RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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The latter half of the survey period—October 1, 2019 to September 30, 2020—was marked by lockdowns, virtual hearings, and remote work because of the COVID-19 pandemic. But the General Assembly was first able to finish its short session, which included several significant criminal law bills—three of which are summarized below. The Indiana Supreme Court's transfer grants in criminal cases were limited and often resulted in narrow opinions, resolving cases without language of broader applicability. This survey focuses on supreme court opinions as well as several significant opinions of the Indiana Court of Appeals that provide direction in criminal cases from beginning (bail, speedy trial, discovery, and jury selection and instructions) to end (double jeopardy, sentencing, and expungement).

I. LEGISLATIVE DEVELOPMENTS

A. Texting Ban Broadened to Use of Handheld Device

In 2011, the General Assembly enacted a ban on "'texting' (sending or receiving textual material on a cellphone or other handheld electronic device; also called 'text messaging' or 'wireless messaging') or emailing while operating a motor vehicle"; no other uses of cellphones by drivers were restricted.[1]

As the Seventh Circuit Court of Appeals observed in discussing the statute, "[n]o *fact* perceptible to a police officer glancing into a moving car and observing the driver using a cellphone would enable the officer to determine whether it was a permitted or a forbidden use"—aptly noting all the following were permitted: "making and receiving phone calls, inputting addresses, reading driving directions and maps with GPS applications, reading news and weather programs, retrieving and playing music or audio books, surfing the Internet, playing video games—even watching movies or television."[2]

In 2020, the statute was broadened in ways that allow much easier enforcement of the texting ban, which will likely lead to a plethora of search and seizure challenges after the stop is initiated. With exceptions for hands-free or voice-operated technology, or to report an emergency, "a person may not hold or

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1. United States v. Paniagua-Garcia, 813 F.3d 1013, 1013 (7th Cir. 2016) (citing Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 45 IND. L. REV. 1067, 1067 (2012)).

2. *Id.* at 1013-14 (emphasis in original) (citing Schumm, *supra* note 1, at 1067).

use a telecommunications device while operating a moving motor vehicle."[3] Telecommunications device is defined to include a "(1) wireless telephone; (2) personal digital assistant; (3) pager; or (4) text messaging device."[4]

B. Credit Time for Home Detention

Adding to the nuances of pretrial credit at sentencing, the General Assembly amended the statute involving credit for pretrial home detention (Class P) to provide those individuals do "not earn *accrued time* for time served on pretrial home detention awaiting trial."[5] The amendment was in response to a recent court of appeals' opinion that held "a person placed on pretrial home detention earns accrued time (calculated at a day for a day) pursuant to the unmistakable implications of Section 35-50-6-3.1 and that the trial court has no discretion to deny it."[6] Therefore, defendants placed on home detention pretrial now earn "one (1) day of good time credit for every four (4) days the person serves on pretrial home detention awaiting trial."[7]

C. Restrictions on Depositions of Children

Finally, a new statute imposed significant restrictions on a defendant charged with certain crimes from deposing "a child less than sixteen (16) years of age who is the victim or alleged victim of a sex offense."[8] Before this statute, defendants faced few limitations on their ability to depose child witnesses, who were treated the same as other witnesses under Indiana Trial Rules 26 and 30.[9] Under the new legislation, a defendant must first contact the prosecutor and (1) secure the prosecutor's agreement to "the manner in which the deposition shall be conducted"; (2) obtain court authorization after a hearing with a finding "that there is a reasonable likelihood that the child victim will be unavailable for trial and the deposition is necessary to preserve the child victim's testimony"; or (3) obtain court authorization after a hearing with a finding, following a hearing, "that the deposition is necessary: (A) due to the existence of extraordinary circumstances; and (B) in the interest of justice."[10]

The statute is certain to be challenged as a violation of separation of powers, among other things. In *State ex rel. Kostas v. Johnson*, for example, the court held a statute requiring judges to act within a certain timeframe was an unconstitutional exercise of legislative power because it interfered with judicial

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3. IND. CODE § 9-21-8-59(a) (2021).
4. *Id.* § 9-13-2-177.3(a)(1)-(4).
5. *Id.* § 35-50-6-3.1(f) (emphasis added).
6. Thompson v. State, 120 N.E.3d 1066, 1070 (Ind. Ct. App. 2019).
7. IND. CODE § 35-50-6-3.1(f).
8. *Id.* § 35-40-5-11.5(a).
9. *See generally* Jones v. State, 445 N.E.2d 98 (Ind. 1983) (upholding exclusion of defendant charged with child molesting from taking a deposition of the child).
10. IND. CODE § 35-40-5-11.5(d).

functions.[11] Although the judiciary retains a role in depositions under the new statute, the General Assembly has in essence rewritten the Trial Rules regarding depositions.

II. CASE DEVELOPMENTS: BAIL

After a pilot project in several counties in 2016, Criminal Rule 26 became effective in all courts on January 1, 2020.[12] Instead of keeping low-risk offenders in jail because they could not afford bail, Criminal Rule 26 was designed to "encourag[e] trial judges to engage in evidence-based decision making at the pretrial stage" while continuing "to maximize the likelihood of the arrestee's appearance at trial and the protection of public safety."[13] The first two parts of the rule provide:

> **(A)** If an arrestee does not present a substantial risk of flight or danger to self or others, the court should release the arrestee without money bail or surety subject to such restrictions and conditions as determined by the court except when:
> (1) The arrestee is charged with murder or treason.
> (2) The arrestee is on pre-trial release not related to the incident that is the basis for the present arrest.
> (3) The arrestee is on probation, parole or other community supervision.
> **(B)** In determining whether an arrestee presents a substantial risk of flight or danger to self or other persons or to the public, the court should utilize the results of an evidence-based risk assessment approved by the Indiana Office of Court Services, and such other information as the court finds relevant. The court is not required to administer an assessment prior to releasing an arrestee if administering the assessment will delay the arrestee's release.[14]

Although argued on statutory grounds, the court of appeals referred to Criminal Rule 26 in *Yeager v. State*.[15] There, the trial court set bail at $250,000 cash for a defendant charged with four Level 3 felony offenses.[16] The defendant had no criminal history besides underage drinking, lived in the area his

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11. State *ex rel.* Kostas v. Johnson, 69 N.E.2d 592, 596 (Ind. 1946).

12. Amanda Bridgman, *Criminal Rule 26 – New Rules for Bonding Out – Now in Effect*, TIMES UNION ONLINE (Jan. 1, 2020), https://timesuniononline.com/Content/Default/News/Article/Criminal-Rule-26-New-Rules-For-Bonding-Out-Now-In-Effect/-3/224/123968 [https://perma.cc/564B-YXFS].

13. *FAQ: Criminal Rule 26*, IND. CT. TIMES (Feb. 28, 2017), http://indianacourts.us/times/2017/02/faq-criminal-rule-26/ [https://perma.cc/5ANT-HVP8].

14. IND. R. CRIM. P. 26(A)-(B).

15. Yeager v. State, 148 N.E.3d 1025 (Ind. Ct. App. 2020), *vacated and dismissed as moot*, 168 N.E.3d 277 (Ind. 2021).

16. *Id.* at 1026.

> whole life, lived in the same house (which he was buying) for twelve years, had a job to which he could return, and had a good relationship with his family (who also lived in the area and was supportive of him).[17]

The pretrial director recommended that the defendant be released to pretrial supervision.[18]

In light of "substantial mitigating factors showing that he recognize[d] the court's authority to bring him to trial" and without evidence he "pose[d] a risk to the physical safety of the victim or the community," the court of appeals held that the trial court abused its discretion in denying his request to reduce bail.[19] The case was remanded with instructions that he "be released to pretrial supervision with the added condition of electronic monitoring."[20] After quoting Criminal Rule 26, the court added its conclusion was "consistent with the new evidence-based risk-assessment system that Indiana has adopted."[21]

The Attorney General sought transfer, and the Indiana Prosecuting Attorney's Council filed an amicus brief in support of transfer.[22] Their primary concern was the ability of trial judges to impose bail based on a perceived risk of physical danger by the defendant, who in this case was alleged to have committed a violent offense.[23]

But a probable cause affidavit merely sets forth probable cause to support the charges—not clear and convincing evidence that the defendant poses a risk of physical danger. The charges may be relevant to the bail determination, but the court of appeals made clear no evidence was presented "as to how he could possibly constitute a threat to anyone"; as the court of appeals explained, reliance on the injuries alone to support finding the defendant is "a danger to [the injured child or] the community . . . . violates the presumption of innocence to which Yeager is entitled."[24]

The Indiana Supreme Court heard oral argument in November of 2020 and then granted transfer and dismissed the case as moot on May 26, 2021, wiping out the court of appeals' opinion as precedent.[25]

Although Criminal Rule 26 mentions a substantial risk of danger to others, only certain classes of potentially dangerous, recidivist defendants are expressly exempted from the beneficent presumption of the rule: those already on pretrial release for another offense and anyone on "probation, parole or other community

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17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 1029.

22. Indiana Prosecuting Attorneys Council's Amicus Curiae Brief in Support of Petition to Transfer, *Yeager*, 148 N.E.3d 1025 (Ind. Ct. App. 2020), 2020 WL 4207962.

23. *Id.* at *6.

24. *Yeager*, 148 N.E.3d at 1028 (citations omitted).

25. Yeager v. State, 168 N.E.3d 277 (Ind. 2021).

supervision."[26] Cases decided during the next survey period will presumably offer some additional guidance for squaring the presumption of innocence and pretrial bail with the concern for public safety.

III. SPEEDY TRIAL

Both the federal and Indiana constitutions guarantee the right to a speedy trial,[27] and Criminal Rule 4 provides specific timelines that defendants use in challenging pretrial incarceration or excessive delay between the time of delay and trial.[28]

Relying on the interplay between Criminal Rule 4 and Appellate Rule 14, the Indiana Supreme Court found that the State's failure to seek a stay while pursuing an interlocutory appeal violated Rule 4.[29] In *Battering v. State*, the State charged the defendant with two counts of child molesting and one count of child solicitation.[30] After the defendant successfully suppressed evidence from a police interrogation, the State simultaneously filed a motion to certify the order for interlocutory appeal and a motion to continue the jury trial date.[31] Rejecting the court of appeals' decision that labeled a motion to stay as a "mere formality," the justices unanimously agreed that a "plain reading of [Appellate Rule 14] provides that an interlocutory appeal *only* constitutes a stay *if* the trial court or the Court of Appeals so orders."[32] Because the State did not seek a stay, the one-year time limit of Rule 4 continued to run during the interlocutory appeal.[33] As a result, the court ordered the defendant discharged.[34]

In a pair of cases decided days apart, the court of appeals found Rule 4 violations when the prosecutors in both cases made misrepresentations in motions for continuances regarding the status of lab test results.

In *Peele v. State*, the State requested a continuance less than two weeks prior to the speedy trial date because it had not yet received drug test results.[35] However, the State failed to disclose that the State had not even attempted to obtain the drug test results.[36] The court likewise concluded that the defendant did not waive his speedy-trial request by failing to object: the trial court specifically advised the defendant that he need not object, as it would be "assumed."[37] In any event, the facts of the case established a clear violation of the defendant's right

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26. IND. R. CRIM. P. 26(A)(3).
27. U.S. CONST. amend. VI; IND. CONST. art. 1, § 12.
28. IND. R. CRIM. P. 4(C).
29. Battering v. State, 150 N.E.3d 597, 598 (Ind. 2020).
30. *Id.*
31. *Id.* at 599.
32. *Id.* at 600-02 (emphasis in original).
33. *Id.* at 602.
34. *Id.*
35. Peele v. State, 136 N.E.3d 1155, 1157 (Ind. Ct. App. 2019).
36. *Id.* at 1159-60.
37. *Id.* at 1160.

to a speedy trial, and the defendant was entitled to a discharge of the charges against him.[38]

Similarly, the court of appeals found a speedy-trial violation in *Dilley v. State* when the State sought a continuance seventeen days prior to the speedy trial date, and in its motion represented that they were still awaiting lab results for the drugs, but that they had made all reasonable efforts to obtain the results in time to comply with the speedy-trial request.[39] However, a police officer testified at trial that he personally transported the drugs to the testing facility *after* the State's request for a continuance.[40] Therefore, the defendant was entitled to discharge.[41]

IV. THE COVID-19 PANDEMIC

The COVID-19 pandemic had a dramatic effect on criminal proceedings beginning in March 2020 and extending well into 2021. As these cases are tried months later, issues regarding speedy trial rights or alleged violations from remote proceedings will likely be raised in some appeals.

One week after the governor issued a state of emergency, courts began operating on an emergency basis.[42] In an order issued on March 16, 2020, the Indiana Supreme Court directed each trial court to consider local needs in filing a petition for emergency measures, including "[t]olling for a limited time all laws, rules, and procedures setting time limits for speedy trials in criminal and juvenile proceedings."[43]

A March 19, 2020 statement from Chief Justice Rush noted that trial courts were "postponing jury trials, allowing for remote hearings, keeping only essential staff working in the courthouses, and holding only necessary and emergency hearings."[44] Days later on March 23, a supreme court order "toll[ed] all laws, rules, and procedures setting time limits for speedy trials in criminal and juvenile proceedings," regardless of the individual county orders.[45] The order was renewed on April 23, and again on May 29—this time with the following added specificity:

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38. *Id.*

39. Dilley v. State, 134 N.E.3d 1046, 1048 (Ind. Ct. App. 2019).

40. *Id.* at 1049.

41. *Id.* at 1051.

42. *See* Ind. Supreme Court Office of Judicial Admin., *Resuming Operations of the Trial Courts*, at 3 (May 13, 2020), https://www.in.gov/courts/files/covid19-resuming-trial-court-operations.pdf [https://perma.cc/LM37-5J5C].

43. *In re* Admin. Rule 17 Emergency Relief for Ind. Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), 141 N.E.3d 388, 388 (Ind. 2020).

44. Chief Justice Loretta Rush Statement, Press Conference with State Leaders (Mar. 19, 2020), https://www.in.gov/courts/files/covi19-2020-0319-rush-satement-at-press-conference.pdf [https://perma.cc/N3RB-T88Z].

45. *In re* Admin. Rule 17 Emergency Relief for Ind. Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), 141 N.E.3d 389, 390 (Ind. 2020).

2. For purposes of
   a. Indiana Criminal Rule 4(A) and 4(C), and
   b. early-trial demands filed under Indiana Criminal Rule 4(B) before April 3, 2020, the tolled period shall be calculated from April 3, 2020 through August 14, 2020 and shall be further subject to congestion of the court calendar or locally existing emergency conditions for good cause shown.
3. For purposes of Indiana Criminal Rule 4(B) early-trial motions filed after April 2, 2020 and before August 15, 2020, the motion shall be deemed to have been made on August 14, 2020 and shall be further subject to congestion of the court calendar or locally existing emergency conditions for good cause shown.[46]

When ordered to submit plans to gradually resume operations in May, each county was expected to coordinate "with appropriate local officials and local justice system partners to account for local health conditions, facility readiness, and litigants' needs," as recited in the resumption orders, reviewed individually by county and posted on the judiciary's website.[47]

Although jury trials began to resume in July in some counties, jury trials did not resume in Marion County until late August.[48] An article addressing the logistical and legal concerns with jury trials quoted the Chief Justice as follows: "We have to figure out a way to provide the right to a jury trial. You can't waive a constitutional protection. Period. And we don't want to force guilty pleas."[49]

Whether under the broad Indiana Supreme Court orders, local orders approved for individual counties, or case-specific orders citing a congested calendar or emergency, many defendants remained incarcerated without a trial for several months—creating a backlog that will take many months to clear.[50] One motion for speedy trial filed during this period noted that Hoosiers had retained an unencumbered right to bear arms (including gun stores remaining open), peacefully protest, travel, and vote; it argued that "[d]epriving a citizen his

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46. *In re* Admin. Rule 17 Emergency Relief for Ind. Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), 145 N.E.3d 787, 788 (Ind. 2020).

47. *Trial Court Transition Plans for Expanded Operations*, COURTS.IN.GOV, https://www.in.gov/courts/covid/plans/ (last visited Apr. 3, 2021) [https://perma.cc/88SC-YSMM].

48. *Marion Superior Court Releases Pandemic-Related Jury Service PSA*, IND. LAW. (Oct. 14, 2020), https://www.theindianalawyer.com/articles/marion-superior-court-releases-pandemic-related-jury-service-psa [https://perma.cc/6DP4-CDQR].

49. Niki Kelly & Matthew LeBlanc, *Will Delays Hurt Right to Fair Trial?*, J. GAZETTE (May 17, 2020), https://www.journalgazette.net/news/local/indiana/statehouse/20200517/will-delays-hurt-right-to-fair-trial [https://perma.cc/SNR6-B4KD].

50. *See U.S. & Indiana County Jail Populations During the COVID-19 Pandemic*, IND. U. PUB. POL'Y INST. (June 2020), https://policyinstitute.iu.edu/doc/covid-19-jail-populations.pdf [https://perma.cc/4RAU-EX2R]. Concerns about vulnerable inmates, confined in jails in prisons where social distancing was all but impossible, led to calls for reducing the jail population, which led to a reduction of more than 20%. *Id*.

constitutional right to a speedy trial, and the presumption of innocence, while others are permitted to exercise their constitutional rights defies reason and due process."[51]

V. DISCOVERY ISSUES

The Indiana Court of Appeals rejected a defendant's argument that the trial court wrongly denied the defendant's discovery request of records from the child victim's one-on-one sessions with a social worker.[52] In *Friend v. State*, the child victim had a possible diagnosis of reactive attachment disorder (RAD), which can cause increased dishonesty.[53] However, the court concluded that the records of the child victim's sessions with the social worker were privileged.[54] Judge Crone dissented as to the discovery issue, opining that "the interest in maintaining confidentiality of [the child victim]'s counseling is outweighed by the need for fair administration of justice regarding the truth of [the child victim]'s accusation."[55]

Similarly, in *Norton v. State*, a trial court did not err when it declined to release a complaining witness' mental health records after the trial court reviewed the records *in camera*.[56] Although the defendant contended that the records were material to his defense, the court of appeals reasoned that the defendant could have called the complaining witness to the stand and asked her if she had disclosed to her mental health providers that she was the victim of an intimate crime.[57] In other words, under Indiana Code section 16-39-3-7(1), the defendant did not make a sufficient showing that he had no other reasonable means to obtain the information he sought.[58]

VI. JURY-RELATED ISSUES

The right to be tried by one's peers, rather than a single agent of the state, has deep roots in both federal and Indiana jurisprudence.[59] Exercise or waiver of that right implicates a variety of issues, three of which are discussed below.

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51. Mot. for Speedy Trial, State v. Raftery, No.15D01-2002-F4-000002 (Dearborn Super. Ct. Apr. 20, 2020).

52. Friend v. State, 134 N.E.3d 441, 447 (Ind. Ct. App. 2019), *trans. denied*, 141 N.E.3d 25 (Ind.), *cert. denied*, 141 S. Ct. 162 (2020).

53. *Id.* at 444.

54. *Id.* at 446-47.

55. *Id.* at 452 (Crone, J., concurring and dissenting) (citation omitted).

56. Norton v. State, 137 N.E.3d 974, 985 (Ind. Ct. App. 2019).

57. *Id.*

58. *Id.* at 985-86.

59. *See* Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring); Randall T. Shepherd, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 576-81 (1989).

A. Waiver of Jury Trial Right

In the case of repeat sexual offender and habitual offender enhancements, a defendant must make a personal waiver of the right to trial by jury.[60] In *Young*, the stipulation to the defendant's repeat sexual offender and habitual offender status "established the existence of his prior convictions, [and] established that the prior convictions were unrelated, and . . . was the equivalent of a guilty plea."[61] Moreover, because the defendant did not personally waive his right to a jury trial on the enhancements, the court vacated the enhancements and remanded for a new trial on the enhancements.[62]

B. Batson Challenges

In *Cornell v. State*, the court of appeals reaffirmed that striking less than all of the potential minority jurors does not create a prima facie case of discrimination.[63] In addition, the reason provided by the prosecutor, that the potential juror had previous involvement with the criminal justice system and that he had a son similar in age to the defendant, provided a "sufficiently race-neutral explanation for striking [the potential juror]."[64] Finally, the court noted no evidence to undermine "the demeanor and credibility of the State when it offered its race-neutral explanation."[65]

C. Juror Misconduct

The Indiana Supreme Court denied transfer by a three to two vote in *Jones v. State*, where the trial court denied a joint request by the State and defendant for a mistrial when a juror had unauthorized contact with a member of the defendant's family.[66] In his dissenting opinion from the denial of transfer, Justice David explained that Jones met the two-prong presumption in *Ramirez*,[67] and the State did not rebut the presumption of prejudice—in fact, the State agreed that a mistrial was the proper remedy, even after the trial court questioned the jurors

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60. *See* Young v. State, 143 N.E.3d 965 (Ind. Ct. App. 2020).

61. *Id.* at 970.

62. *Id.* at 971.

63. Cornell v. State, 139 N.E.3d 1135, 1141-42 (Ind. Ct. App. 2020); *see* Hardister v. State, 849 N.E.2d 563, 576 (Ind. 2006) ("A prima facie showing requires the defendant to show that peremptory challenges were used to remove members of a cognizable racial group from the jury pool and that the facts and circumstances raise an inference that the removal was because of race.").

64. *Cornell*, 139 N.E.3d at 1142.

65. *Id.* at 1143.

66. Jones v. State, 131 N.E.3d 183, 184 (Ind. 2019).

67. The *Ramirez* Court clarified the analysis for potential instances of juror misconduct: "Defendants are entitled to a rebuttable presumption of prejudice when they can show by a preponderance of the evidence that an unauthorized, extra-judicial contact or communication with jurors occurred, and that the contact or communication pertained to the matter before the jury." Ramirez v. State, 7 N.E.3d 933, 934 (Ind. 2014).

individually.[68]

VII. JURY INSTRUCTIONS

Cases involving instructional error, especially when finding flaws in pattern instructions used widely across the state, are among the most impactful decisions. Four notable cases of instructional error are reviewed below.

A. Commission of a Crime During Self-Defense

Indiana's self-defense statute instructs that a person cannot use force defending himself if he, among other things, "is committing . . . a crime."[69] Two decades ago, the supreme court held in *Mayes v. State* that it would not strictly apply that statute because "[t]he legislature is presumed to have intended the language used in the statute to be applied logically and not to bring about an unjust or absurd result."[70] Instead, the court required "there must be an immediate *causal connection* between the crime and the confrontation."[71]

In *Gammons v. State*, the trial court told the jury the defendant could not assert self-defense if he was "committing a crime that [wa]s directly and immediately *related to* the confrontation."[72] The supreme court held the instruction, which was based on Pattern Jury Instruction 10.0300, "was an imprecise statement of law."[73] It explained:

> By instructing that the crime and confrontation must merely be "directly and immediately related," the instruction weakened the causal connection required to preclude a claim of self-defense. While the pattern instruction uses the word "connected" instead of "related," we view the court's slight word revision as a distinction without a difference.[74]

Although relying heavily on its earlier precedent, the Indiana Supreme Court refined it and went a step further, noting:

> Justice Boehm's concurrence in [the earlier case] presaged this diminution of the standard, warning that the Court—by rephrasing that "the evidence must show that **but for** the defendant committing a crime, the confrontation resulting in injury to the victim would not have occurred"—left open circumstances where a "defendant should be free to claim self-defense."[75]

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68. *Jones*, 131 N.E.3d at 186 (David, J., dissenting).

69. IND. CODE § 35-41-3-2 (2021).

70. Mayes v. State, 744 N.E.2d 390, 393 (Ind. 2001) (citation omitted).

71. *Id.* at 394 (emphasis added).

72. Gammons v. State, 148 N.E.3d 301, 304 (Ind. 2020) (supreme court's emphasis) (citation omitted).

73. *Id.*

74. *Id.*

75. *Id.* (quoting *Mayes*, 744 N.E.2d at 394 (emphasis in original), 397 (Boehm, J.,

Agreeing with Justice Boehm that the "'but for' test is too broad" and "could foreclose the defense in an instance where a defendant's crime was tenuously connected with the confrontation," the *Gammons* opinion noted that test could "impede the defense in the same unjust and absurd ways as a literal reading of the statute."[76] The court concluded instead that "self-defense is barred only when there is an immediate causal connection between the crime and the confrontation."[77]

Many instructional errors do not require a new trial, and the court of appeals found any instructional error harmless because Gammons shot an unarmed man "eight times, hitting him six times, some of which entered through his back and buttocks."[78] The supreme court disagreed, noting, "Because Gammons asserted that he fired the shots only until [the aggressor] retreated, we cannot be sure that the trial's outcome would have been the same under a proper instruction and presume this error affected the verdict."[79] After summarizing earlier Indiana cases involving shots fired, the court drew the line at "shooting at an incapacitated or defenseless victim."[80] Relying on the defendant's "account of the events leading up to the confrontation, [the court could not] say with certainty that the jury would have convicted Gammons without hearing the erroneous instruction."[81]

B. Negligence Instruction in Criminal Recklessness Prosecution

In *New v. State*, the trial court refused to give the defendant's tendered jury instruction on negligence during his trial for criminal recklessness.[82] The main theory of defense at trial was that she backed her vehicle into the victim by accident.[83] "A criminal defendant is entitled to have a jury instruction on 'any theory or defense which has some foundation in the evidence.'"[84] Her theory of mere negligence had some foundation in the evidence and could have led to her acquittal; therefore, she was entitled to a jury instruction on the theory of negligence.[85]

Simply allowing "counsel to argue that what she did was negligent rather than reckless was an inadequate substitute for an instruction from the trial court

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concurring)).

76. *Id.* (quoting *Mayes*, 744 N.E.2d at 396 (Boehm, J., concurring)).

77. *Id.* at 304-05 (quoting *Mayes*, 744 N.E.2d at 394 (majority opinion)).

78. Gammons v. State, 136 N.E.3d 604, 613 (Ind. Ct. App. 2019), *vacated*, 148 N.E.3d 301 (Ind. 2020).

79. *Gammons*, 148 N.E.3d at 305.

80. *Id.* at 306.

81. *Id.*

82. New v. State, 135 N.E.3d 619, 622-23 (Ind. Ct. App. 2019).

83. *Id.* at 624.

84. *Id.* (quoting Hernandez v. State, 45 N.E.3d 373, 376 (Ind. 2015) (quoting Toops v. State, 643 N.E.2d 387, 389 (Ind. Ct. App. 1994))).

85. *Id.*

explaining the concept."[86] Therefore, she was entitled to a new trial on the criminal recklessness charge.[87]

C. Second Admonishment Not Required

A second admonishment need not be given concerning juror discussions of the case when there are no intervening trial proceedings between the reading of the preliminary instructions and when the court excuses the jury for lunch.[88] Although Indiana Code section 35-37-2-4(a) requires trial courts give an admonishment that limits juror discussions of the case "in the preliminary instruction, before separating for meals, and at the end of the day," the court noted that the trial judge "effectively killed two birds with one stone" because the court excused the jury for lunch immediately following the preliminary instructions.[89]

D. Specific Nature of Prior Felony in SVF Instructions

Although not technically a jury instruction case, in *McAnalley v. State*,[90] the defendant, who was on trial for unlawful possession of a firearm by a serious violent felon, offered to stipulate to his status as a person who could not lawfully possess a firearm.[91] Instead of accepting the stipulation, the trial court instructed the jury on the specific nature of the prior felony (robbery) and admitted evidence of the prior robbery.[92]

The court of appeals agreed with the defense's concern that repeated references to the earlier robbery conviction likely influenced jurors to believe unfairly that the defendant, and not someone else, constructively possessed the handgun.[93] The better practice is to follow the U.S. Supreme Court's holding in *Old Chief v. United States*[94] (to accept the stipulation) and the Indiana Supreme Court opinion in *Russell v. State*,[95] which "affirmed the trial court's partial bifurcation of the defendant's case to allow the jury to make the initial determinations of whether Russell had committed murder and whether he committed the non-existent offense of possessing the firearm."[96] Judge Bradford concurred in the result because he "do[es] not believe bifurcation is a better or

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86. *Id.*

87. *Id.*

88. Cruz Rivera v. State, 127 N.E.3d 1256, 1259 (Ind. Ct. App. 2019).

89. *Id.* at 1258 (quoting IND. CODE § 35-37-2-4(a) (2021)).

90. McAnalley v. State, 134 N.E.3d 488 (Ind. Ct. App. 2019), *trans. denied*, 145 N.E.3d 33 (Ind. 2020).

91. *Id.* at 507.

92. *Id.*

93. *Id.* at 509.

94. Old Chief v. United States, 519 U.S. 172 (1997).

95. Russell v. State, 997 N.E.2d 351 (Ind. 2013).

96. *McAnalley*, 134 N.E.3d at 512.

necessary practice when a defendant is only charged with SVF."[97]

VIII. CRIME OR NOT A CRIME

Indiana's appellate courts decided several cases regarding the sufficiency of evidence for a variety of criminal charges. This section summarizes an Indiana Supreme Court opinion that serves as the latest installment in reviewing challenges to the rejection of the insanity defense despite unanimous expert testimony. It then turns to court of appeals cases that found insufficient evidence, and finally a few that found sufficient evidence.

A. Another 3-2 Insanity Opinion

Under the affirmative defense of insanity, "[a] person is not responsible for [his] conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense."[98] When a defendant raises insanity, the trial court must appoint two or three psychiatrists, psychologists, or physicians to examine the defendant and testify at trial.[99]

In the face of unanimous expert opinion of insanity, juries or judges sometimes find defendants Guilty But Mentally Ill ("GBMI"). As Judge Baker wrote nearly two decades ago,

> *Barany* [*v. State*, 658 N.E.2d 60 (Ind. 1995),] has made it very difficult even for defendants with well-documented mental illnesses to successfully raise the insanity defense. Under the rule of *Barany*, even if all expert testimony regarding a defendant's state of mind points to the fact that the defendant could not have appreciated the wrongfulness of his actions *at the time of a crime*, the jury is free to disregard the experts' opinions in favor of lay evidence of the defendant's demeanor before and after the crime.[100]

Consistent with that view, *Thompson v. State* affirmed a GBMI bench verdict, noting "a finder of fact is entitled to decide whether to credit the opinions of experts on insanity."[101]

Appellate challenges to GBMI verdicts have generated three 3-2 opinions in the past decade. A bench verdict of GBMI was reversed in *Galloway v. State*, where the court observed: "Despite nonconflicting expert and lay opinion testimony [the Defendant] was insane, the trial court rejected the insanity defense after concluding that the defendant could continue to be a danger to society because of an inadequate State mental health system."[102]

More recently, a three-justice majority in *Barcroft v. State* affirmed the

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97. *Id.* at 513 (Bradford, J., concurring).
98. IND. CODE § 35-41-3-6(a) (2021).
99. *Id.* § 35-36-2-2(b).
100. Moler v. State, 782 N.E.2d 454, 458 (Ind. Ct. App. 2003).
101. Thompson v. State, 804 N.E.2d 1146, 1147 (Ind. 2004).
102. Galloway v. State, 938 N.E.2d 699, 703 (Ind. 2010).

defendant's GBMI conviction for murder, citing her "deliberate, premeditated conduct in the weeks and days leading up to the crime," along with her efforts to avoid detection of her criminal conduct during and after the crime.[103] This "evidence of Barcroft's demeanor—taken together with the flaws in the expert opinion testimony and the absence of a well-documented history of mental illness—was sufficient to support an inference of sanity."[104]

Justice Goff wrote the dissenting opinion in *Barcroft* but authored the majority opinion in *Payne v. State*,[105] which was joined by Chief Justice Rush and Justice David—both of whom dissented in *Barcroft*. The majority distinguished "Barcroft's sparse medical record," from "Payne's long history of mental illness [that was] consistent and thoroughly documented."[106] Coupled with unanimous expert opinion of insanity, Payne's consistently documented record "fully undermines the probative value of any relevant demeanor evidence" and left "no 'reasonable [or] logical' inferences to draw from the evidence in support of the verdict."[107]

In dissent, Justice Massa, joined by Justice Slaughter, concluded:

> [the majority] discounts the evidence of Payne's demeanor, elevates the documentation of his mental illness, reweighs the conflicting evidence, and supplants the factfinder's determination. I fear the Court's opinion, by flouting our standard of review, quiets the immutable trust we place in factfinders and permits appellate courts to inconsistently establish rejected insanity defenses.[108]

B. Insufficient Evidence

1. Not a Rubber Stamp.—Acknowledging that it "seldom reverse[s] for insufficient evidence," in *Webb v. State*, the court of appeals reiterated the "deferential" standard of review is not a "rubber stamp."[109] After an exhaustive review of the evidence at trial, the court vacated Level 2 and 3 felony attempted robbery charges based on

> discrepancies in the evidence about Webb's car and hair, the lack of physical evidence connecting Webb to the offenses, the fact that [the victim] never identified Webb as the shooter, the vague text messages, and the fact that the [cell phone] location information does not establish

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103. Barcroft v. State, 111 N.E.3d 997, 1005 (Ind. 2018).

104. *Id.* at 1008.

105. Payne v. State, 144 N.E.3d 706 (Ind. 2020).

106. *Id.* at 712.

107. *Id.* at 713 (quoting Thompson v. State, 804 N.E.2d 1146, 1149 (Ind. 2004) (alteration in original)).

108. *Id.* at 715 (Massa, J., dissenting).

109. Webb v. State, 147 N.E.3d 378, 386-87 (Ind. Ct. App.), *trans. denied*, 152 N.E.3d 595 (Ind. 2020).

that Webb was the shooter[.][110]

2. Trespass Conviction Reversed.—In *Kifer v. State*, a building authority manager banned a man from a building that houses government agencies at the direction of officials.[111] Several years later, the man entered the building to file a police report.[112] The court of appeals reversed his conviction for criminal trespass, reiterating an "agent's own statement that he could act as an agent is insufficient, 'more is required.'"[113] The court explained that "the general manager employed by the Building Authority . . . is not the agent of judicial officers, law enforcement officials, or elected department heads and therefore cannot derive his authority from them, absent a specific court order."[114] As a matter of first impression, the court explained it would be "unreasonable to construe the trespass statute to allow a citizen to be permanently and perpetually banned from the premises of a public building intended to serve the community and which housed several facilities that citizens need to access intermittently in the operation of daily life."[115]

3. Home Improvement Fraud.—In *Reust v. State*, the court of appeals reversed a home improvement fraud conviction because the "plain language of the statutes defining home improvement and dwelling require the consumer to live in the dwelling at the time of the home improvement," which did not "conflict with the statutory exemption for new construction."[116] The owners of a home being built had hired Reust to provide landscaping services.[117] Reust did not complete the project, nor did he return any of the $20,000 the owners paid him.[118] The court reasoned that reversal was proper because the landscaping was to be done on a new home construction site, and since the new home construction was not residential property because the owners were not living "in the dwelling at the time of the home improvement," Reust's landscaping was "not an alteration, repair, or modification of residential property."[119]

4. Turn Signals not Required in Roundabouts.—In *State v. Davis*, the Indiana

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110. *Id.* at 387.

111. Kifer v. State, 137 N.E.3d 990, 991 (Ind. Ct. App. 2019).

112. *Id.*

113. *Id.* at 993 (quoting Glispie v. State, 955 N.E.2d 819, 822 (Ind. Ct. App. 2011)).

114. *Id.*

115. *Id.* at 994. In a footnote, the court "decline[d] to address whether a permanent ban can be in place with the specification that access to the building is possible upon advance notice or by request for an escort at the entrance." *Id.* at 994 n.3.

116. Reust v. State, 139 N.E.3d 1056, 1061 (Ind. Ct. App. 2019).

117. *Id.* at 1057-59.

118. *Id.*

119. *Id.* at 1061-63. The court upheld Reust's conviction for theft, noting that "it is possible for a defendant to be properly charged with one of [theft or home improvement fraud] instead of the other. It follows that it is appropriate for us to find the evidence insufficient on the home improvement fraud conviction, while finding the evidence sufficient to support the theft conviction." *Id.* at 1065-66.

Court of Appeals agreed that a defendant did not violate the turn signal statute when exiting a roundabout without using a turn signal.[120] After first agreeing with the State that a driver need not use a turn signal when entering a roundabout, the court observed that "our current turn signal statute is completely unworkable in" the context of exiting a roundabout.[121] Moreover, it was not objectively reasonable for the police officer to believe the defendant violated the turn-signal statute, and so the trial court correctly suppressed the results of the search of the vehicle, which had yielded methamphetamine, paraphernalia, and an operating while intoxicated charge.[122]

C. Sufficient Evidence

1. Stalking.—The Indiana Supreme Court clarified in *Falls v. State* that a stalking conviction may be sustained "by conduct that is purely continuous in nature," and need not also be repeated.[123] In *Falls*, the defendant followed the victim in her car for more than two and a half hours, including twice to the police station.[124] Noting that the court of appeals has decided at least two cases where the defendant's conduct was not "repeated,"[125] the *Falls* court explained that although the defendant's conduct may not have been "repeated," it certainly was "continuing harassment."[126]

2. Pellet Gun Is a "Deadly Weapon".—The use of a deadly weapon enhances many criminal charges and includes a device that "(A) is used; (B) could ordinarily be used; or (C) is intended to be used" in a manner that "is readily capable of causing serious bodily injury."[127] *Davis v. State* explained whether a weapon is a "deadly weapon" is determined from its description, the manner of its use, and the circumstances of the case.[128] And *Whitfield v. State* held that a disabled pellet gun is a "deadly weapon" because "pellet guns are virtually indistinguishable from the real caliber guns," and the victim in that case "was so frightened that he could hardly speak."[129]

Building on those authorities, during the survey period in *Moore v. State*, the court of appeals found substantial evidence of probative value that a man's pellet gun was a deadly weapon when (1) he put the gun to his mother's temple when he told her that he was going to shoot her, and (2) witnesses including a police

120. State v. Davis, 143 N.E.3d 343, 346 (Ind. Ct. App. 2020).

121. *Id.* at 347-48.

122. *Id.* at 349-50.

123. Falls v. State, 131 N.E.3d 1288, 1290-91 (Ind. 2019).

124. *Id.* at 1290.

125. C*ompare* C.S. v. T.K., 118 N.E.3d 78 (Ind. Ct. App. 2019), *with* S.B. v. Seymour Cmty. Sch., 97 N.E.3d 288, 295-96 (Ind. Ct. App. 2018).

126. *Falls*, 131 N.E.3d at 1290-91.

127. IND. CODE § 35-31.5-2-86(a)(2) (2021).

128. Davis v. State, 835 N.E.2d 1102, 1112 (Ind. Ct. App. 2005).

129. Whitfield v. State, 699 N.E.2d 666, 671 (Ind. Ct. App. 1998).

officer initially believed the pellet gun was a real gun.[130]

3. Force Must Have Nexus.—In *Olson v. State*, the Indiana Court of Appeals reaffirmed that the "force" element in a robbery charge must have a nexus to the taking.[131] The court affirmed the denial of a motion to dismiss filed by the defendants charged with robbing a convenience store when the defendants allegedly took cigars and then attacked a clerk in the parking lot.[132]

4. Failure to Register Vehicle Information.—Applying the objective reasonableness standard to the requirement that a sex offender must register vehicle information for a vehicle that the offender "operates on a regular basis," the court of appeals rejected a defendant's argument in a motion to dismiss that the statute was void for vagueness.[133] Noting that "due process does not require perfect statutory precision,"[134] the court reasoned that "a reasonable person would have considered [the defendant]'s failure to register the information for the vehicle he operated to have put him at risk under the statute" when he used the truck for five consecutive days to haul scrap metal and help a third party move.[135]

IX. DOUBLE JEOPARDY

For the past two decades, challenges involving "multiple punishment" were recognized as a distinct brand of double jeopardy claim under the Indiana Constitution.[136] In August 2020 in *Wadle v. State*, the Indiana Supreme Court overruled two decades of "constitutional tests in resolving claims of substantive double jeopardy," replacing it with "an analytical framework that applies the statutory rules of double jeopardy."[137] The case is discussed in the Indiana constitutional law survey article,[138] but double jeopardy is no longer of constitutional dimension.[139] The baton (or hot potato?) has been passed and will be part of the criminal law survey going forward.

Wadle is likely the most impactful criminal case of the year. Potential limitations on multiple punishments are crucial issues for trial lawyers seeking to resolve cases and for judges at sentencing. Published opinions from the court of appeals in the six weeks following *Wadle* shed some light on its potential reach.

Two early cases suggest that Justice Sullivan's concurring opinion in

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130. Moore v. State, 137 N.E.3d 1034, 1037 (Ind. Ct. App. 2019).

131. Olson v. State, 135 N.E.3d 988, 993 (Ind. Ct. App. 2019).

132. *Id.*

133. McClernon v. State, 139 N.E.3d 1104, 1111 (Ind. Ct. App. 2019).

134. *Id.* at 1108.

135. *Id.* at 1109.

136. *See* Richardson v. State, 717 N.E.2d 32 (Ind. 1999).

137. Wadle v. State, 151 N.E.3d 227, 235 (Ind. 2020).

138. Scott Chinn, Daniel E. Pulliam, & Stephanie Gutwein, *Practicing Pragmatism During a Pandemic: Indiana's Appellate Courts Practically Apply Indiana's Constitution in 2020*, 54 IND. L. REV. (forthcoming 2021).

139. *Wadle*, 151 N.E.3d at 235.

Richardson,[140] which set forth five categories of double jeopardy and was applied in a subsequent majority opinion in *Guyton v. State*,[141] may remain viable. First, in *Rowland v. State*, Senior Judge Rucker applied the new *Wadle* framework and found no violation because possession of marijuana and possession of paraphernalia were not included offenses under the included offense statute or as charged.[142] But the opinion did not stop there, noting that *Wadle* "appears to have left undisturbed the 'long adhered to . . . series of rules of statutory construction and common law that are often described as double jeopardy but are not governed by the constitutional test set forth in *Richardson*.'"[143] The panel found no violation of one of those rules, "the very same act test," because the evidence at trial suggested "any marijuana found in the pipes was separate and distinct from the additional marijuana found in the car."[144]

Largely avoiding *Wadle* and also relying on "common law double jeopardy jurisprudence," the court of appeals accepted the State's concession that a defendant could not be convicted both of "Class A misdemeanor reckless driving for passing a school bus when its arm signal device was extended causing bodily injury and Level 6 felony criminal recklessness" arising from the same act with the same victim.[145] These cases signal that all five categories from the Sullivan concurring opinion in *Richardson* remain viable after *Wadle*, a view that has some support in the limited language overruling only "the constitutional test" of *Richardson*, albeit with limiting language about the continued vitality of some sources cited by Justice Sullivan.[146]

Other cases, however, relied only on the *Wadle* test, suggesting the Sullivan categories are no longer viable. *Barrozo v. State* found included offenses were not implicated because reckless driving requires operating a vehicle in a reckless manner, thereby endangering others and causing the bodily injury, but "leaving the scene of an accident merely requires that the defendant's vehicle was involved in an accident (he need not have caused the accident or the bodily injury) and that the defendant then left the scene of the accident without providing his identifying information, among other things."[147]

Two convictions for reckless driving, however, could not stand under the companion case to *Wadle*, which applies to multiplicity—charging a single offense in multiple counts.[148] Unlike some crimes that explicitly allow multiple convictions if there are multiple victims, reckless driving "occurs—and may be punished—only once, because the unit of prosecution is the act of reckless

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140. *Richardson*, 717 N.E.2d at 55-57 (Sullivan, J., concurring).

141. Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002).

142. Rowland v. State, 155 N.E.3d 637, 640 (Ind. Ct. App. 2020).

143. *Id.* (quoting Pierce v. State, 761 N.E.2d 826, 830 (Ind. 2002)).

144. *Id.* at 641.

145. Shepherd v. State, 155 N.E.3d 1227, 1240-41 (Ind. Ct. App.), *trans. denied*, 160 N.E.3d 514 (Ind. 2020).

146. Wadle v. State, 151 N.E.3d 227, 235, 244, 247 n.20 (Ind. 2020).

147. Barrozo v. State, 156 N.E.3d 718, 724 (Ind. Ct. App. 2020) (emphasis omitted).

148. *Id.* at 725 (applying Powell v. State, 151 N.E.3d 256 (Ind. 2020)).

driving."[149]

X. SENTENCING

Sentencing challenges come in many forms and are among the most common issues raised on appeal. This section begins with a potent statutory protection that limits sentences arising from multiple non-violent offenses that were part of a single criminal episode and then turns to cases applying the unique prerogative of Indiana appellate courts to review and revise "inappropriate" sentences under Appellate Rule 7(B).[150]

A. Episode of Criminal Conduct

Indiana Code section 35-50-1-2 limits consecutive sentences for non-violent offenses "arising out of an episode of criminal conduct."[151] An "episode of criminal conduct" is "offenses or a connected series of offenses that are closely related in time, place, and circumstance."[152] In *Edwards v. State*, the court of appeals acknowledged a split among panels regarding this statutory limitation as applied to possession crimes.[153] Distilling that precedent, it concluded: "In cases where a nexus does exist between a possession crime and another offense is committed while the possession continues, it is appropriate to find that the crimes are connected in time, place, and circumstance."[154] But "in cases where the illegal possession at issue is completely passive and has no relation in circumstance with other continuing, illegal possessions, . . . the act of acquisition . . . should be used to evaluate whether those offenses were part of an episode of criminal conduct."[155]

The defendant, who was convicted of ten counts of possession of child pornography in *Edwards*, secured a reduction because the offenses were part of a single episode of criminal conduct: "Common sense dictates that the simultaneous, or near-simultaneous, acquisition of several of the images would most likely constitute a single episode of criminal conduct, while the acquisition of the same images separately over the course of several days, weeks, or months would most likely not."[156] Because the State sought imposition of a harsher penalty, the State bore the burden to produce evidence but failed to prove acquisition of images during more than one episode of conduct.[157]

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149. *Id.* at 728.
150. IND. R. APP. P. 7(B).
151. IND. CODE § 35-50-1-2(c), (d) (2021).
152. *Id.* § 35-50-1-2(b).
153. Edwards v. State, 147 N.E.3d 1019, 1022 (Ind. Ct. App. 2020)
154. *Id.* at 1024-25.
155. *Id.* at 1025.
156. *Id.*
157. *Id.* at 1026.

B. Appellate Rule 7(B)

1. Waiver of the Right to Appeal.—More than a decade ago in *Creech v. State*, the Indiana Supreme Court held that defendants may waive their right to appeal when the waiver is made knowingly and voluntarily.[158] The court found a valid waiver where the plea agreement specifically waived the "right to appeal [his] sentence."[159] Subsequent opinions have generally upheld waivers, except in cases with conflicting advisements from the trial court during the guilty plea.[160]

For example, the plea agreement in *Johnson v. State* granted the trial court full discretion as to the sentence and included the following provision: "DEFENDANT WAIVES RIGHT TO APPEAL AND POST CONVICTION RELIEF."[161] The per curiam opinion held the general language waiving Johnson's "right to appeal" was "insufficiently explicit to establish a knowing and voluntary waiver," "particularly when contained in the same sentence as an unenforceable waiver of post-conviction relief."[162] Justice Slaughter dissented and "would expressly adopt the court of appeals' opinion,"[163] which found "no ambiguity in the plea agreement"; "if this provision is to mean anything, it must mean that Johnson waived the right to appeal his sentence, as he waived the right to appeal his conviction by the very act of pleading guilty."[164]

Many criminal cases like *Johnson* are resolved by plea agreements that include a purported waiver of the right to challenge a sentence; other plea agreements do not include such a provision, some defendants plead guilty without an agreement, and, occasional cases, like *McHenry v. State*,[165] involve a muddled process that must be sorted out on appeal. There, a plea agreement to two Level 4 felony child molesting counts limited the trial court sentencing to "the statute outlining the maximum and minimum penalties for a Level 4 felony."[166] The written agreement advised the defendant of the "right to appeal the sentence imposed after entering an open plea [but] erroneously characterized [his] plea as not an open plea."[167] Moreover, the trial court advised the defendant of the right

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158. Creech v. State, 887 N.E.2d 73, 74 (Ind. 2008),

159. *Id.* at 74-75.

160. *See, e.g.*, Ricci v. State, 894 N.E.2d 1089, 1093 (Ind. Ct. App. 2008) ("Unlike *Creech*, the trial court here clearly and unambiguously stated *at the plea hearing* that it read the plea agreement and that, according to its reading of the agreement, Ricci had not surrendered the right to appeal his sentence. Neither the prosecutor nor the defense attorney contradicted this statement." (emphasis in original) (footnote omitted)).

161. Johnson v. State, 145 N.E.3d 785, 786 (Ind. 2020).

162. *Id.* at 787.

163. *Id.*

164. Johnson v. State, 140 N.E.3d 854, 864 (Ind. Ct. App. 2019), *trans. granted*, 145 N.E.3d 785 (Ind. 2020).

165. McHenry v. State, 152 N.E.3d 41 (Ind. Ct. App. 2020).

166. *Id.* at 46.

167. *Id.*

to appeal at the end of the hearing, and the State did not object.[168] Consistent with an earlier decision, the court rejected the State's argument that the plea was not open simply because another count had been dismissed and denied its request to dismiss the appeal.[169]

2. Reductions for Drug Offenses and to a Prosecutor's Request.—As discussed in previous survey articles, the current justices have shown little inclination to reduce sentences in cases with child victims but have instead limited the one or two reductions each year, generally to cases involving young defendants, drug-related crimes, or defendants suffering from serious mental illness.[170]

In the drug-related offense category, the most recent installment involves a relatively young defendant sentenced to 24½ years for dealing meth: 18 years—16 years executed and 2 years suspended—on each of three Level 2 counts in a controlled buy case, which was consecutive to 6½ years—4 years executed and 2½ years suspended—for a Level 4 case arising from a traffic stop.[171]

Appellate Rule 7(B) mentions both "the nature of the offense and the character of the offender."[172] However, the short per curiam opinion focused on the latter, noting the twenty-one-year-old defendant had a difficult childhood and early adulthood:

> She was exposed to a culture of drug use and dealing at a young age and began using illegal drugs at 14, when a relative forcibly injected her with heroin. Mullins was also physically and sexually abused from a very young age. At 17, she spent a short time in a treatment center for mental health, substance abuse, and addiction issues.
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> Mullins married at 18. Shortly thereafter, she and her husband became homeless, often staying temporarily with acquaintances from the drug scene. During that time, she continued to be the victim of physical and sexual abuse. Mullins has been diagnosed with significant mental health issues that have gone largely untreated. Mullins's criminal history is not violent and includes two previous drug-possession convictions and an outstanding warrant for auto theft from early 2016.[173]

Under these circumstances, the majority ordered that Mullins serve her sentences concurrently for an aggregate sentence of eighteen years.[174] Justice

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168. *Id.*

169. *Id.* at 45-46 (relying on Williams v. State, 51 N.E.3d 1205 (Ind. Ct. App. 2016)). The court rejected the 7(B) claim based on both the nature of the offense, including a position of trust, and character of the offender (juvenile history and a probation violation). *Id.*

170. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 51 IND. L. REV. 1015, 1030 (2018).

171. Mullins v. State, 148 N.E.3d 986, 987 (Ind. 2020).

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

173. *Mullins*, 148 N.E.3d at 987.

174. *Id.* at 987-88.

Slaughter dissented without a separate opinion, "believing transfer should be denied."[175] In a recent case, he expressed the view, "[o]nce we conclude a challenged sentence was legal, I would stop there and not expend our limited resources substituting our collective view of what sentence is appropriate for that of the trial judge."[176]

The court of appeals also reduced a sentence in a drug prosecution, relying on a long line of cases that sometimes mention Rule 7(B).[177] Beginning with *Beno v. State*, the Indiana Supreme Court has held it impermissible to order consecutive sentences for drug dealing convictions that were based on nearly identical State-sponsored sales to a police informant as part of an ongoing sting.[178] Relying on *Beno* and more recent cases, the court of appeals ordered concurrent terms in *Davis v. State*, because the defendant "was enticed by the police to make drug sales as part of a sting operation," even though "the drug buys happened over two years apart" and involved two different drugs (heroin and methamphetamine).[179]

In another case, *Jackson v. State*, the supreme court reduced a sentence for a fifty-two-year-old man who had led a law-abiding life.[180] He was convicted of rape despite his claim of consent of a "moderately intellectually handicap[ped]" victim and sentenced to thirty-six years in prison, which established a release date when he would be seventy-nine years old.[181] Rather than minimizing the nature of the offense, the court focused on the prosecutor's recommendation of "the advisory sentence of nine years for each of the three counts" (for a total of twenty-seven years) and "did not object to a split sentence with part of that time served on probation."[182] Consistent with that recommendation, the Indiana Supreme Court reduced the sentence under Appellate Rule 7(B) to twenty years in prison with seven years on probation.[183] *Jackson* will likely be cited in the future when trial courts impose a sentence higher than the one requested by the prosecutor. Although not cited in *Jackson*, an earlier opinion embraced the same idea.[184] Again, Justice Slaughter dissented, with the vote line simply noting he believed transfer should be denied.[185]

However, in *McCain v. State*, a unanimous Indiana Supreme Court upheld a forty-five-year sentence for voluntary manslaughter.[186] Finding the "character of

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175. *Id.* at 988.

176. Faith v. State, 131 N.E.3d 158, 160-61 (Ind. 2019) (Slaughter, J., dissenting).

177. Eckelbarger v. State, 51 N.E.3d 169, 170 (Ind. 2016).

178. Beno v. State, 581 N.E.2d 922, 924 (Ind. 1991).

179. Davis v. State, 142 N.E.3d 495, 507 (Ind. Ct. App. 2020).

180. Jackson v. State, 145 N.E.3d 783, 784 (Ind. 2020).

181. *Id.*

182. *Id.*

183. *Id.* at 785.

184. *See* Akard v. State, 937 N.E.2d 811, 814 (Ind. 2010) (declining to increase a sentence on appeal "particularly in the context of the State's request for no greater sentence at trial and its assertion on appeal that such is an appropriate sentence").

185. *Jackson*, 145 N.E.3d at 785.

186. McCain v. State, 148 N.E.3d 977, 979 (Ind. 2020).

the offender weigh[ed] heavily in favor of an enhanced sentence," the court focused on the defendant's "extensive history of felony and misdemeanor convictions—though non-violent" and "his Facebook post showing a desire for violent conflict."[187] The nature of the offense—"a point-blank shooting of a complete stranger in a crowded fast-food restaurant after getting into an argument because someone looked at him sideways" also weighed "heavily in favor of an enhanced sentence."[188]

3. One Prong or Two?: A Request for Clarity.—By its very nature, the wide-ranging review for "inappropriateness" under Appellate Rule 7(B) would be expected to produce some variations among judges. The court of appeals opinion in *Turkette v. State*[189] highlights two lingering areas of concern. First, the opinion expressed the prevailing view that "Rule 7(B) requires us to consider both the nature of the offense and the character of the offender"; defendants are "not required to prove . . . each of those prongs independently."[190] Although a few cases have required defendants prove both, *Turkette* reiterated "the two prongs are separate inquiries that we ultimately balance to determine whether a sentence is inappropriate."[191]

In a lengthy footnote, the panel also took issue with considering "the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence was inappropriate."[192] *Anglemyer v. State* reiterated that the Indiana Constitution and Rule 7(B) allow for an "independent" review of a sentence, even when "the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence that is supported by the record, and the reasons are not improper as a matter of law."[193] In a concurring opinion, Judge Bailey observed:

> Because the "initial guidance" language might be read to suggest that we consider the trial court's sentencing statement as a pronouncement of findings and conclusions, perhaps in some manner constraining our 7(B)

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187. *Id.* at 985.

188. *Id.* Although it addressed a 7(B) claim unresolved by the court of appeals, the Indiana Supreme Court's primary motivation for taking the case was to reject the claim that the trial court's comments that the manslaughter verdict was "a gift" and that the evidence presented "the cleanest cut video I have ever seen of my impression of murder"—were "evidence that the judge improperly imposed his own beliefs during sentencing." *Id.* at 981-82. That analysis offers limited guidance for future cases because "examining a judge's sentencing decision for impermissible motives is a highly fact specific inquiry," and the comments came "very close to the line" but did not cross it in light of an extensive and unique "record as a whole." *Id.* at 983.

189. Turkette v. State, 151 N.E.3d 782 (Ind. Ct. App.), *trans. denied*, 157 N.E.3d 528 (Ind. 2020).

190. *Id.* at 786 (citation omitted).

191. *Id.* (citation omitted).

192. *Id.* at 787 n.5 (quoting Reis v. State, 88 N.E.3d 1099, 1105 (Ind. Ct. App. 2017)).

193. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007).

> review akin to a search for clear error, I agree that we are not well served by continuing to repeat it.[194]

He also agreed with the majority that 7(B) review requires a balancing instead of proving both prongs but concluded, "we await and invite further guidance from our Supreme Court."[195]

As to the first issue involving the two prongs of 7(B), the *Mullins* case discussed above[196] and other Indiana Supreme Court cases offer implicit guidance that defendants must establish only one prong to warrant a reduction.[197] Perhaps most supportive of this approach, in *Hamilton v. State*, the Indiana Supreme Court reduced a sentence when the defendant argued only one prong, noting "[h]e does not call our attention to any aspects of his character that argue for a reduction in his sentence."[198]

Second, as to the "initial guide" language, conducting an "independent appellate review," the appellate court must necessarily consider the same essential facts considered by the trial court.[199] When considering the "character of the offender," appellate courts must consider such things as prior criminal history, age, and mental health issues—all of which were hopefully carefully weighed by the trial court.[200] But even when a trial court "thoughtfully considered the mitigating and aggravating circumstances in reaching its sentencing decision," revision may be warranted as part of an appellate court's "independent review."[201]

In assessing the nature of the offense, an appellate court brings a broader perspective. What one trial judge may remark is "the worst" burglary or robbery she has ever seen in imposing a maximum sentence, may not be similarly viewed by appellate judges based on their years of reviewing criminal cases on appeal (and often decades of trial experience before their appellate service). Appellate courts have long been tasked with bringing a fresh perspective, reviewing the

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194. *Turkette*, 151 N.E.3d at 790 (Bailey, J., concurring).

195. *Id.*

196. *See supra* notes 171-75 and accompanying text.

197. Mullins v. State, 148 N.E.3d 986, 987 (Ind. 2020) (focusing on the defendant's difficult childhood and adulthood, substance abuse issues, and non-violent criminal history); Wampler v. State, 67 N.E.3d 633, 635 (Ind. 2017) (focusing on the defendant's mental illness and "the strength of Judge Mathias's dissent" about mental illness); Eckelbarger v. State, 51 N.E.3d 169, 170 (Ind. 2016) (focusing on the nature of the drug offenses grounded in evidence seized pursuant to a warrant arising from evidence of a controlled buy); Connor v. State, 58 N.E.3d 215, 218-19 (Ind. Ct. App. 2016) (citing additional examples from the Indiana Court of Appeals); Denham v. State, 142 N.E.3d 514, 517 (Ind. Ct. App.), *trans. denied*, 149 N.E.3d 610 (Ind. 2020) (adhering to *Connor*, reviewing a "sentence without finding that his argument only as to the 'character of the offender' prong in App. R. 7(B) resulted in waiver").

198. Hamilton v. State, 955 N.E.2d 723, 726-27 (Ind. 2011).

199. *Turkette*, 151 N.E.3d at 787 n.5.

200. *Id.*

201. Livingston v. State, 113 N.E.3d 611, 614 (Ind. 2018).

sentence "in a climate more distant from local clamor."[202] Indeed, appellate courts

> are in as good a position as the trial court to make [sentencing] determinations based upon the record before us in a proper case. All the material available to the trial court at time of sentencing is equally available to us on appeal. It is contained in the record. Further, *the appellate process is uniquely suited to dispassionate consideration of the subject free of the everyday pressures of a trial courtroom*.[203]

In sum, with the unanimous denial of transfer in *Turkette*, these questions will continue to linger, but the prevailing approach will likely continue to be an "independent review" under Appellate Rule 7(B) that may reference, but is not constrained by, the trial court's articulation of aggravating and mitigating circumstances.

XI. EXPUNGEMENT

After nearly thirty years, Indiana's legislature revamped the state's dated and ineffectual expungement regime in 2013.[204] After some refinement the following year, the resulting structure requires trial courts to accept a petition for expungement if all the statutory requirements are satisfied and provides safeguards against collateral consequences in areas such as employment and licensing, but requires the payment of costs and fees.[205] As one national publication explained, "[F]rom what appears to be a standing start, Indiana's legislature has enacted one of the most nuanced and comprehensive systems of individualized judicial relief in the country . . . ."[206]

Developments during the survey period added some clarification that will assist some seeking expungements. In *N.G. v. State*, the Indiana Supreme Court held that the statute requiring a waiting period for an individual seeking to expunge a prior conviction applied retroactively. N.G. was convicted of Level 6 felony theft, and more than ten years later it was converted to a misdemeanor.[207]

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202. Jackson v. State, 145 N.E.3d 783, 784 (Ind. 2020) (quoting Serino v. State, 798 N.E.2d 852, 856-57 (Ind. 2003)).

203. Fointno v. State, 487 N.E.2d 140, 145 (Ind. 1986) (emphasis in *Fointno*) (quoting Cunningham v. State, 469 N.E.2d 1, 8 (Ind. Ct. App. 1984)).

204. Drew Kirages, Note, *Reentry Reform in Indiana: HEA 1006 and Its (Much Too Narrow) Focus on Prison Overcrowding*, 49 IND. L. REV. 209, 213-14 (2015).

205. *Id.*

206. Margaret Colgate Love, *Forgiving, Forgetting, and Forgoing: Legislative Experiments in Restoring Rights and Status*, 30 FED. SENT'G REP. 231, 234 (2018); *but see* Joseph C. Dugan, Note, *I Did My Time: The Transformation of Indiana's Expungement Law*, 90 IND. L.J. 1321, 1322 (2015) (discussing criticisms of Indiana's approach because "[i]ts procedures are convoluted. Its remedies are flimsy. It excludes certain classes of petitioners while setting an unreasonably high bar for others. Its 'one-bite-at-the-apple' limitation and repayment prerequisites are unrealistic, particularly for low-income petitioners.").

207. N.G. v. State, 148 N.E.3d 971, 972-73 (Ind. 2020).

Two years after the conversion, N.G. petitioned to expunge the conviction.[208] Because the statute required waiting at least five years from the date of conviction for a misdemeanor conviction, the trial court denied the petition, and the court of appeals agreed.[209]

N.G. sought transfer; while transfer was pending, the General Assembly amended the statute to clarify when the time period began to run.[210] Under the amended statute, N.G. would have qualified to have his conviction expunged.[211] After first concluding that the amendment was remedial because it cured the ambiguity in the statute, the Indiana Supreme Court applied the amended statute to N.G. because it effectuated the purpose behind Indiana's expungement scheme: to provide ex-offenders the opportunity to fully reintegrate into society.[212]

CONCLUSION

Developments during the survey period answered some questions but left many lingering question marks. How sharp will the teeth of Criminal Rule 26 cut in future cases? How will reviewing courts deal with speedy trial rights under Criminal Rule 4 in light of the suspension of jury trials for most of the latter half of the survey period (and some of the next one)? Although defendants rarely succeed on sufficiency challenges, several cases decided during the survey period highlight that it is not an insurmountable task. Some cases announce principles of broader application, but another 3-2 opinion on the sufficiency of an insanity verdict, this time reversing the trial court, may not lend itself to future application. Will the attempt to fix the admittedly broken *Richardson* test for double jeopardy prove successful?

Although one opinion invalidated a purported waiver of the right to appeal a sentence, most sentencing claims continue to fail. A split remains in the Indiana Court of Appeals on the scope of challenges, but a four-justice majority of the Indiana Supreme Court appears likely to invoke Rule 7(B) to reduce occasional outlier sentences, mostly in drug prosecutions or with young or otherwise sympathetic defendants.

208. *Id.* at 973.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at 974-75.