were followed by a strong push by Chief Justice Rush for increased funding and statewide e-filing and Justice David, who has co-chaired technology initiatives with Judge Paul Mathias. As Justice David explained, "The Indiana Supreme Court is committed to the most effective use of technology to ensure that courts operate with efficiency and fairness—e-filing is a key component of our modernization plans."[287]

In short, all three of these efforts (recorded confessions, bail reform, and electronic filing), like the many cases discussed in this Article, highlight Justice Dickson's commitment to fairness and openness of court proceedings.

CONCLUSION

While the cases Justice Dickson has decided have certainly had a significant impact on Indiana law, it is not just his decisions that have affected us. It is also his sense of self and the way that he has approached his job. Justice Dickson's careful attention to history and efforts to give real meaning to the Indiana

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assessment in a particular case." *Id.* at 575.

284. *State of the Judiciary*, *supra* note 283.

285. *Id.* On September 7, 2016, the Indiana Supreme Court issued an order adopting Criminal Rule 26, which with few exceptions requires "[i]f an arrestee does not present a substantial risk of flight or danger to themselves or others, the court should release the arrestee without money bail or surety subject to such restrictions and conditions as determined by the court . . . ." Order Adopting Criminal Rule 26, No. 94S00-1602-MS-86, 2016 LEXIS 619 (Ind. Sept. 7, 2016), http://www.in.gov/judiciary/files/order-rules-2016-0907-criminal.pdf [https://perma.cc/XPH4-C65B].

286. *State of the Judiciary*, *supra* note 283.

287. Marcia Oddi, *E-Filing is Already Underway in Some Indiana Trial Courts*, IND. L. BLOG (Aug. 11, 2015), http://indianalawblog.com/archives/2015/08/ind_courts_more_903.html [https://perma.cc/7SK9-2JRZ].

Constitution sets the bar high for his colleagues and successor. His concern for Indiana's citizens is authentic and deep. He has also respected the separation of powers while exhibiting a restrained jurisprudential approach.

Even when Justice Dickson held the minority view of a case, as in *Walden*, he had a passionate and yet civil voice on the court. His opinions have also displayed even-handedness and a commitment to the integrity of the court system through reliable and relevant evidence. Justice Dickson has been the picture of what it means to be a real judge, the epitome of thoughtfulness, restraint, and class.