

# RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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## INTRODUCTION

The survey period—October 1, 2022 to September 30, 2023—marked the first year of a new Indiana Supreme Court, as Justice Derek Molter replaced Justice Steven David on September 1, 2022. As suggested in last year’s survey, that transition could mean changes in direction or focus.<sup>1</sup> The five justices, all appointed by Republican governors, have sometimes divided, often 3-2.

As in the past, this survey focuses on Indiana Supreme Court opinions while also addressing some opinions of the Indiana Court of Appeals that provide significant direction in criminal cases from beginning (such as speedy trial requests and discovery sanctions) to end (sentencing, post-conviction relief). It concludes with some thoughts on the past year and what it might signal about future direction.

## I. SPEEDY TRIAL

Defendants pursuing a speedy trial may ground their claim in either Indiana Criminal Rule 4 or the federal and state constitutions.<sup>2</sup> As summarized below, the court of appeals addressed two claims under Criminal Rule 4 and a third under the federal constitution.

In *Wellman v. State*, a defendant charged with alcohol-related driving offenses requested several continuances because the State failed to provide the results of a blood test from the night of his arrest.<sup>3</sup> After thirteen months of waiting, he moved for discharge under Indiana Criminal Rule 4(C), which the trial court denied.<sup>4</sup>

The court of appeals reversed.<sup>5</sup> Rule 4(C) requires the State to bring a defendant to trial within one year, although delays effected by a defendant’s motion for a continuance are excluded.<sup>6</sup> Nevertheless, Indiana courts have long recognized an exception—termed “the discovery exception” in *Wellman*—

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1. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 56 IND. L. REV. 737, 737 (2023) (discussing Indiana Supreme Court and Indiana Court of Appeals opinions providing direction in criminal cases).

2. Although the claim discussed in this survey is a due process challenge, speedy trial claims usually involve the Sixth Amendment and sometimes its Indiana constitutional analog of Article 1, Section 12. *See, e.g.*, *Watson v. State*, 155 N.E.3d 608, 614 n.2 (Ind. 2020).

3. 210 N.E.3d 811, 812 (Ind. Ct. App. 2023).

4. *Id.*

5. *Id.*

6. *Id.* at 814.

when a continuance is caused by the State's delay in providing discovery.<sup>7</sup> The court rejected the State's argument that the delay should be attributed to the defendant because he requested the continuances, declining to follow the State's cited authority that did not reference earlier cases or address the discovery exception.<sup>8</sup>

Another panel took a different approach in *Bik v. State*.<sup>9</sup> There, the majority characterized a long period of delay for a defendant who required an interpreter as "communication issues with his attorney" and thus attributable to the defendant.<sup>10</sup> Judge Bailey dissented, noting that

The trial court made a determination that the root cause of delay was the absence of discovery. I cannot conclude that the trial court misinterpreted the law or clearly erred in its fact-finding.

To be sure, *Bik* could have requested a speedy trial without having received discovery from the State. But that is an untenable position for a defendant when the State has simply failed to marshal its proof. "To put the defendants in a position whereby they must either go to trial unprepared due to the State's failure to respond to discovery requests or be prepared to waive their rights to a speedy trial, is to put the defendants in an untenable situation."<sup>11</sup>

The defendant sought transfer arguing "a split in the Court of Appeals regarding the application of Indiana Criminal Rule 4(C) when the delay is the direct result of the State's failure to provide discovery to the defense in a timely manner."<sup>12</sup> The State argued no conflict with *Wellman*.<sup>13</sup> The Indiana Supreme Court denied transfer by a 3-2 vote with Chief Justice Rush and Justice Slaughter voting to grant transfer.<sup>14</sup>

In a third opinion not grounded in Rule 4, the court of appeals held that a twenty-three-year delay in filing murder charges did not violate due process.<sup>15</sup> Prosecutors have discretion when to bring charges, but long pre-indictment

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7. *Id.* at 815 ("When a trial court grants a defendant's motion for continuance because of the State's failure to comply with the defendant's discovery requests, the resulting delay is not chargeable to the defendant.") (quoting *Carr v. State*, 934 N.E.2d 1096, 1101 (Ind. 2010)).

8. *Id.*

9. 211 N.E.3d 594 (Ind. Ct. App.), *trans. denied*, 215 N.E.3d 347 (Ind. 2023).

10. *Id.* at 598.

11. *Id.* at 599 (Bailey, J., dissenting) (quoting *Biggs v. State*, 546 N.E.2d 1271, 1275 (Ind. Ct. App. 1989)).

12. Pet. to Transfer at 2, *Bik v. State*, 211 N.E.3d 594 (Ind. Ct. App. 2023) (No. 22A-CR-1932).

13. Brief in Opposition to Transfer, *Bik v. State*, 211 N.E.3d 594 (Ind. Ct. App. 2023) (No. 22A-CR-1932).

14. Order Denying Transfer, *Bik v. State*, 211 N.E.3d 594 (Ind. Ct. App. 2023) (No. 22A-CR-1932).

15. *Higgason v. State*, 210 N.E.3d 868, 886 (Ind. Ct. App.), *trans. denied*, 215 N.E.3d 341 (Ind. 2023).

prosecutorial delays may result in a Due Process Clause violation.<sup>16</sup> In such cases,

the defendant has the burden of proving that he suffered “actual and substantial prejudice to his right to a fair trial,” and upon meeting that burden must then demonstrate that “the State had no justification for delay,” which may be demonstrated by showing that the State “delayed the indictment to gain a tactical advantage or for some other impermissible reason.”<sup>17</sup>

In *Higgason v. State*, the court of appeals found the State was justified in waiting twenty-three years to file charges in a triple homicide case.<sup>18</sup> The State needed additional evidence that “could not be gathered at the time of the crime.”<sup>19</sup> Although DNA was collected from under one of the victim’s fingernails in 1998, DNA testing was not as advanced as it became by 2020, when the results showed the defendant was a contributor to the DNA.<sup>20</sup> Therefore, “the State had a justifiable explanation for its delay and the delay did not occur to gain a tactical advantage.”<sup>21</sup>

## II. DISCOVERY VIOLATIONS

The survey period included two opinions addressing the consequences of a discovery violation by the prosecution.

In *State v. Lyons* the Indiana Supreme Court reiterated the broad discretion trial courts possess in sanctioning discovery violations—but also set some guardrails.<sup>22</sup> Charged with molesting his daughter, Lyons

agreed with the prosecutor that he would sit for a polygraph and that the State of Indiana could offer the results into evidence at trial in any resulting prosecution. But on the eve of trial, the deputy prosecutor disclosed that she would not do so because she had just learned that when Sergeant Dan Gress administered the exam years earlier, he had concerns about Lyons’ mental state, so he unilaterally changed the exam to a “non-stipulated,” inadmissible investigatory examination. Sergeant Gress had omitted those facts when testifying at a prior suppression hearing about the admissibility of the polygraph examination and Lyons’ related statements, and he failed to provide prosecutors his notes reflecting that change. Based on this late disclosure, the trial court

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16. *Ackerman v. State*, 51 N.E.3d 171, 189 (Ind. 2016).

17. *Id.* at 189-90 (quoting *Schiro v. State*, 888 N.E.2d 828, 834 (Ind. Ct. App. 2008)).

18. *Higgason*, 210 N.E.3d at 869.

19. *Id.* at 880.

20. *Id.*

21. *Id.*

22. 211 N.E.3d 500 (Ind. 2023).

continued the trial and released Lyons from custody. And as a discovery sanction for Sergeant Gress misleading the parties and the court, the judge suppressed the incriminating statements Lyons made to Sergeant Gress immediately after the exam.<sup>23</sup>

The State pursued an interlocutory appeal, which it lost in the court of appeals and then sought transfer.<sup>24</sup> The Indiana Supreme Court affirmed the trial court, holding “before excluding evidence as a Trial Rule 37 discovery sanction, a trial court must find that (1) the exclusion is the sole remedy available to avoid substantial prejudice, or (2) that the sanctioned party’s culpability reflects an egregious discovery violation.”<sup>25</sup>

As to the first, the State conceded that its disclosure about the polygraph was “exceedingly late under the local rules governing discovery and was therefore a discovery violation.”<sup>26</sup> The supreme court agreed with the State that “[w]hen considering whether an order excluding evidence is the sole remedy to avoid substantial prejudice, a court can only consider real—not hypothetical—prejudice. And continuing the trial in this case cured the prejudice to Lyons.”<sup>27</sup>

Nevertheless, the trial court did not abuse its discretion by excluding the evidence on the second basis—that the egregious nature of the violation.<sup>28</sup> Indeed, the trial court found that Sergeant Gress’ misleading omissions were so egregious that the State should pursue a perjury investigation.<sup>29</sup> As the trial judge explained on the record:

I hope that the Prosecutor understands that this is not a personal ruling against the State but it is a professional decision that the Court [makes] to protect the rights of the accused, to make sure that the trial has integrity, to make sure that the lawyers have integrity in this court, to make sure that we don’t have false testimony presented at any time in this court, especially by people as powerful as Sergeant Gress. And I would hope that the prosecutors understand that ruling because the integrity of these proceedings is—means everything.<sup>30</sup>

The defendant had signed the stipulation at a time when he believed shadows were speaking to him.<sup>31</sup> And Sergeant Gress “changing the terms of the contract unilaterally without the permission of the prosecutor or the Defendant frustrated

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23. *Id.* at 502.

24. *Id.*

25. *Id.*

26. *Id.* at 506.

27. *Id.*

28. *Id.*

29. *Id.* at 507.

30. *Id.*

31. *Id.*

the entire purpose of the Defendant meeting with [Sergeant] Gress.”<sup>32</sup> Without Lyons “entering into the stipulated agreement (i.e. the contract), he would have never spoken to [Sergeant] Gress.”<sup>33</sup>

In short, longstanding precedent allows the exclusion of the State’s evidence when a discovery violation is “grossly misleading or demonstrates bad faith.”<sup>34</sup> The record supported the trial court’s finding that level of culpability here, and thus the trial court did not abuse its discretion.<sup>35</sup>

The second case, which was decided by the court of appeals, involved the suppression of potentially exculpatory material. In *State v. Parchman*,<sup>36</sup> the trial court granted a defense motion to correct error because the State violated *Brady v. Maryland*<sup>37</sup> when it failed to disclose the juvenile delinquency history of one of its witnesses. The State appealed.<sup>38</sup>

A *Brady* violation requires three things: “(1) the evidence at issue must be favorable to the accused, either because the evidence is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued.”<sup>39</sup> The State conceded in *Parchman* that it inadvertently suppressed the juvenile delinquency history of a witness, which was impeachment evidence.<sup>40</sup> The sole issue on appeal was prejudice or materiality.<sup>41</sup> “Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”<sup>42</sup>

In reversing the trial court, the court of appeals held the impact of the witness’s “ten-year-old juvenile delinquency adjudication is negligible, at best.”<sup>43</sup> On trial for shooting two men and killing one of them, the defendant had argued self-defense.<sup>44</sup> But the testimony of the witness/victim with the juvenile adjudication was cumulative of other “testimony that Parchman was standing over one-hundred feet away from the victims when he began shooting at them” and cumulative of other evidence that the victims had been shot on their “back side.”<sup>45</sup>

Although the convictions remained intact, the trial court was “rightfully displeased” with the State’s noncompliance with discovery.<sup>46</sup> The appellate

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32. *Id.*

33. *Id.*

34. *Id.* at 508.

35. *Id.*

36. 200 N.E.3d 499, 500 (Ind. Ct. App. 2022), *trans. denied*, 208 N.E.3d 1250 (Ind. 2023).

37. 373 U.S. 83 (1963).

38. *Parchman*, 200 N.E.3d at 499.

39. *Id.* at 504 (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 505.

44. *Id.* at 502.

45. *Id.* at 505.

46. *Id.* at 505 n.6.

court “disapprove[d]” of the State’s failure to provide the witness’s complete criminal history; “whether evidence is prejudicial or inadmissible is within the discretion of the courts, not the State.”<sup>47</sup>

The defendant sought transfer, which was denied by a 3-2 vote with Chief Justice Rush and Justice Goff voting to grant transfer.<sup>48</sup>

### III. JURY SELECTION

Justice Molter’s first opinion upon joining the Indiana Supreme Court addressed the importance of allowing lawyers to question witnesses directly as part of *voir dire*.<sup>49</sup> Two opinions from the court of appeals addressed prejudicial comments by a prospective juror and the viewing of exhibits during deliberations.

#### A. Direct Questioning of Jurors

Indiana Trial Rule 47(D) provides: “The court shall permit the parties or their attorneys to conduct the examination of prospective jurors, and may conduct examination itself.”<sup>50</sup> For decades that provision has been applied in courtrooms across the state to allow lawyers—and not simply the judge—to question prospective jurors.

However, in *Doroszko v. State*, “the trial judge informed the parties he ‘ask[s] the voir dire,’” although he welcomed counsel to submit questions for the court’s consideration.<sup>51</sup> The parties on appeal agreed this procedure violated Rule 47(D).<sup>52</sup>

A new trial was ordered.<sup>53</sup> An error under Trial Rule 47(D) “is not harmless if it deprives a party of an adequate opportunity to exercise peremptory or for-cause challenges to prospective jurors based on a key, disputed aspect of the case.”<sup>54</sup> The trial court not only denied the defendant “the opportunity to conduct his own examination, it also inadequately examined the prospective jurors on controversial legal principles relevant to his claim of self-defense,” with the “cursory nature” of its questioning of six “yes” or “no” questions.<sup>55</sup>

The unanimous opinion provides useful reminders and broader guidance, including that trial courts have discretion in imposing time limitations or limits

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47. *Id.*

48. Order Denying Transfer, *State v. Parchman*, 200 N.E.3d 499 (Ind. Ct. App. 2022), *trans. denied*, 208 N.E.3d 1250 (Ind. 2023) (No. 21A-CR-447).

49. *Doroszko v. State*, 201 N.E.3d 1151, 1153 (Ind. 2023).

50. IND. R. TRIAL P. 47(D).

51. *Doroszko*, 201 N.E.3d at 1154.

52. *Id.* at 1155.

53. *Id.* at 1158.

54. *Id.*

55. *Id.* at 1157.

on repetitive, argumentative, or improper questions by lawyers.<sup>56</sup> Judges may also question jurors—but not to the exclusion of questions from counsel:

As part of its own examination, the court may, but does not have to, include questions the parties submit to the court in writing. If the court elects to examine the prospective jurors, it is within its discretion to decide whether its examination or the parties' examination will occur first, but whenever the trial court examines the prospective jurors, it must allow the parties an opportunity to supplement the court's inquiry by posing their own additional questions directly to the prospective jurors.<sup>57</sup>

### *B. Prejudicial Juror Comments*

In *Burton v. State*, a prospective juror told another juror that the defendant had been involved in a car accident twenty years earlier that killed a man and that he “should be sitting in prison.”<sup>58</sup> Three prospective jurors heard this comment.<sup>59</sup> Defense counsel moved to strike them for cause, which the trial court denied after each juror said they could remain fair and impartial.<sup>60</sup>

The court of appeals agreed the remarks were prejudicial and suggested that “better courses of action” were warranted considering the constitutional right to an impartial jury.<sup>61</sup> Because voir dire was ongoing, remedial measures would not “have greatly affected the proceedings. The court could have easily stricken these prospective jurors and continued voir dire with the remaining members of the jury panel, or at least allowed Burton to use his peremptory challenges as the State suggested.”<sup>62</sup>

Nevertheless, the court of appeals found no reversible error based on the binding 1988 precedent of *Kindred v. State*,<sup>63</sup> which “rejected an impartial-jury challenge involving arguably worse facts.”<sup>64</sup> The trial court in *Kindred* “questioned the prospective jurors regarding the possibility of prejudice, admonished the jurors to put aside preconceived notions, and ascertained the willingness of each to base his decision solely upon evidence presented at trial”—“corrective actions [that] eliminate[d] any prejudice which may have occurred.”<sup>65</sup>

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56. *Id.* at 1156

57. *Id.*

58. 218 N.E.3d 617, 618 (Ind. Ct. App. 2023).

59. *Id.*

60. *Id.*

61. *Id.* at 620.

62. *Id.*

63. 524 N.E.2d 279, 288 (Ind. 1988).

64. *Burton*, 218 N.E.3d at 620.

65. *Id.*; see *Kindred*, 524 N.E.2d at 288.

### C. Viewing Exhibits During Deliberations

In *Torrence v. State*, the court of appeals found no error, much less fundamental error, in “allowing the jury, during deliberations, to view in open court four specifically requested exhibits instead of viewing all of the exhibits.”<sup>66</sup> Indiana Code section 34-36-1-6, which “outlines the procedure for handling disagreement among jurors about testimony or if the jury requests to be informed on any point of law,” did not apply because the jurors expressed no disagreement but simply asked to view the exhibits.<sup>67</sup>

The court then turned to case law, which sets forth three factors for courts to consider in deciding whether to permit jurors to take exhibits into the jury room: “(1) whether the material will aid the jury in a proper consideration of the case; (2) whether any party will be unduly prejudiced by submission of the material; and (3) whether the material may be subjected to improper use by the jury.”<sup>68</sup> Without resort to the factors, the court found no abuse of discretion in allowing the deliberating jury “to review the requested, previously viewed, and admitted exhibits, in open court while being monitored by the trial court and the parties.”<sup>69</sup>

In addition, cases applying the three factors further supported its decision that allowing the “jury to view exhibits in the jury room[] support[s] [its] decision that the court here did not abuse its discretion by monitoring the jury’s review of the exhibits in open court.”<sup>70</sup>

## IV. CRIME OR NOT A CRIME?

Indiana’s appellate courts decided several cases regarding challenges to the validity of a specific charge. This section starts with an Indiana Supreme Court opinion that reiterated the deferential nature of such claims and then turns to a recent case of forcible resistance, an issue of persisting confusion. Next, this section summarizes cases from the court of appeals that found insufficient or sufficient evidence in different scenarios.

### A. Review is Deferential

During the last survey period, a divided panel of the court of appeals reversed a murder and other convictions because the circumstantial evidence came “nowhere close to proof beyond a reasonable doubt” in *Young v. State*.<sup>71</sup>

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66. 219 N.E.3d 775, 776 (Ind. Ct. App. 2023)

67. *Id.* at 778; IND. CODE § 34-36-1-6 (2023).

68. *Torrence*, 219 N.E.3d at 779 (quoting *Thacker v. State*, 709 N.E.2d 3, 7 (Ind. 1999)).

69. *Id.*

70. *Id.* (emphasis omitted).

71. 187 N.E.3d 969, 976 (Ind. Ct. App.), *vacated*, 198 N.E.3d 1172 (Ind. 2022).



The Indiana Supreme Court disagreed, found sufficient evidence, and affirmed the convictions.<sup>72</sup> Convictions may result from circumstantial evidence alone, and appellate courts must look at the aggregate of evidence or “whole picture”—not individual pieces of evidence.<sup>73</sup> Put another way, a jury may be convinced, beyond a reasonable doubt, by looking at “a web of facts in which no single strand may be dispositive.”<sup>74</sup> In summarizing the circumstantial evidence sufficient to affirm the conviction under its customary deferential review, Justice Goff wrote for the unanimous court:

the jury could reasonably have inferred that Young spotted the victims at the gas station, drove somewhere nearby with alleyway access, tossed his cigarette in the alleyway, ran to the gas station to carry out the shootings, walked back up the alleyway to get away, and later looked up how to clean the weapon he had used. His deactivated location data suggested he was concealing his activity. No single “smoking gun” was presented, but we cannot say that a reasonable fact-finder was unable to draw the conclusion that Young was guilty.<sup>75</sup>

*B. “Forcibly” Resisting Requires Clarification*

Indiana’s resisting law enforcement statute requires that a person “forcibly” resist, obstruct, or interfere with law enforcement.<sup>76</sup> In a memorandum decision in *Evans v. State*, the majority of a court of appeals’ panel found a defendant acted forcibly when she “slammed” shut her slightly ajar apartment door—making no contact with a police officer—after the officer expressed intent to arrest her.<sup>77</sup>

The Indiana Supreme Court denied transfer by a 3-2 vote.<sup>78</sup> Chief Justice Rush, joined by Justice Slaughter, dissented from the denial of transfer, writing that the court of appeals’ majority had applied too low of a bar and that “persisting confusion” on the issue warranted a grant of transfer to provide guidance and a “simpler inquiry.”<sup>79</sup> Specifically, in their view, echoing a similar 2020 dissent, the court should “adopt a standard requiring the evidence to establish that (1) the threat is directed at the officer, and (2) the defendant’s action, viewed objectively, threatened the use of force—that is, an act of violence.”<sup>80</sup>

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72. *Young v. State*, 198 N.E.3d 1172, 1182 (Ind. 2022).

73. *Id.* at 1176.

74. *Id.* (quoting *Kriner v. State*, 699 N.E.2d 659, 664 (Ind. 1998)).

75. *Id.* at 1178.

76. IND. CODE § 35-44.1-3-1(a)(1) (2021).

77. *Evans v. State*, No. 22A-CR-174, 2022 WL 16630780, at \*3 (Ind. Ct. App. Nov. 2, 2022), *trans. denied*, 207 N.E.3d 428 (Ind. 2023).

78. *Evans v. State*, 207 N.E.3d 428, 428 (Ind. 2023) (mem.).

79. *Id.* (Rush, C.J., dissenting).

80. *Id.* at 429 (citing *Tyson v. State*, 149 N.E.3d 1186, 1186 (Ind. 2020)) (emphasis omitted).

### C. Child Molesting Conviction Reduced

Child molesting by fondling is usually a Level 4 felony while molestation involving “other sexual conduct” committed by a defendant who is at least twenty-one is a Level 1 felony.<sup>81</sup> Other sexual conduct includes “an act involving . . . the penetration of the sex organ or anus of a person by an object.”<sup>82</sup>

*Austin v. State* found insufficient evidence of penetration necessary to support the charged Level 1 felony offenses.<sup>83</sup> The child testified that Austin used his “whole hand to rub up and down on the outside of her private part and that it made her feel tingly.”<sup>84</sup> That evidence failed to establish even “the slightest penetration of the sex organ, including penetration of the external genitalia” necessary to prove “other sexual conduct.”<sup>85</sup> The court ordered the convictions reduced to Level 4 felonies.<sup>86</sup>

### D. Contempt Finding Reversed

In *Knowles v. State*, a trial court entered a contempt finding and ordered loss of credit time based on the defendant’s failure to participate in the completion of a pre-sentence report.<sup>87</sup> Because the trial court had no personal knowledge of the disobedience, a finding of direct contempt was not sustainable.<sup>88</sup> Nor could the defendant be found in indirect contempt when “the trial court did not comply with, or even appear to consider, Indiana Code section 34-47-3-5,” which “codifies the due-process requirements for notice and opportunity to be heard on an indirect-contempt allegation.”<sup>89</sup>

### E. Intimidation Convictions Affirmed, Despite State’s Concession

In *Hochstetler v. State*, three Amish bishops were convicted of Class A misdemeanor intimidation based on their communications with a woman who had secured a protective order against her husband after DCS involvement for inappropriate physical discipline of their children.<sup>90</sup> Specifically, the bishops were charged with communicating a threat to the woman to expose her to “hatred, contempt, disgrace, or ridicule, with the intent that [she] engage in

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81. IND. CODE § 35-42-4-3 (2022).

82. IND. CODE § 35-31.5-2-221.5(2) (2014).

83. 201 N.E.3d 1184, 1184 (Ind. Ct. App. 2022).

84. *Id.* at 1185 (internal quotations omitted).

85. *Id.* (quoting *Boggs v. State*, 104 N.E.3d 1287, 1289 (Ind. 2018)).

86. *Id.* at 1186.

87. 202 N.E.3d 1165, 1169 (Ind. Ct. App. 2023).

88. *Id.*

89. *Id.* at 1170.

90. 215 N.E.3d 365, 365 (Ind. Ct. App. 2023), *reh’g denied* (Oct. 10, 2023).

conduct against her will, to wit: petition to remove herself from a protective order[.]”<sup>91</sup>

The defendants argued at trial that their threatened speech involved a matter of public or general concern within the Amish community that required the State to prove actual malice.<sup>92</sup> Although the State argued against requiring actual malice in the trial court, “on appeal, without explanation, the State reverse[d] course,” urging that the convictions must be reversed because the evidence of actual malice was lacking.<sup>93</sup> Finding no authority requiring it to accept the State’s concession, the court of appeals proceeded to “examine the law and the facts before us to determine whether the evidence supports Defendants’ convictions.”<sup>94</sup> “Given the Defendants’ pattern of behavior concerning the protective order, the content of their threat, their choice to utter the threat within the confines of E.W.’s home without the presence of their wives, and Defendants’ power and position with the church, the State presented sufficient evidence that Defendants” committed intimidation.<sup>95</sup>

#### *F. Police Officer’s Perjury Conviction Upheld*

A person commits perjury when he “makes a false, material statement under oath or affirmation, knowing the statement to be false or not believing it to be true[.]”<sup>96</sup> The State must show that the defendant “(1) made a false statement under oath; and (2) said statement was material to a point in the case.”<sup>97</sup>

In *Lawson v. State*, a police officer who prepared a probable cause affidavit for a delinquency case included a false statement that another officer saw the juvenile throw a punch.<sup>98</sup> Charged with perjury, the officer argued that the false statement about the punch was immaterial and could not constitute perjury because the juvenile was charged with disorderly conduct, not battery.<sup>99</sup>

The court of appeals disagreed, noting the statement about throwing a punch was a clear indication the juvenile had “engaged in fighting or in tumultuous conduct” to satisfy the statute,<sup>100</sup> although the juvenile’s other behavior did not necessarily satisfy the statute.<sup>101</sup> The defendant’s claim that he did not include a false statement “knowingly” was “a request for this court to reweigh the evidence and judge his credibility,” which the appellate court refused to do.<sup>102</sup>

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91. *Id.* at 370.

92. *Id.* (citing *Brewington v. State*, 7 N.E.3d 946 (Ind. 2014)).

93. *Id.* at 370.

94. *Id.* at 371.

95. *Id.* at 374.

96. IND. CODE § 35-44.1-2-1(a)(1) (2024).

97. 199 N.E.3d 829, 835 (Ind. Ct. App. 2022).

98. *Id.* at 833.

99. *Id.* at 836.

100. IND. CODE § 35-45-1-3(a)(1).

101. *Lawson*, 199 N.E.3d at 836.

102. *Id.* at 837.

*G. Permitless Carry Statute is Not Retroactive*

For decades, carrying a handgun without a license, subject to some exceptions, was a misdemeanor offense.<sup>103</sup> That changed on July 1, 2022, when the General Assembly amended the statute to remove the license requirement, effectively abolishing the criminal offense.<sup>104</sup>

In *Lawrence v. State*, a defendant charged with carrying without a license in 2021 argued unsuccessfully that the 2022 amendment should apply retroactively to him.<sup>105</sup> “Absent explicit language to the contrary, statutes generally do not apply retroactively. But there is a well-established exception for remedial statutes, that is, statutes intended to cure a defect or mischief in a prior statute.”<sup>106</sup> Unlike earlier statutory amendments given retroactive effect, the handgun amendment did not clear up any confusion in a statute or address silence in a statute. Rather, “the legislature reversed course on the license requirement, signaling a major change in Indiana's policy on handguns.”<sup>107</sup>

V. HARMLESS ERROR

The remedy for insufficient evidence in the cases discussed in Part IV is vacating the conviction. But most errors at trial may be rectified by a new trial, assuming they are consequential enough to require any recourse. When evidence is erroneously admitted or excluded in a criminal trial, the appellate court will engage in harmless error review unless the error is structural.<sup>108</sup> If a constitutional error occurred, the State must generally prove it harmless beyond a reasonable doubt.<sup>109</sup>

In cases of non-constitutional error, however, appellate decisions have taken inconsistent and confusing approaches. *Hayko v. State*<sup>110</sup> found error in the lack of proper foundation for a witness’s testimony under Evidence Rule 608(a), an issue addressed in the survey article on evidence.<sup>111</sup> Of far broader significance,

103. See IND. CODE § 35-47-2-1(a) (2017).

104. See P.L. 175-2022, § 8.

105. 214 N.E.3d 361, 362 (Ind. Ct. App. 2023).

106. *Id.* at 362-63.

107. *Id.* at 363.

108. *Bell v. State*, 173 N.E.3d 709, 717 (Ind. Ct. App. 2021) (“[There is] a limited class of fundamental constitutional errors that def[ies] analysis by harmless error standards,’ thus requiring automatic reversal without the need to show prejudice. These errors, known as ‘structural errors,’ affect ‘the framework within which the trial proceeds, rather than simply an error in the trial process itself.’”) (citation omitted).

109. See *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (“[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.”).

110. 211 N.E.3d 483, 494 (Ind. 2023), *reh’g denied* (Aug. 18, 2023), *cert. denied*, 144 S. Ct. 570 (2024).

111. Colin E. Flora, *2023 Developments in Indiana Evidentiary Practice*, 57 IND. L. REV. 917 (2024).

and thus addressed here, is the appropriate harmless-error analysis. Under Appellate Rule 66(A):

No error or defect in any ruling or order or in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.<sup>112</sup>

Neither party cited Rule 66(A), which the Indiana Supreme Court considered indicative of “a larger, confusing trend.”<sup>113</sup>

The rule was adopted in 2001, but its application in Indiana’s appellate courts “has been far from consistent.”<sup>114</sup> Much of the inconsistency stems from confusion and conflation with Trial Rule 61.<sup>115</sup> Trial Rule 61 “instructs an evidentiary error is not grounds for ‘reversal on appeal unless refusal to take such action appears to the court inconsistent with substantial justice’ and directs courts to ‘disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.’”<sup>116</sup>

But the unanimous opinion authored by Chief Justice Rush made clear that “Appellate Rule 66(A), not Trial Rule 61, defines reversible error for our appellate courts.”<sup>117</sup> Under its “probable impact test,” the “party seeking relief bears the burden of demonstrating how, in light of all the evidence in the case, the error’s probable impact undermines confidence in the outcome of the proceeding below.”<sup>118</sup> The test is not to review the sufficiency of the remaining evidence, but rather requires “review of what was presented to the trier of fact compared to what should have been presented, and when conducting that review, [appellate courts] consider the likely impact of the improperly admitted or excluded evidence on a reasonable, average jury in light of all the evidence in the case.”<sup>119</sup> If, “considering the entire record,” the “error’s probable impact is sufficiently minor,” reversal is not warranted because “confidence in the outcome is not undermined.”<sup>120</sup>

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112. IND. R. APP. P. 66(A).

113. *Hayko*, 211 N.E.3d at 491-94. The Indiana Supreme Court has resolved the Rule 66(A) issue.

114. *Id.* at 492.

115. *Id.*

116. *Id.* (citing IND. R. TRIAL P. 61).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

## VI. TERMINATION OF DIVERSION AGREEMENTS

The Indiana Court of Appeals addressed the termination of pretrial diversion agreements in two different opinions, reversing the trial court in both. First, in *Smith v. State*, police arrested a defendant for Level 6 felony lifetime parole violation and Class A misdemeanor criminal trespass, but the State only charged him with the misdemeanor offense.<sup>121</sup> The parties entered a diversion agreement under which the State agreed to withhold prosecution for one year if Smith complied with various terms.<sup>122</sup> The agreement allowed the State “the right to revoke th[e] agreement for any reason prior to its execution and for any violation of its terms thereafter.”<sup>123</sup> A week later, without any violation on Smith’s part, the State moved to revoke the agreement and to add a count for Level 6 felony lifetime parole violation, which the trial court permitted.<sup>124</sup>

The court of appeals reversed and remanded with instructions to dismiss the case.<sup>125</sup> Based on contract principles, the agreement was supported by consideration, and the State was bound by the agreement’s terms.<sup>126</sup> The State’s revocation of the agreement, without any violation of its terms, was a breach of the diversion agreement.<sup>127</sup>

Second, in *Winans v. State*, the court held it was fundamental error to hold a bench trial after termination of a diversion agreement.<sup>128</sup> Criminal Rule 22 provides the procedure for defendants charged with a misdemeanor to request a jury trial.<sup>129</sup> Many forfeit that right by failing to make a timely demand, but not the defendant in *Winans*, who filed a motion for a jury trial three days after being charged with two misdemeanor offenses.<sup>130</sup> Months later, however, she entered a pretrial diversion, which she did not successfully complete.<sup>131</sup> The trial court later set the case for a bench trial, which was continued a few times before her trial and convictions.<sup>132</sup>

Although the Defendant never objected to a bench trial, conducting a bench trial without obtaining a valid waiver of the right to a jury trial was fundamental error.<sup>133</sup> As the court of appeals explained, discharge from the pretrial diversion program returned the Defendant “to the original position that she occupied before she entered into the pre-trial diversion program, i.e., being prosecuted for

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121. 198 N.E.3d 395, 397 (Ind. Ct. App. 2022).

122. *Id.*

123. *Id.*

124. *Id.* at 397-98.

125. *Id.* at 399.

126. *Id.* at 398.

127. *Id.* at 399.

128. 220 N.E.3d 558, 560 (Ind. Ct. App. 2023).

129. IND. R. CRIM. P. 22.

130. *Id.* at 562.

131. *Id.* at 561.

132. *Id.*

133. *Id.* at 562-63.

domestic battery and resisting law enforcement.”<sup>134</sup> The case should have been set for a jury trial—not a bench trial—after her discharge from the diversion program.<sup>135</sup>

## VII. SENTENCING

Although most survey periods include notable opinions addressing sentence revisions under Appellate Rule 7(B), few published opinions from the court of appeals during the survey addressed such claims, and the Indiana Supreme Court did not issue opinions in any 7(B) cases.<sup>136</sup> The survey period instead included some notable 3-2 denials of transfer regarding claims for sentence revision. As summarized below, Chief Justice Rush and Justice Goff dissented from the denial of transfer in three cases, including two in which they wrote to explain their rationale.<sup>137</sup> Justice Massa and Justice Molter voted to grant transfer in a case where the State requested an increase in a sentence.<sup>138</sup> Justice Slaughter has been uninterested in expending the court’s “limited resources substituting [the court’s] collective view of what sentence is appropriate for that of the trial judge.”<sup>139</sup>

### A. 100-Year Sentence Upheld for Thirteen-Year-Old

The court of appeals affirmed a 100-year sentence for a thirteen-year-old boy who killed two of his younger siblings by smothering them with a blanket or towel.<sup>140</sup> Chief Justice Rush, joined by Justice Goff, dissented from the denial of transfer, expressing concern that:

by denying transfer, we pass up an important opportunity to clarify that, consistent with Eighth Amendment precedent, a juvenile’s characteristics matter when considering whether their sentence violates Article 1, Section 16. And we also pass up an important opportunity to consider whether Kedrowitz’s 100-year sentence—a de facto sentence of life without parole—passes constitutional muster. In recent years, several state supreme courts have found that shorter term-of-years

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134. *Id.* at 562.

135. *Id.* at 562-63. Moreover, the error was not invited because the failure to object to the bench trial settings was not “part of a deliberate, well-informed trial strategy.” *Id.* at 563.

136. For example, in *Lane v. State*, a divided panel of the court of appeals revised a 3,000-day sentence (more than eight years) imposed against a defendant who pleaded guilty to ten counts of class A misdemeanor invasion of privacy. 211 N.E.3d 551 (Ind. Ct. App. 2023). The Indiana Supreme Court heard oral argument on November 8, 2023, and no decision has been issued as of the drafting of this article.

137. See *infra* Part VII.A-C and accompanying footnotes.

138. See *infra* Part VII.D and accompanying footnotes.

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

140. *Kedrowitz v. State*, 199 N.E.3d 386, 392 (Ind. Ct. App. 2022), *reh’g denied*, (Feb. 9, 2023), *trans. denied*, 210 N.E.3d 1284 (Ind. 2023).

sentences imposed on juveniles violate their states' analogous constitutional provisions. We should determine whether Article 1, Section 16 requires a similar result.<sup>141</sup>

*B. Maximum Sentence for Meth-Addicted Defendant*

Chief Justice Rush, joined by Justice Goff, also dissented from the denial of transfer in a case involving a maximum sentence of sixteen years for Level 3 felony dealing in methamphetamine.<sup>142</sup> Although maximum sentences “are generally most appropriate for the worst offenders,”<sup>143</sup> they did not believe the defendant was one of the “worst offenders.”<sup>144</sup> “His criminal history—though not insignificant—largely shares a nexus with his substance abuse issues. And he has taken positive steps to address those issues[.]”<sup>145</sup> The dissenters also expressed concern about the limited availability of problem-solving courts to aid in rehabilitation, noting that “not every county—including where Kellams was charged and convicted—has adopted this avenue for justice.”<sup>146</sup> This disparity perpetuates a justice-by-geography anomaly that disadvantages individuals like Kellams.<sup>147</sup> Months later the Chief Justice gave a media interview highlighting these concerns.<sup>148</sup>

*C. Maximum Sentence for Three Misdemeanor Offenses*

In a memorandum decision, the court of appeals affirmed a three year sentence following a guilty plea to three counts of class A misdemeanor criminal mischief.<sup>149</sup> The court characterized the offense as the defendant “inexplicably, and without provocation, decided to throw rocks at the windows of three different buildings, causing thousands of dollars’ worth of damage.”<sup>150</sup> As to his character, it noted that he had “engaged in a troubling pattern of criminal behavior in Gibson County that include[d] several prior criminal mischief convictions, including one for throwing rocks through the stained-glass

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141. *Id.* at 1285 (internal citations omitted).

142. *Kellams v. State*, 198 N.E.3d 375, 376 (Ind. 2022) (Rush, C.J., dissenting).

143. *Buchanan v. State*, 767 N.E.2d 967, 973 (Ind. 2002) (citations omitted).

144. *Kellams*, 198 N.E.3d at 376 (Rush, C.J., dissenting).

145. *Id.*

146. *Id.*

147. *Id.*

148. Richard Essex, *Indiana Chief Justice: State Should Act to Avoid ‘Justice by Geography’*, WISHTV (Apr. 17, 2023, 10:34 PM), <https://www.wishtv.com/news/indiana-chief-justice-state-should-act-to-avoid-justice-by-geography/> [<https://perma.cc/29QP-LTCR>]. The exclusive interview with an Indianapolis television station highlighted the concerns raised in the case, including the lack of problem-solving courts to help address addiction in 34 of Indiana’s 92 counties. *Id.*

149. *Martin v. State*, No. 22A-CR-1487, 2022 WL 17409907, at \*1 (Ind. Ct. App. Dec. 5, 2022), *trans. denied*, 205 N.E.3d 193 (Ind. 2023).

150. *Id.* at \*3.



windows of a local church.”<sup>151</sup> Moreover, it did not credit his guilty plea as “an example of his good character entitling him to a lesser sentence,” observing instead from its “review of the record that Martin was rude and wholly unremorseful during the sentencing hearing.”<sup>152</sup>

Martin petitioned for transfer, emphasizing that no pre-sentence investigation report had been prepared to document his criminal history.<sup>153</sup> The court of appeals, however, had quoted the trial court’s comments at sentencing—“[y]ou keep coming back here over and over again and I’m done. You have worn out whatever mercy that I’m willing to give”—and taken judicial notice that “the same judge had sentenced Martin in eight other prosecutions during the past six years.”<sup>154</sup> Although not writing separately, Chief Justice Rush and Justice Goff voted to grant transfer.<sup>155</sup>

#### *D. Increasing Sentences on Appeal*

This section—and, indeed, Indiana decisional law—focuses almost exclusively on the potential downward revision of a sentence on appeal. A decade and a half ago in *McCullough v. State*, the Indiana Supreme Court held that, when a defendant requests independent review of a sentence, appellate courts have the option either to affirm, reduce, or increase the sentence imposed.<sup>156</sup> Although individual judges have written dissents arguing for an increased sentence,<sup>157</sup> just one court of appeals’ opinion has increased a sentence, and that increase was swiftly vacated by the Indiana Supreme Court.<sup>158</sup>

The Supreme Court’s denial of transfer by a 3-2 vote in *Thomas v. State* is thus noteworthy.<sup>159</sup> The court of appeals panel in *Thomas* affirmed a nearly thirty-three-year sentence for multiple counts of child molesting with a habitual offender enhancement.<sup>160</sup> The majority rejected both the defendant’s Appellate Rule 7(B) request for a downward revision of the sentence and the State’s argument for an increase of the sentence.<sup>161</sup> Judge May dissented, noting that “Thomas’s offenses were egregious. He abused a position of authority to molest

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151. *Id.*

152. *Id.*

153. Petition to Transfer, *Martin v. State*, 205 N.E.3d 193 (Ind. Ct. App. 2022) (No. 22A-CR-1487).

154. *Martin*, 2022 WL 17409907, at \*2 n.1.

155. *Martin v. State*, 205 N.E.3d 193 (Ind. 2023) (mem.).

156. 900 N.E.2d 745 (Ind. 2009).

157. *See, e.g.*, *Holt v. State*, 62 N.E.3d 462, 467 (Ind. Ct. App. 2016) (Bradford, J., dissenting) (“Consequently, due to the age of the victims and nature of his offenses, I see no basis for leniency. I would therefore invoke this court’s authority to revise Holt’s sentence upward to eight years for each conviction.”).

158. *Akard v. State*, 937 N.E.2d 811 (Ind. 2010).

159. *Thomas v. State*, 215 N.E.3d 338 (Ind. 2023) (mem.).

160. *Thomas v. State*, No. 22A-CR-2086, 2023 WL 2961743, at \*1 (Ind. Ct. App. Apr. 17, 2023).

161. *Id.* at \*4-6.

the victim, and he threatened the victim in an effort to prevent her from reporting the molestations. Moreover, Thomas videotaped himself molesting the victim.”<sup>162</sup> Based on the “egregious” nature of the offenses and the defendant’s significant criminal history, she would have revised his sentence to sixty-three-and-a-half years as requested by the State.<sup>163</sup>

The State argued on transfer that the sentence upheld by the court of appeals was “both an outlier and wholly inadequate to address the harm that resulted from Thomas’s actions. Further guidance from this Court is necessary to explain when and under what circumstances upward sentence revisions are justified under Rule 7(B).”<sup>164</sup> Justice Massa and Justice Molter voted to grant transfer, although neither wrote a dissent from the denial of transfer to explain their specific rationale.<sup>165</sup> Two votes to grant transfer, especially from a memorandum decision that lacks precedential value, signals that the issue of upward appellate revisions may well surface again.

#### *E. Prior Acquittals Cannot Be Aggravating Circumstances at Sentencing*

Outside the Rule 7(B) realm of sentence revision, the court of appeals addressed consideration of prior acquittals at a sentencing hearing. In *Walden v. State*, the trial court found as an aggravating circumstance at sentencing that a defendant convicted of child molesting was at high risk to re-offend because “this is the third time he has been charged with similar offenses.”<sup>166</sup>

The court of appeals relied on *McNew v. State*,<sup>167</sup> where a trial court abused its discretion in considering prior acquittal in an unrelated armed robbery charge in enhancing a defendant’s sentence following his conviction for two counts of robbery:

a judge does not err in considering prior arrests which had not been reduced to conviction in determining what sentence to impose. But he did not properly consider the armed robbery charge which resulted in acquittal. A not guilty judgment is more than a presumption of innocence; it is a finding of innocence. *And the courts of this state, including this Court, must give exonerative effect to a not guilty verdict if anyone is to respect and honor the judgments coming out of our criminal justice system.*<sup>168</sup>

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162. *Id.* at \*7 (May, J., dissenting).

163. *Id.*

164. State’s Petition to Transfer at 6, *Thomas v. State*, 215 N.E.3d 338 (Ind. 2023) (No. 22A-CR-2086). (citation omitted).

165. *Thomas v. State*, 215 N.E.3d 228 (Ind. 2023) (mem.).

166. *Walden v. State*, 216 N.E.3d 1165, 1172 (Ind. Ct. App.), *trans. denied*, 222 N.E.3d 929 (Ind. 2023).

167. 391 N.E.2d 607, 609, 612 (1979).

168. *Walden*, 216 N.E.3d at 1177 (emphasis added) (citing *McNew v. State*, 391 N.E.2d 607 (Ind. 1979)).

Likewise, “the trial court’s consideration of Walden’s charges in two prior child molesting cases that resulted in acquittals as bearing on his likelihood of re-offense could only be relevant if the trial court failed to give exonerative effect to those acquittals.”<sup>169</sup>

The case was remanded for resentencing based on the “prominence of Walden’s prior acquittals in the trial court’s oral and written sentencing statements.”<sup>170</sup> The majority was not convinced that the trial court would have ordered consecutive sentences if it had not considered this improper factor.<sup>171</sup> Judge Bradford dissented because, “[b]ased on the numerous proper aggravating factors,” he was “confident that the trial court would have imposed the same sentence[.]”<sup>172</sup>

#### VIII. POST-CONVICTION RELIEF FOR SENTENCING APPEALS WITH PLEA WAIVER

Defendants have a constitutional right to appeal their sentences,<sup>173</sup> but they may waive that right so long as their waiver is knowing and voluntary under the 2008 *Creech v. State* opinion from the Indiana Supreme Court.<sup>174</sup> In the decade and a half since, many prosecutors have included such waivers in plea agreements, which have generally been upheld on appeal unless the language was ambiguous or the trial court gave conflicting advisements during the plea colloquy.<sup>175</sup>

Thunder clouds have been forming around this issue in recent years. For example, the plea agreement in *Johnson v. State*, a 2020 case, granted the trial court full discretion as to the sentence and included the following provision: “DEFENDANT WAIVES RIGHT TO APPEAL AND POST CONVICTION RELIEF.”<sup>176</sup> 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.”<sup>177</sup> Justice Slaughter dissented and “would expressly adopt the court of appeals’ opinion,”<sup>178</sup> which found “no ambiguity in the plea agreement”; “if this provision is to mean anything, it must

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169. *Id.*

170. *Id.* at 1178.

171. *Id.*

172. *Id.* at 1179 (Bradford, J., dissenting).

173. IND. CONST. art. 7, §§ 4, 6.

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

175. See generally Joel M. Schumm & Riley L. Parr, *Recent Developments in Indiana Criminal Law and Procedure*, 54 IND. L. REV. 851, 870 (2022).

176. 145 N.E.3d 785, 786 (Ind. 2020) (per curiam).

177. *Id.* at 787.

178. *Id.* (Slaughter, J., dissenting).

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.”<sup>179</sup>

Recent opinions from the court of appeals and divided votes on transfer have foreshadowed a shift. For example, the court of appeals found in *Grate v. State*, that the defendant waived the right to appeal her sentence pursuant to the terms of the written plea agreement.<sup>180</sup> The Indiana Supreme Court denied transfer by a 3-2 vote with Chief Justice Rush and Justice Goff dissenting from the denial of transfer in a written opinion that identified “a trifecta of errors establishing that Grate did not knowingly or voluntarily waive her constitutional right to appeal her sentence.”<sup>181</sup>

Her plea agreement’s waiver provision listed her constitutional rights before ambiguously stating, ‘Also, the right to appeal, so long as the Judge sentences the Defendant within the terms of this plea agreement[.]’ At her subsequent guilty plea hearing, the trial court never mentioned Grate’s right to appeal her sentence let alone that she was waiving this right by pleading guilty. Further compounding the confusion, after imposing a sentence, the court advised Grate she had ‘the right to appeal this sentence’ and later appointed counsel for that purpose.<sup>182</sup>

In another case in which the court of appeals dismissed an appeal based on a *Creech* waiver, Chief Justice Rush and Justice Goff voted to “grant transfer to review the Appellant’s sentence under Indiana Appellate Rule 7(B).”<sup>183</sup>

A 3-2 opinion decided in 2023 broke new ground. In *Davis v. State*, Justice Molter wrote for a three-justice majority that, even if a trial court made conflicting statements before accepting a guilty plea that may have misled a defendant, the “remedy is to vacate his conviction through postconviction proceedings, not to nullify his appeal waiver through a direct appeal.”<sup>184</sup> Moreover, “the remedy of setting aside the conviction would result in Davis invalidating the entire plea agreement rather than allowing him to retain its benefits while escaping its burdens.”<sup>185</sup>

Justice Goff, joined by Chief Justice Rush, dissented, concluding that the appeal waiver was unenforceable “because Davis was affirmatively advised by

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

180. No. 22A-CR-2224, 2023 WL 2657532, at \*1 (Ind. Ct. App. Mar. 28, 2023), *trans. denied*, 213 N.E.3d 1025 (Ind. 2023) (mem.).

181. *Grate v. State*, 213 N.E.3d 1025, 1026 (Ind. 2023) (mem.) (Rush C.J., dissenting).

182. *Id.*

183. *Vance v. State*, 208 N.E.3d 1255 (Ind. 2023) (mem.).

184. 207 N.E.3d 1183, 1184 (Ind.), *opinion modified and superseded on reh'g*, 217 N.E.3d 1229 (Ind. 2023), *as modified* (Oct. 3, 2023).

185. *Id.* at 1188.

the trial court, before entry of his guilty plea, that he would retain the right to appeal.”<sup>186</sup> Because appeal waivers can be severed from the rest of a plea agreement, the defendant “should be allowed his appeal, rather than having to make an ‘all or nothing’ challenge to his plea.”<sup>187</sup>

Davis sought rehearing, and both the Indiana Public Defender Council and the State Public Defender filed amici briefs in support, reporting “confusion among public defenders about whether the majority opinion forecloses direct appeals of sentencing issues that remain viable notwithstanding an appeal waiver.”<sup>188</sup> The court granted rehearing in part, with two changes. First, in framing the issue presented and addressed, the revised opinion notes: “Because we cannot nullify Davis’s appeal waiver through this direct appeal based on the claim that the waiver was not knowing and voluntary, we must dismiss the appeal. However, Davis may still seek relief through post-conviction proceedings.”<sup>189</sup> Second, the revised opinion added the following footnote at its conclusion:

To be sure, there remain circumstances where defendants may pursue a direct appeal of sentencing issues notwithstanding an appeal waiver. For example, some sentencing appeal issues are nonwaivable. *See Crider v. State*, 984 N.E.2d 618, 619 (Ind. 2013) (“In this case we conclude that the waiver of the right to appeal contained in a plea agreement is unenforceable where the sentence imposed is contrary to law and the Defendant did not bargain for the sentence.”). Other issues may also fall outside the scope of the waiver. *See Archer v. State*, 81 N.E.3d 212, 214, 216 (Ind. 2017) (holding that the defendant’s appeal waiver did not cover her right to appeal the restitution amount). This appeal does not implicate those issues because Davis’s transfer petition seeks to nullify the appeal waiver as not knowing and voluntary rather than to raise a nonwaivable sentencing issue or an issue outside the scope of his appeal waiver.<sup>190</sup>

#### IX. LIFE WITHOUT PAROLE DIRECT APPEALS

Although the life without parole (LWOP) sanction is noteworthy, the issues raised on appeal often are not. The Indiana Constitution gives the Indiana Supreme Court exclusive jurisdiction over all death penalty cases,<sup>191</sup> and most

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186. *Id.* at 1190 (Goff, J., dissenting).

187. *Id.*

188. Order Granting Rehearing at 2, *Davis v. State*, 217 N.E.3d 1229 (Ind. 2023), *as modified* (Oct. 3, 2023) (No. 22S-CR-253).

189. *Davis v. State*, 217 N.E.3d 1229, 1232 (Ind. 2023), *as modified* (Oct. 3, 2023).

190. *Id.* at 1236 n.3.

191. IND. CONST. art. VII, § 4.

LWOP cases go directly to the Indiana Supreme Court by court rule.<sup>192</sup> As suggested in last year's survey, the fairly routine nature of LWOP direct appeals may lead some to wonder if the cases are better suited for resolution in the court of appeals.<sup>193</sup> The relatively unremarkable nature of the three direct appeals of LWOP cases during this survey period add further credence to that view. Routing those appeals to the court of appeals would simply require an amendment to the Appellate Rules—not the Indiana Constitution.

First, the only challenge raised in *Carmack v. State* was to the murder conviction; nothing was argued about the LWOP statute or sentence.<sup>194</sup> There, a mother who was convicted of murdering her ten-year-old stepdaughter argued that the State failed to disprove that the child was killed in sudden heat, which would have resulted in a conviction to voluntary manslaughter.<sup>195</sup> Swinging for the fences, the State argued “as a matter of law that frustration with a child's behavior can never trigger sudden heat mitigating murder to manslaughter.”<sup>196</sup> State supreme courts in Iowa and Tennessee have held as much.<sup>197</sup>

The Indiana Supreme Court decided the case more narrowly, finding that “the record here is so bereft of evidence of sudden heat that if there be any error, it was giving the jury this option in the first place, notwithstanding the cautious virtue of protecting the appellate record.”<sup>198</sup> The “run-of-the-mill disciplinary problems” involving the stepdaughter “do not even raise an eyebrow for adequate provocation under Indiana law.”<sup>199</sup> Moreover, voluntary manslaughter was not an option based on a sustained overnight “cooling-off” period between the alleged frustration and killing.<sup>200</sup>

Next, the challenges in *Owen v. State* principally involved the LWOP sentence for an “acknowledged gang leader” involved in a gang-related murder.<sup>201</sup> The unanimous opinion by Justice Slaughter was relatively straightforward. First, it rejected the defendant's challenge that he was not “a major participant because he did not actually kill [the victim] himself and was not there for each and every event leading up to her murder.”<sup>202</sup> The court reiterated that “major participation in a murder requires, at least, the defendant's ‘(1) active involvement in any crimes surrounding the commission of the

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192. IND. R. APP. P. 4(A)(1). Life without parole is usually imposed through the same statutory procedure used in capital cases. See IND. CODE § 35-50-2-9 (2016). A seldom-used statute that was repealed in 2014 allowed imposition of LWOP for a third, especially serious felony. See IND. CODE §35-50-2-8.5 (2013), *repealed* by P.L.158-2013, SEC.662.

193. Schumm, *supra* note 1, at 755.

194. 200 N.E.3d 452, 455 (Ind. 2023).

195. *Id.* at 458.

196. *Id.* at 459.

197. *Id.* (citing *State v. Brown*, 836 S.W.2d 530, 554 (Tenn. 1992); *State v. Taylor*, 452 N.W.2d 605, 606 (Iowa 1990)).

198. *Id.*

199. *Id.* at 459, 462.

200. *Id.* at 462-63.

201. 210 N.E.3d 256, 265 (Ind. 2023), *reh'g denied* (Aug. 17, 2023).

202. *Id.* at 264.

murder; and (2) physical presence during the entire sequence of criminal activity culminating in the murder and flight from the scene.”<sup>203</sup> Although “the perpetrator who delivers the fatal blow is plainly a major participant, an accomplice need not be the ‘trigger man’ to qualify as a ‘major participant’ in a murder.”<sup>204</sup> As summarized by the court, Owens

actively participated in the antecedent crimes leading to [the victim’s] murder; confined her against her will; interrogated her; gave the order to “make her go to sleep”; did not intervene as he watched [a gang member] choke [the victim] and slit her throat; and led the effort in covering up the crime.<sup>205</sup>

The *Owen* opinion also rejected challenges to two aggravating circumstances listed in the LWOP statute under the deferential standard of appellate review: (1) committing the murder while also committing or attempting to commit criminal organization activity<sup>206</sup> and (2) killing while under the custody of a county sheriff.<sup>207</sup>

Third, the challenges raised in *Oberhansley v. State*<sup>208</sup> were also specific to the LWOP statute but required relatively little discussion in their unanimous resolution. First, the opinion written by Justice Goff found the “jury’s LWOP recommendation implicitly reflected the necessary determination” that the aggravating circumstances outweighed the mitigating circumstances—a statutory prerequisite for an LWOP sentence.<sup>209</sup> It also declined to revise the sentence as inappropriate considering his severe mental illness; neither his character, reflected in his lengthy criminal history and drug use on the day of the crime, nor the nature of his crimes, which he conceded was “horrific,” warranted a reduction.<sup>210</sup>

As a final point, in addressing whether a claim was adequately preserved for appellate review, the court stated the following in a footnote:

We are mindful that LWOP sentences are largely “subject to the same statutory standards” as death sentences and, like the latter, trigger a “heightened-reliability interest.” *Wright v. State*, 168 N.E.3d 244, 261 (Ind. 2021) (internal citations omitted). Regardless of a defendant’s attempt to waive a sentencing appeal, “the death sentence cannot be imposed on anyone in this State until it has been reviewed by this Court and found to comport with the laws of this State and the principles of

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203. *Id.* at 265 (citations omitted).

204. *Id.* (citations omitted).

205. *Id.* at 266.

206. IND. CODE § 35-50-2-9(b)(1)(I) (2016).

207. *Id.* § 35-50-2-9(b)(9)(B).

208. 208 N.E.3d 1261, 1265 (Ind. 2023).

209. *Id.* at 1265.

210. *Id.* at 1271-72.

our state and federal constitutions.” *Judy v. State*, 275 Ind. 145, 157-58, 416 N.E.2d 95, 102 (1981).<sup>211</sup>

Justice Slaughter concurred, except as to that footnote, in what was an otherwise unanimous opinion.<sup>212</sup>

#### X. BELATED APPEALS

Finally, the Indiana Supreme Court divided 3-2 in allowing a defendant to pursue a belated appeal. Indiana Post-Conviction Rule 2(1)(a) allows an eligible convicted defendant to “petition the trial court for permission to file a belated notice of appeal of the conviction or sentence if;

- (1) the defendant failed to file a timely notice of appeal;
- (2) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
- (3) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.”<sup>213</sup>

In *Leshore v. State*, a divided Indiana Supreme Court vacated a divided court of appeals opinion, allowing a defendant who pleaded guilty to felonies in 1999 the opportunity to pursue a belated appeal based on his discovery of new information in 2021.<sup>214</sup> First, in concluding that the defendant was not at fault for the delay, the majority opinion by Justice Massa noted the mistaken advice provided in 2005 by his public defender meant he had “no reason to appeal his sentence when he was never aware of his right to do so.”<sup>215</sup> The court also pointed to “equitable factors weighing in his favor: he was nineteen years-old when sentenced, he had limited education and contact with the legal system, and no experience with appellate law and its many rules.”<sup>216</sup> Second, the majority found that diligence was “best measured from the time when Leshore learned of his rights,” from another inmate in 2021, “to the filing of his permission to file a belated notice of appeal,” nineteen days later.<sup>217</sup> This nineteen-day delay was diligent; “while we decline to draw a line for when diligence must always begin, we can say Leshore was prompt enough.”<sup>218</sup>

Justice Goff, joined by Justice Slaughter, dissented. In their view, Leshore did not demonstrate diligence in pursuing an appeal when he “gave up any pursuit of post-conviction relief for a period of sixteen years. Had he proceeded

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211. *Id.* at 1269 n.4.

212. *Id.* at 1272.

213. IND. R. POST-CONVIC. RLF. 2(1)(a).

214. 203 N.E.3d 474, 475 (Ind. 2023).

215. *Id.* at 479.

216. *Id.*

217. *Id.*

218. *Id.*



with sentencing claims via Post-Conviction Rule 1 in 2005, he would probably have discovered much sooner that he needed to seek a belated appeal.”<sup>219</sup>

#### CONCLUSION

Newly appointed Justice Molter authored half of the six criminal transfer opinions discussed above.<sup>220</sup> Two were unanimous. *Doroszko* reaffirmed the importance of allowing lawyers to question prospective jurors, granting a new trial in a rare case involving a judge who did not follow the Trial Rules.<sup>221</sup> *Lyons* affirmed a weighty sanction for an egregious discovery violation.<sup>222</sup> *Davis*, by a 3-2 vote, broke new ground for addressing the long-standing concern of appeals of sentences in the face of plea agreements purporting to waive the right.<sup>223</sup> Two of the court’s other transfer opinions were unanimous—*Young*’s affirmance of convictions under the deferential standard of review for sufficiency of evidence and *Hayko*’s important clarification of harmless error standards.<sup>224</sup> In the third, *Leshore*, Justice Molter was part of an uncommon three-justice majority (with Chief Justice Rush and Justice Massa) allowing a defendant to pursue a belated appeal.<sup>225</sup>

Although these transfer opinions are certainly important, the hundreds of criminal cases denied transfer annually have at least as significant an impact on the direction of Indiana’s criminal law jurisprudence. On that front, Chief Justice Rush and Justice Goff were increasingly a vote short in securing review on important issues, including the *Brady* issue in *Parchman* and especially on the revision of sentences in three separate cases.<sup>226</sup> On the sentencing front, Justice Molter, by joining Justice Massa in voting to grant transfer in *Thomas*, signaled openness to increasing a sentence on appeal, which would surely diminish the willingness of some defendants to raise a challenge to the appropriateness of their sentence.<sup>227</sup>

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219. *Id.* at 481 (Goff, J., dissenting).

220. Although bearing a criminal court cause number and important to criminal law, some opinions are principally ones of Indiana Constitutional Law, see *Harris v. State*, 211 N.E.3d 929 (Ind. 2023), or Appellate Practice, see *Means v. State*, 201 N.E.3d 1158 (Ind. 2023), which are summarized in the respective survey articles. See Scott Chin et al., *Legislative Leeway: A Year of Indiana Constitutional Law Restraint—2022-2023*, 57 IND. L. REV. 971 (2024); Bryan H. Babb et al., *Developments in Indiana Appellate Procedure: Rule Amendments, Remarkable Case Law, and Court Guidance for Appellate Practitioners*, 57 IND. L. REV. 795 (2024).

221. *Doroszko v. State*, 201 N.E.3d 1151 (Ind. 2023).

222. *Lyons v. State*, 211 N.E.3d 500 (Ind. 2023).

223. *Davis v. State*, 207 N.E.3d 1183, 1184 (Ind. 2023).

224. *Young v. State*, 187 N.E.3d 969, 976 (Ind. Ct. App. 2022); *Hyako v. State*, 211 N.E.3d 483, 494 (Ind. 2023).

225. *Leshore v. State*, 203 N.E.3d 474, 475 (Ind. 2023).

226. *Parchman v. State*, 200 N.E.3d 499, 500 (Ind. Ct. App. 2022).

227. *Thomas v. State*, *Thomas v. State*, 215 N.E.3d 338 (Ind. 2023) (mem.).

Chief Justice Rush remains the most likely to grant transfer, usually on petition from the criminal defendant and frequently joined by Justice Goff. She was occasionally joined by others, including Justice Slaughter in voting to address the speedy trial claim in *Bik* and advocating for a “simpler inquiry” of resisting law enforcement in *Evans*.<sup>228</sup>

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228. *Bik v. State*, 211 N.E.3d 594 (Ind. Ct. App. 2023); *Evans v. State*, 207 N.E.3d 428, 428 (Ind. 2023) (mem.).