Update—Criminal Law and Procedure

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Introduction

During 1992, the United States Supreme Court issued only a limited number of significant decisions dealing with criminal law and procedure. Conversely, the Indiana Supreme Court granted transfer of a large number of Indiana Court of Appeals decisions and further evinced its apparent desire to adopt a formal set of evidentiary rules for Indiana. Additionally, the court continued to exercise its right to review and revise criminal sentences found to be inappropriate or contrary to the Indiana Constitution. The court also expressed its interest in the provision of legal services for indigent criminal defendants in Indiana.

Furthermore, two statutory enactments effective July 1, 1992, have generated considerable debate since their effective date, but resolution of the issues they raise must await the appellate courts' consideration. Because of the high volume of significant state court decisions and the availability of other sources reviewing United States Supreme Court decisions, this Article will concentrate on Indiana law.

I. Statutory Enactments

A new provision that allows incarcerated criminal defendants to petition for a reduction of their sentence under certain circumstances became effective July 1, 1992. Indiana Code section 35-38-1-23,[1] the

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1. Ind. Code § 35-38-1-23 (Supp. 1992). The statute provides:

(a) Notwithstanding IC 35-50-2-2, a person may petition the sentencing court for a reduction of sentence if:

(1) the person has been sentenced to more than four (4) years imprisonment;

(2) the person is in credit Class I;

(3) there are less than two (2) years remaining until the person's earliest possible release date;

(4) the person has successfully completed an educational, a vocational, or a substance abuse program that the department has determined to be appropriate; and

(5) the person has demonstrated a pattern of behavior consistent with evidence

"earned credit time" statute, allows even those with nonsuspendible sentences to receive a reduction in their remaining sentence if they have participated in certain therapeutic, training, or rehabilitative programs while incarcerated. The grant of up to a two-year reduction in sentence is at the discretion of the trial court, but does not require the approval, or even the participation, of the prosecutor, as does the older sentence modification statute.[2] Additionally, the earned credit time statute may not be used unless the defendant has received greater than a four year sentence and less than two years remain until the inmate's earliest release date.[3] In contrast, the older modification statute, which applies only to at least partially suspendible sentences, is more often applied for within the first year of the prisoner's incarceration.

Although Indiana Code section 35-38-1-23 makes no mention of any State involvement in the procedure for sentence reduction, a question has been raised as to whether those defendants sentenced for a term of years through plea agreements should be eligible for its benefits. This question arises from the doctrine established in *State ex rel. Goldsmith v. Marion Superior Court*,[4] relating to the older sentence modification. In *Goldsmith*, the Indiana Supreme Court held that a defendant sentenced for a specific term of years under a plea agreement could not receive

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of rehabilitation.

(b) Upon the filing of a petition under subsection (a), the court may reduce the sentence of the person by up to two (2) years upon a finding that:
(1) all conditions of subsection (a)(1) through (a)(5) exist; and
(2) reduction of the sentence is in the best interests of justice.

(c) The court may grant or deny the petition without a hearing and without making written findings or conclusions.

2. *Id.* § 35-38-1-17 (Supp. 1992). The statute provides in relevant part:
Within three hundred sixty-five (365) days after:

(1) the defendant begins serving his sentence;

(2) a hearing at which the defendant is present and of which the prosecuting attorney has been notified; and

(3) obtaining a report from the department of correction concerning the defendant's conduct while imprisoned; the court may reduce or suspend the sentence. The court must incorporate its reasons in the record.

(b) If more than 365 days have elapsed since the defendant began serving the sentence, and after a hearing at which the convicted person is present the court may reduce or suspend the sentence, subject to the approval of the prosecuting attorney. The court must give notice of the order to reduce or suspend the sentence under this section to the victim (as defined in IC 35-35-3-1) of the crime for which the defendant is serving the sentence.

(c) The court may suspend a sentence for a felony under this section only if suspension is permitted under IC 35-50-2-2.

3. *Id.* § 35-38-1-23.

4. 419 N.E.2d 109 (Ind. 1981).

a modification of sentence under Indiana Code section 35-38-1-17, unless the right to receive such a modification was preserved in the agreement.[5] The rationale of *Goldsmith* was that if the defendant were allowed such a modification, it would undermine the "bargain" that had been negotiated in the plea agreement.[6]

It might be argued to the contrary, however, that those sentenced under plea agreements *should* be eligible for relief under Indiana Code section 35-38-1-23, because the statute on its face addresses rehabilitation shown during the period of incarceration, something that could not have been known at the time of plea bargaining and sentencing. The fact that the statute does not call for the approval or participation of the State in the process, and that it can be used in cases where the original sentence was nonsuspendible, might also favor an argument for the availability of the reduction to those sentenced by plea agreements. Finally, it might be argued that the legislature, in omitting State approval and participation from the new reduction procedure, specifically intended to allow for reduction without consideration of the State's original position regarding sentencing.[7] Ultimate resolution these issues will rest with the appellate courts.

Another statutory provision that seems sure to foster continuing controversy is Indiana Code chapter 6-7-3, Indiana's Controlled Substance Excise Tax. These statutes are nominally tax provisions; however, their impact on criminal practice will be significant. In part, the statutes provide that any controlled substances delivered, possessed or manufactured in violation of Indiana Code chapter 35-48-4 or 21 U.S.C. §§ 841-85 are subject to the tax.[8] The tax is assessed per gram of pure, impure, or diluted substance,[9] and varies from ten dollars per gram to forty dollars per gram. The more commonly possessed substances, such as cocaine and marijuana, are taxed at the forty dollar per gram rate.[10]

The tax is to be paid when the person receives delivery of, takes possession of, or manufactures the substance.[11] When the tax is paid, the department of revenue is to issue evidence of payment to the taxpayer,

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5. *Id.* at 114.

6. *Id.*

7. Former Sen. Edward A. Pease, who was the original author of this legislation and Chairman of the Indiana Senate Judiciary Committee, indicated by affidavit that the intent of the bill was to allow for reduction of sentences which were imposed through plea agreements. The use of such affidavits to discern legislative intent is questionable, however. *See, e.g.*, O'Laughlin v. Bartin, 571 N.E.2d 1258, 1260-61 (Ind. 1991).

8. IND. CODE § 6-7-3-5 (Supp. 1992).

9. The quantity of impure or diluted substance is counted so long as there is a detectable quantity of the pure controlled substance, *Id.* § 6-7-3-6(b) (Supp. 1992).

10. *Id.* § 6-7-3-6(a)(1) (Supp. 1992).

11. *Id.* § 6-7-3-8 (Supp. 1992).

which is valid for forty-eight hours after payment is made.[12] The taxpayer must have evidence of payment in his or her possession to avoid the nonpayment penalties.[13] Possession of the prohibited substances without having paid the tax is a class D felony, unless the criminal act giving rise to the tax liability is a class A misdemeanor.[14] Failure to pay the tax also subjects the person to a 100% penalty,[15] thus effectively doubling the tax amount. An assessment for the tax due under the statute is a jeopardy assessment,[16] which allows for immediate seizure of assets prior to hearing.[17] The statute also provides that up to ten percent of the tax amount collected may be paid to anyone providing information leading to its collection and, that if the information is provided by a law enforcement agency, the agency shall receive thirty percent of all amounts collected.[18]

Obviously, there has not been a rush of those seeking to pay this new tax,[19] even though failure to pay results in a doubling of the assessment and possible prosecution for a class D felony, and even though the statute states that "[a] person may not be required to reveal the person's identity at the time the tax is paid."[20] There have been a number of assessments issued, however, and the monetary amount of the assessments has been staggering.[21] The amount is not surprising because marijuana is taxed at forty dollars per gram plus an additional forty dollars per gram penalty for failure to pay the tax. Given the number of grams per ounce, twenty-eight, possession of just one ounce of marijuana, including stems, dirt, and any other adulterants, would result in an assessment of $2,240.

Although collection of such massive amounts of money would seem to be problematical at best, the provision for immediate seizure and levy of assets has implications far beyond the collection of the whole amount. For example, what will be the effect on the already overburdened

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12. *Id.* § 6-7-3-10 (Supp. 1992).
13. *Id.*
14. *Id.* § 6-7-3-11(b) (Supp. 1992).
15. *Id.* § 6-7-3-11(a) (Supp. 1992).
16. *Id.* § 6-7-3-13 (Supp. 1992).
17. *Id.* § 6-8.1-5-3 (Supp. 1992).
18. *Id.* § 6-7-3-16 (Supp. 1992).
19. In the first three months after the effective date of the tax, only one instance of taxpayer payment was noted by the Indiana Department of Revenue. INDIANAPOLIS STAR, Oct. 9, 1992, at B-1.
20. IND. CODE § 6-7-3-8 (Supp. 1992).
21. As of Dec. 28, 1992, assessments under the new tax totalled $49,345,679. Telephone Interview with Commissioner's Office of the Indiana Department of Revenue (Dec. 28, 1992).

public defender system[22] if those who initially have assets to retain counsel for any accompanying or resultant criminal prosecution suddenly have insufficient assets to do so? Additionally, if a person's assets have been seized, will he or she be able to effectively pursue any of the statutory remedies to contest the tax or seizure?

Other issues that may arise and be litigated in regard to the new statutory scheme include the adequacy of its protection against self-incrimination, and the impact of the Fourth Amendment of the United States Constitution and Article I, section 11 of the Indiana Constitution[23] on the use of illegally seized evidence to support the tax assessment. Challenges based on whether the tax is truly a "excise tax" rather than a criminal penalty might also be expected—especially because the tax and penalty frequently far exceed the value of the taxable item.[24] If the tax is considered a fine or penalty, rather than a valid tax, additional issues arise, such as: double jeopardy concerns when a criminal prosecution is also involved[25] and whether the possible disposition of the monies collected is proper under the Indiana Constitution.[26] A number of other states have similar statutes,[27] many of which have been upheld against constitutional challenges,[28] but the various statutory provisions are not identical, and it remains to be seen whether Indiana's statute will withstand the challenges expected.

While an exhaustive analysis of possible areas of contention regarding the new statutory scheme is beyond the scope of this note, it certainly appears that the excise tax will continue to foster considerable debate and litigation in the near future.

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22. On Nov. 9, 1992, the Indiana Supreme Court recognized the problems with the public defender system in Indiana when it issued an order announcing the possible use of its rule-making authority to reform this system, and soliciting comments from those with an interest in the problem. Order Seeking Comment on Petition for Rule Making, Cause No. 49S00-9210-MS-822.

23. U.S. CONST. amend. IV. The Fourth Amendment to the U.S. Constitution states in relevant part that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." Article I, § 11 of the Indiana Constitution contains identical language.

24. For example, the one ounce of marijuana mentioned previously would have a tax and penalty totalling $2,240, far exceeding its market value.

25. *See, e.g.*, United States v. Halper, 490 U.S. 435 (1989).

26. Article VIII, § 2 of the Indiana Constitution provides that the Common School Fund consists of "the fines assessed for breaches of the penal laws of the State," and "all forfeitures which may accrue." IND. CONST. art. VIII, § 2.

27. Some of the other states with similar statutory schemes include Minnesota, Florida, Alabama, Colorado, Illinois, and Wisconsin.

28. *See, e.g.*, Briney v. State Dep't of Rev., 594 So.2d 120 (Ala. Civ. App. 1991), *cert. denied*, 1910 187 (Ala. 1992); Harris v. Department of Revenue, 563 So.2d 97 (Fla. App. 1990); Sisson v. Triplett, 428 N.W.2d 565 (Minn. 1988).

II. Case Law Decisions

A. Evidentiary Decisions

The Indiana appellate courts issued a number of decisions this year that will affect the admissibility of evidence in criminal trials. The Indiana Supreme Court continued to consider the adoption of a standardized system of written evidentiary rules, whether through its rule-making powers,[29] or through a more piecemeal, case-by-case process.[30] Probably the most significant 1992 decision in this regard is that rendered in *Lannan v. State*,[31] wherein the Indiana Supreme Court rejected Indiana's long-standing use of the Depraved Sexual Instinct (DSI) rule[32] as a special exception to the general prohibition against the use of other misconduct as substantive evidence to show the guilt of the accused.[33]

Although upholding the defendant's conviction in *Lannan*, the court found that consideration of evidence of the defendant's depraved sexual instinct as substantive evidence of guilt in certain sex offense trials[34]

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29. Pursuant to its rule-making authority, the Indiana Supreme Court has established an ad hoc committee with representatives from throughout the State to study and propose a system of written rules of evidence. *In re* the Appointment of Supreme Court Committee On Rules Of Evidence, 602 N.E.2d 137 (Ind. 1992).

30. *See, e.g.*, Modesitt v. State, 578 N.E.2d 649 (Ind. 1991) (abandoning the *Patterson* rule and adopting Fed. R. Evid. 801 (d)(1)(A) regarding hearsay testimony); Thomas v. State, 580 N.E.2d 224 (Ind. 1991) (adopting Fed. R. Evid. 804(b)(3) regarding admissibility of statements against penal interest); *see also* the more recent decision in Nunn v. State, 601 N.E.2d 334, 338 (Ind. 1992) (adopting Fed. R. Evid. 609(c) regarding impeachment of a witness with a prior conviction for which he had been pardoned).

31. 600 N.E.2d 1334 (Ind. 1992).

32. The DSI rule allowed for admission of other incidents of sexual "misconduct" under the theory that the defendant possessed a "depraved sexual instinct" which caused him or her to repeatedly commit certain kinds of aberrant sexual acts. These other acts were admissible to show that it was more likely than not that the defendant acted in conformity with his or her deviant sexual character. *See, e.g.*, Stwalley v. State, 534 N.E.2d 229 (Ind. 1989); Kerlin v. State, 265 N.E.2d 22 (Ind. 1970).

33. *Lannan*, 600 N.E.2d at 1339. The general rule against the use of other misconduct evidence prohibits the use of such evidence to show that the defendant has a propensity to engage in criminal conduct. 12 Robert L. Miller, Indiana Evidence § 404.201 (1984) (Supp. 1993). There are, however, certain exceptions to this rule, such as allowing admission of prior acts that are very similar in nature and show a common scheme or plan; acts that go to the defendant's identity or motive when they are at issue; or acts that negate the defenses of mistake or accident. *See* 12 *id.* § 404.20. Additionally, such acts are not admissible if they are too remote in time, otherwise of questionable reliability, or greatly prejudicial. 12 *id.* § 404.203-04.

34. DSI evidence was most commonly used in prosecutions for child molestation and deviate conduct, but was not admissible in prosecutions for rape. 12 Miller, *supra* note 33, § 404.216.

when the evidence would not ordinarily be admissible under the other misconduct rule, was no longer justified.[35] The court rejected any recidivism argument to justify the old DSI rule, noting that despite the fact drug dealers are high recividists, evidence of other similar misconduct is not admissible in their prosecutions unless it fits within the standard exceptions to the prohibition of such evidence.[36] The court also rejected justification for this special rule based on one of its original premises for admission: that juries would be unlikely to believe the complaining witness's claim that such an event occurred unless it also heard evidence the defendant possessed a depraved sexual instinct. This premise was rejected because, in the present day and age, the layperson is all too familiar with allegations of child molesting.[37]

The court therefore adopted Federal Rule of Evidence 404(b)[38] in its entirety,[39] and noted there would still be a number of instances in which DSI evidence would be admissible against the defendant under the new standard.[40]

Although the court in *Lannan* decided the adoption of Fed. R. of Evid. 404(b) would be effective from the date of the decision forward,[41] in another decision, it applied the rule to a case in which review was still pending. In *Pirnat v. State,*[42] the defendant had appealed his conviction, in part based on the admission of DSI evidence. The court of appeals affirmed his conviction, and he petitioned for transfer to the Indiana Supreme Court. Because the Petition for Transfer was still pending when *Lannan* was decided, the court remanded the case to the court of appeals for reappraisal in light of the new rule.[43]

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35. *Lannan*, 600 N.E.2d at 1339.

36. *Id.* at 1336-37. *See, e.g.,* Conklin v. State, 587 N.E.2d 725 (Ind. Ct. App. 1992) (finding evidence that the defendant had sold an informant drugs in the past did not fit within the exception to the prohibition of other crimes evidence, and was therefore not admissible). This holding in *Conklin* was affirmed on transfer, 596 N.E.2d 1369 (Ind. 1992), although the case was remanded in part for retrial on other grounds.

37. *Lannan*, 600 N.E.2d at 1337.

38. The rule states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404(b).

39. *Lannan*, 600 N.E.2d at 1339.

40. *Id.* at 1339-40.

41. *Id.* at 1339.

42. 600 N.E.2d 1342 (Ind. 1992).

43. *Id.* More recently, the new rule regarding DSI evidence was applied to a case

In another decision dealing with a sex offense, the court held in *Sims v. State*[44] that statements made to a sex offender counselor were inadmissible against the defendant at trial.[45] Sims was on trial for child molesting and had been convicted previously of sexual battery. As a condition of his probation for the previous conviction, Sims was required to attend and complete sex offender treatment. He was in treatment for seventeen months, and at the subsequent child molesting trial, the counselor was permitted to testify as to details related by Sims in counseling.[46] The counselor was also permitted to give his clinical observations that Sims did not respond well to treatment and fit the pattern of a "regressive pedophile."[47]

Indiana Code section 25-23.6-6-1, making communications between a social worker and client privileged, was not yet in effect at the time of Sim's trial, and the communications did not fall within the physician patient privilege.[48] Nevertheless, the court still applied the privilege based on the same principle underlying the statute and the physician-patient privilege: that protecting counselor-patient communications promotes successful treatment by ensuring full disclosure between the counselor and patient.[49]

The court also found admission of the counselor's testimony to be tantamount to a circumvention of the defendant's Fifth Amendment rights.[50] The court reasoned that because Sims was required to seek treatment, he probably believed his communications would be confidential, and failure to disclose potentially incriminating evidence could have subjected him to further penalty for refusing to comply with the court's order.[51] Because evidence Sims was compelled to reveal was improperly used to his prejudice, the court decided he was entitled to a new trial where such evidence would be excluded.[52]

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that was tried before the rule was announced but which was still pending on appeal, althouth the court of appeals noted an apparent discrepancy regarding the retroactive application of *Lannan*. Vanover v. State, 605 N.E.2d 218, 219-20 (Ind. Ct. App. 1992). *See also* Moran v. State, 604 N.E.2d 1258, 1262 (Ind. Ct. App. 1992) (applying the *Lannan* rule to a pending appeal).

44. 601 N.E.2d 344 (Ind. 1992) This decision was also rendered on transfer of a court of appeals decision which had reversed the defendant's conviction on other grounds, Sims v. State, 591 N.E.2d 1044 (Ind. Ct. App. 1992).

45. *Sims*, 601 N.E.2d at 346-47.

46. *Id.* at 345.

47. *Id.*

48. *Id.* at 346-47.

49. *Id.*

50. *Id.* at 346.

51. *Id.*

52. *Id.* at 347.

The Indiana Supreme Court granted transfer of yet another court of appeals decision to discuss the admissibility of expert testimony on the issue of whether a defendant's personality profile was consistent with the formulation of the intent to commit murder. In *Byrd v. State*,[53] the court reversed the appellate court's decision that such testimony was admissible.[54] Byrd had sought to admit expert psychiatric testimony that his Minnesota Multiphasic Personality Inventory (MMPI) profile was inconsistent with formulating the intent to commit intentional murder. In finding such testimony properly excluded by the trial court, the Indiana Supreme Court found the proffered testimony was really character evidence.[55] The court noted that although defendants may offer evidence of their good character through their reputation, it is generally admitted through lay testimony of those who knew their reputation prior to the instant offense.[56] The court also reiterated the general rule that evidence of the defendant's character is not admissible to prove he acted in accord therewith on a particular occasion.[57]

The court found that in the instant case, the character evidence was being offered through an expert who based his opinion on MMPI results and the defendant's behavior after the offense.[58] Although MMPI-based testimony has been admitted in Indiana on the issue of the defendant's potential for rehabilitation, the court found no suggestion that the MMPI is an accurate indicator of whether the defendant committed the charged offense.[59] The court held that defendants may present evidence of their good character only for particular traits relevant to the acts charged. Because the expert's testimony in this case was about the defendant's character in general, it did not constitute evidence of a particular character trait and was therefore properly excluded.[60]

Despite the court's reversal on this issue, however, the cause was still remanded for retrial on an issue on which the two appellate courts agreed.[61] In addition to excluding the expert testimony on character, the trial court had also excluded expert testimony concerning the consistency of the defendant's claimed memory loss with the condition of retrograde amnesia. The court of appeals found this exclusion to be erroneous.[62]

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53. 593 N.E.2d 1183 (Ind. 1992)
54. *Id.* at 1187.
55. *Id.*
56. *Id.* at 1184-85.
57. *Id.*
58. *Id.* at 1187.
59. *Id.*
60. *Id.*
61. *Id.* at 1188.
62. Byrd v. State, 579 N.E.2d 457, 462 (Ind. Ct. App. 1991).

The court noted that there had been no dispute as to the expert's qualifications, and although Byrd had not raised his memory loss as a defense to the charged conduct, he had attempted to use it to explain why he could not remember what happened on the night the victim was murdered. The court observed that the State had missed few opportunities to attack the defendant's credibility by questioning the validity of his claimed memory loss, and therefore the disputed testimony was related to the issue of credibility.[63] Although the expert's testimony tended to show the defendant was credible, the court found it did not rise to the level of prohibited direct testimony as to his credibility and should have been admitted.[64] The supreme court agreed with the court of appeals on this issue, and found remand for retrial was appropriate.[65]

Other evidentiary decisions of note include *Taggart v. State*,[66] *Driver v. State*,[67] and *McKeown v. State*.[68] In *Taggart*, the supreme court found reversible error in the admission of a nontestifying codefendant's redacted confession because there was other evidence presented at trial which linked the defendant to the confession, and no limiting instruction was given.[69] In so finding, the court retroactively applied the rule announced in *Richardson v. Marsh*,[70] that admission of redacted confessions of codefendants that incriminate the defendant only through linkage by other evidence, is a violation of the right to confrontation unless there is a limiting instruction advising the jury that the confession applies only to the confessor. Because Taggart's conviction rested largely on the testimony of witnesses whose credibility was crucial, the error in admission of his codefendant's confession was held to require reversal.[71]

In *Driver*, the court of appeals considered the constitutional right to face-to-face confrontation previously set forth in *Brady v. State*.[72] The court in *Driver* found this right was abrogated by the use at defendant's second trial of the recorded testimony from a witness at the first trial who died prior to the second.[73]

Driver's first trial had been held in his absence. It was later determined that he did not knowingly, voluntarily, and intelligently waive his right to be present at that trial, and he was therefore granted a

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63. *Id.*
64. *Id.*
65. *Byrd*, 593 N.E.2d at 1188.
66. 595 N.E.2d 256 (Ind. 1992).
67. 594 N.E.2d 488 (Ind. Ct. App. 1992).
68. 601 N.E.2d 462 (Ind. Ct. App. 1992).
69. *Taggart*, 595 N.E.2d at 258.
70. 481 U.S. 200 (1987).
71. *Taggart*, 595 N.E.2d at 258.
72. 575 N.E.2d 981 (Ind. 1991).
73. Driver v. State, 594 N.E.2d 488, 489-90 (Ind. Ct. App. 1992).

second trial.[74] At his second trial the testimony of the deceased witness was admitted against him.[75] The court of appeals held that the admission of this testimony denied the defendant his right to confrontation.[76]

The importance of raising objections to preserve error was emphasized in *McKeown*, in which a relevance objection to admission of documents relating to a previous case was considered insufficient to preserve the issue for appeal.[77] McKeown was on trial for Operating While a Habitual Traffic Violator, and the documents in question came from a previous case where he had been charged with Operating While Suspended. The objection made was "[y]our honor, the matter that we are addressing here today happened in March of 1989. To present court documents of something that happened in 1987, I see absolutely no relevance."[78] Although the appellate courts seem amenable to carefully considering a variety of evidentiary matters, it also seems clear from the decision in *McKeown*, as well as similar decisions, that they must be scrupulously and very specifically preserved.

B. Sentencing Issues

Another area in which the Indiana Supreme Court was particularly active was in the review of criminal sentences. Although in 1970 the Indiana Constitution was amended to give the court power to review and revise all sentences,[79] and in 1978 the Indiana Rules of Appellate Procedure added provisions for review of criminal sentences,[80] the court's use of this authority was rare until recently.[81] In January, 1992, however, the supreme court issued three decisions in which it exercised the power and determined that the sentences imposed were manifestly unreasonable.

In *Wilson v. State,*[82] the defendant had received the maximum four year sentence for a D felony theft, plus a habitual offender enhancement

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74. *Id.* at 489.
75. *Id.*
76. *Id.*
77. McKeown v. State, 601 N.E.2d 462, 465 (Ind. Ct. App 1992).
78. *Id.*
79. IND. CONST. art. VII, § 4.
80. Rules for the Appellate Review of Sentences, *vacated* Jan. 1, 1990 (now found in IND. APP. R. 17).
81. Significant use of this power appeared to begin in 1990, when the supreme court decided Clark v. State, 561 N.E.2d 759 (Ind. 1990), and found that under the circumstances presented, a 30-year habitual offender enhancement violated the proportionality requirement of Article I, Section 16 of the Indiana Constitution. *Id.* at 766. The next year, in Best v. State, 566 N.E.2d 1027 (Ind. 1991), the court also found that while a thirty year enhancement was not entirely disproportionate, the same constitutional provision limited the enhancement to 10 years. *Id.* at 1032.
82. 583 N.E.2d 742 (Ind. 1992).

of thirty years. The supreme court granted transfer of a memorandum court of appeals decision upholding the conviction and sentence and concluded that in light of the offense and character of the offender, and the fact the prior convictions had occurred when the defendant was in his twenties and while still on parole, a thirty-four year sentence was manifestly unreasonable.[83] The court then remanded the cause for imposition of a two year D felony sentence for theft, plus an enhancement of only ten years for the habitual offender finding.[84]

In *Saunders v. State*,[85] the supreme court also found a sentence manifestly unreasonable when it granted transfer of a court of appeals decision that had upheld a sentence for multiple counts of dealing and conspiracy to deal controlled substances.[86] In sentencing Saunders to a total of 140 years, the trial court had relied on his long history of criminal activity; the fact the crimes were committed while on parole; and the likelihood that the defendant could commit another crime.[87] The supreme court found the defendant's criminal history justified making his multiple dealing convictions consecutive as well as making his multiple conspiracy convictions consecutive, but found that also ordering the dealing and closely-related conspiracy convictions to be served consecutively to each other was manifestly unreasonable.[88] The cause was therefore remanded for imposition of a total sentence of seventy years.[89]

The court had occasion to review the reasonableness of an enhanced murder sentence in *Harrington v. State*.[90] Harrington was convicted of murder and received the maximum sixty-year sentence. In imposing this enhanced sentence, the trial court relied on the following aggravators: (1) the defendant was in need of correctional or rehabilitative treatment in a penal facility, (2) imposition of a reduced sentence would depreciate the seriousness of the crime, and (3) the facts and circumstances surrounding the crime were aggravating.[91] The trial court found the mitigating factors to be the defendant's lack of a criminal history and the fact he had led a law-abiding life for a substantial period of time before the crime.[92] The supreme court held the only relevant and applicable aggravator should have been the body of the trial evidence, and that

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83. *Id.* at 744.
84. *Id.*
85. 584 N.E.2d 1087 (Ind. 1992)
86. Saunders v. State, 562 N.E.2d 729 (Ind. Ct. App. 1991).
87. 584 N.E.2d at 1089.
88. *Id.*
89. *Id.*
90. 584 N.E.2d 558 (Ind. 1992).
91. *Id.* at 565.
92. *Id.*

this aggravator, standing in opposition to the weight of the evidence in mitigation, was clearly insufficient to support a twenty-year sentence enhancement.[93] The cause was therefore remanded for imposition of the presumptive forty year sentence.[94]

Although the Indiana Supreme Court appears willing to consider revising those sentences it feels are unreasonable or constitutionally impermissible, such revision does not occur in every instance. The court refused to grant a petition for transfer of the court of appeals decision in *Sowell v. State*.[95] Sowell received a sentence of eleven years for prostitution. His underlying conviction was enhanced to a D felony because of his prior convictions. He received the maximum D felony sentence of three years, which was further enhanced by eight years due to his status as a D felony habitual offender.[96] The same prior felonies were used both for elevation of the offense to a D felony, and for the habitual offender determination. Sowell apparently had nine convictions for prostitution in the last ten years, plus several misdemeanor convictions. The court of appeals found that the nature of the present offense alone did not justify the enhancements but that, considering the defendant's long history of prior convictions, the enhancement was not unreasonable.[97]

The appellate courts have also looked at the necessary findings for aggravation of sentences generally, as well as whether sentences should be served consecutively or concurrently. In *May v. State*,[98] the court of appeals held that an adequate explanation for enhanced sentences must include at least a list of significant aggravating and mitigating factors; specific reasons why each is aggravating and mitigating; and an evaluation and balancing of the factors.[99] Additionally, in *Ray v. State*,[100] the appeals court held that even where the imposition of a consecutive sentence is mandatory under Indiana Code section 35-50-1-2(b), a statement on the record of the reasons for imposing the consecutive sentence is still required.[101]

The courts also made it clear that unless a trial court is required to impose its sentence consecutively to another sentence pursuant to Indiana Code section 35-50-1-2, it lacks authority to impose the sentence

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93. *Id.*
94. *Id.*
95. 590 N.E.2d 1123 (Ind. Ct. App. 1992), *trans. denied.*
96. *Id.* at 1124.
97. *Id.* at 1126.
98. 578 N.E.2d 716 (Ind. Ct. App. 1991).
99. *Id.* at 723 (citing Robinson v. State, 477 N.E.2d 883 (Ind. 1985).
100. 585 N.E.2d 36 (Ind. Ct. App. 1992).
101. *Id.* at 37.

consecutively to one imposed at another time.[102] In *Baskin v. State*,[103] the court relied on an earlier decision in *Kendrick v. State*,[104] to reaffirm that when a trial court is relying on its discretionary authority under Indiana Code section 35-50-1-2(a), it may impose consecutive sentences only where it is contemporaneously imposing two or more sentences.[105]

The subject of habitual offender enhancements has also received attention recently. In *Stanek v. State*,[106] the Indiana Supreme Court held that adding the habitual offender enhancement to a sentence for the offense of operating a vehicle after driving privileges are forfeited for life (Life HTV) under Indiana Code section 9-12-3-2[107] was precluded because the statute under which the defendant was sentenced for a C felony was itself a habitual offender statute.[108] The court first noted that Title 9, Art. 12 was titled "Habitual Violators of Traffic Laws" and that the structure of the statutory scheme allowed for escalation of punishment with subsequent violations.[109] The statutes first provided for suspension of the person's driving privileges for up to ten years for being a Habitual Traffic Violator.[110] The statutes then made it a class D felony to drive while so suspended, and called for the forfeiture of driving privileges for life.[111] Finally, it became a class C felony to drive after being adjudged a Life HTV.[112]

The court in *Stanek* found, therefore, that it was clearly the legislature's intent to make Article 12[113] a habitual offender statute.[114] The statute provides for increasingly serious penalties for violations of the HTV laws, ranging from an administrative license suspension to a class C felony conviction. The court acknowledged that the language of Indiana Code section 35-50-2-8 allows the State to seek a habitual offender enhancement for "any felony," but held that a conviction under this

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102. IND. CODE § 35-50-1-2(b) (Supp. 1992) (requiring the imposition of consecutive sentences when the defendant commits a crime while on parole, probation, bond, or while still serving a term of imprisonment for another crime.)

103. 586 N.E.2d 938 (Ind. Ct. App. 1992).

104. 529 N.E.2d 1311 (Ind. 1988).

105. *Baskin*, 586 N.E.2d at 939. Recent decisions dealing with the order of imposition of consecutive sentences in situations where a violation of probation is involved are Menifee v. State, 601 N.E.2d 359 (Ind. Ct. App. 1992); Menifee v. State, 600 N.E.2d 967 (Ind. Ct. App. 1992); and Harris v. State, 598 N.E.2d 639 (Ind. Ct. App. 1992).

106. 603 N.E.2d 152 (Ind. 1992).

107. IND. CODE § 9-12-3-2, *repealed and replaced by id.* § 9-30-10-17 (Supp. 1992).

108. *Stanek*, 603 N.E.2d at 153-54.

109. *Id.* at 153.

110. IND. CODE § 9-12-2-1, *repealed and replaced by id.* § 9-30-10-5 (Supp. 1992).

111. *Id.* § 9-12-3-1(b), *repealed and replaced by id.* § 9-30-10-16(b) (Supp. 1992).

112. *Id.* § 9-12-3-2, *repealed and replaced by id.* § 9-30-10-17 (Supp. 1992).

113. Now Article 30.

114. Stanek v. State, 603 N.E.2d 152, 153 (Ind. 1992).

section could not be subject to further enhancement under the habitual offender statute because it is a discreet, separate, and independent habitual offender statute.[115] It will be interesting to see if this type of analysis is applied in the future to cases involving other progressive punishment statutes.

The problems involved in construing and assessing the validity of various convictions in the habitual offender context were also dealt with by the courts. In *Johnson v. State*,[116] the supreme court held that where the underlying, enhanced D felony was committed after September 1, 1985, the Savings Clause in the enacting legislation for the D felony habitual offender statute[117] did not apply and defendants could not be sentenced under the regular habitual offender statute.[118] For the Savings Clause to allow a defendant with only D felony convictions to be sentenced under the regular habitual offender enhancement, both the enhanced felony and the prior felonies must have been committed prior to September 1, 1985.[119]

In *Abron v. State*,[120] however, the court of appeals held that a regular habitual offender enhancement is appropriate if any of the convictions used, (i.e., prior or present convictions), is greater than a class D felony.[121] The court rejected the trial court's conclusion that the statute required at least one of the *prior* convictions be greater than a D felony to make the defendant eligible for the regular habitual offender enhancement.[122]

Some of the difficulties arising from sentencing under the habitual offender statutes were summarized most recently in *Broshears v. State*,[123] where the court found it was error to deny the defendant's request for a special verdict form in the habitual offender proceedings against him. The court found that where more than two prior convictions are alleged, and depending upon which prior convictions are relied on for enhancement, the defendant could be subject to either a regular[124] or D felony[125] habitual offender enhancement, a special verdict form must be used if requested.[126] The court noted that it is permissible for the State to allege

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115. *Id.* at 153-54.
116. 593 N.E.2d 1181 (Ind. 1992), *rev'g* 585 N.E.2d 1352 (Ind. Ct. App. 1992).
117. IND. CODE § 35-50-2-7.1 (1992).
118. *Johnson*, 593 N.E.2d at 1182 (referring to IND. CODE § 35-50-2-8 (1976)).
119. *Id.*
120. 591 N.E.2d 634 (Ind. Ct. App. 1992).
121. *Id.* at 638-39.
122. *Id.* at 638-40.
123. 604 N.E.2d 639 (Ind. Ct. App. 1992).
124. IND. CODE § 35-50-2-8, *amended by id.* § 35-50-2-8 (Supp. 1992).
125. *Id.* § 35-50-2-7.1, *amended by id.* § 35-50-2-7.1 (Supp. 1992).
126. *Broshears*, 604 N.E.2d at 644.

more than the required two prior convictions, but problems have arisen where a general verdict form has been used and one of the prior convictions is later found to have been ineligible to be counted.[127]

In Broshears' case, six prior felony convictions were alleged—two of which were class D felonies. His underlying charge was also a D felony. One of the prior convictions was inappropriate for consideration, and it was also possible the jury had relied upon the prior D felony convictions for enhancement. If the latter had been the case, Broshears would have been eligible only for a D felony habitual enhancement. The court found that because of the situation presented, it was error to deny the defendant's request for a special verdict form. The court noted that despite their general abolition, special verdict forms are allowed in comparative fault cases,[128] and held that the same rationale for their use in comparative fault circumstances should apply to habitual offender proceedings in the defendant's circumstances.[129] The court then set forth, verbatim, what it considered a proper verdict form for this kind of case.[130] Although *Broshears* involved a situation in which both enhancement under two different habitual offender statutes was possible and an invalid conviction was involved, the court's analysis might well apply to any situation where multiple prior convictions are alleged.[131]

C. Right to Counsel and Other Assistance

In *Scott v. State*,[132] the Indiana Supreme Court granted transfer of a court of appeals memorandum decision for the specific purpose of outlining the relevant factors trial courts should use in determining whether indigent defendants are entitled to various kinds of expert assistance at public expense. After first discussing the long-standing history of the protection of indigent defendants' rights to counsel and assistance in Indiana,[133] the court went on to note that appointment of expert assistance to those defendants is within the trial court's discretion,

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127. *Id.* at 643. Because it is impossible to know whether the proper prior convictions were used for the enhancement under those circumstances, the enhancements have been overturned. *See, e.g.*, Nash v. State, 545 N.E.2d 566 (Ind. 1989).

128. IND. CODE § 34-4-33-6, *amended by id.* § 34-4-33-6 (Supp. 1992).

129. *Broshears*, 604 N.E.2d at 644.

130. *Id.* at 645.

131. When a prior conviction is later determined to be ineligible as an enhancer, a special verdict form is necessary to eliminate questions of whether that conviction was relied on for the verdict.

132. 593 N.E.2d 198 (Ind. 1992).

133. *Id.* at 199. See also Bardonner v. State, 587 N.E.2d 1353 (Ind. Ct. App. 1992), *trans. denied*, in which the court of appeals said, "[w]e go on record here stating that criminal defense attorneys and public defenders perform a valuable and highly respected service to the judicial process." *Id.* at 1361, n.8.

and that the defendant bears the burden of demonstrating his or her need.[134]

The appointment of such experts is subject to review for abuse of discretion, however.[135] While noting the standard for appointment is case sensitive, the court set out a number of factors for the trial courts to consider: (1) the presence of a specific showing of how the expert would benefit the defendant, (2) whether the proposed expert's services would bear on an issue which is normally considered to be one where expert testimony would be necessary, (3) the probability that the proposed expert could demonstrate that which the defendant desires, (4) whether the expert services would go toward answering a substantial (versus a merely ancillary) question, (5) how technical the evidence is, (6) how serious the charge and penalty facing the defendant are, (7) how complex the case is, (8) the cost of the requested services, (9) the timeliness of the defendant's request, and (10) the likelihood of the admissibility of the expert's testimony at trial.[136] In apparent consideration of maintaining at least some degree of parity between the State and those defendants without resources to fund their defense, the court also stated:

> [i]f the State is relying upon an expert and expending substantial resources on the case and defendants with monetary resources probably would choose to hire an expert, the trial court should strongly consider such an appointment to assist defense counsel in investigating the same matters, cross-examining the State's expert, or providing testimony.[137]

The stage for *Scott* appeared to have been set in some part by the court's earlier decision in a death penalty case, *Castor v. State*,[138] in which the court held it was error to deny the defendant's request for a psychologist to assist with the penalty phase of his trial.[139] Castor's pretrial motions for expert assistance stated that defense counsel had consulted with a psychologist who posited that the defendant might have been under the influence of "extreme mental or emotional disturbance" when the alleged acts were committed (one of the statutory factors which may be used in mitigation of the death penalty).[140] In view of these circumstances, the supreme court found it was incumbent upon the trial court to allow Castor the appropriate resources to develop this possible

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134. *Scott,* 593 N.E.2d at 200.
135. *Id.*
136. *Id.* at 200-01.
137. *Id.* at 201.
138. 587 N.E.2d 1281 (Ind. 1992).
139. *Id.* at 1288.
140. IND. CODE § 35-50-2-9(c)(2), *amended by id.* § 35-30-2-9(c)(2) (1992).

mitigation evidence, and its failure to do so was an abuse of discretion.[141]

In an earlier decision, however, the court found the failure to grant a defendant's request for funds for an eyewitness identification expert was not prejudicial enough to require reversal of his conviction. Such a request was denied by the trial court in *Hopkins v. State*.[142] In *Hopkins*, there was some question about the confidence of one of four eyewitnesses in her identification of the defendant. The defendant requested $260 to hire an identification expert to cross-examine this witness and testify regarding identification in general. Although finding insufficient prejudice in denial of the request to warrant reversal, the court did acknowledge that the weight of authority favored the admission of expert testimony under similar circumstances.[143]

In another case dealing with eyewitness identification, *Clark v. State*,[144] the court of appeals held that conducting a hearing on a motion to suppress the identification, in the absence of defense counsel, was a denial of the defendant's right to counsel.[145] The court noted this type of hearing offered an opportunity for an effective defense to be seized, and was a critical stage of the proceedings where the defendant confronted both the intricacies of the law and the advocacy of the prosecutor.[146]

The defendant's right to counsel was also found to have been denied in both *Boesel v. State*,[147] and *Carr v. State*.[148] In *Boesel*, the defendant's third appointed counsel moved to withdraw after two months because Boesel did not keep his appointments. This motion was denied, and when Boesel failed to appear for trial two weeks later, the court denied a second motion to withdraw by defense counsel.[149] After completing jury selection and denying a defense motion for continuance, the trial court did grant counsel's third motion to withdraw.[150] The trial then proceeded without the defendant or his counsel present. The court of appeals found the trial court had abused its discretion in allowing defense

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141. *Castor,* 587 N.E.2d at 1288. However, the court rejected the defendant's argument, raised for the first time on appeal, that this denial of expert assistance affected the guilt-innocence phase of the trial as well. *Id.* The defendant did not claim insanity at the time of the offense or his incompetence to stand trial. The court found the use of the expert in this regard was exploratory only, and therefore denial of assistance was not improper. *Id.* (relying on Hough v. State, 560 N.E.2d 511, 516 (Ind. 1990)).

142. 582 N.E.2d 345, 352-53 (Ind. 1991).

143. *Id.* at 353.

144. 577 N.E.2d 620 (Ind. Ct. App. 1991).

145. *Id.* at 621-22.

146. *Id.*

147. 596 N.E.2d 261 (Ind. Ct. App. 1992).

148. 591 N.E.2d 640 (Ind. Ct. App. 1992).

149. 596 N.E.2d at 262.

150. *Id.*

counsel to withdraw after the jury was impanelled, and that proceeding to trial in this fashion denied the defendant's right to counsel under both the United States and Indiana Constitutions.[151] The court noted the right to counsel extends to indigent defendants and is relinquished only by a knowing, voluntary, and intelligent waiver, not by merely failing to appear for trial.[152]

In *Carr*, the court found that the defendant's failure to appear at trial did not constitute either a waiver of the right to counsel, or a waiver of his right to a jury trial.[153] Carr originally requested a jury trial, which was subsequently reset by the trial court on its own motion. When neither Carr nor defense counsel appeared for the new setting, the court discharged the jury and held a bench trial after finding that Carr had voluntarily absented himself. After Carr eventually appeared, the court advised him of his conviction, appointed counsel, and proceeded with the habitual offender portion of the proceedings against him. At that time, Carr was advised that his earlier absence constituted a waiver of his right to a jury for the earlier trial as well as the habitual offender proceedings.[154] The court of appeals found that because the record did not support the trial court's finding that Carr had waived his jury trial rights, the trial court had erred in holding both proceedings without a jury.[155] The appellate court also found Carr's absence from trial did not act as a waiver of his constitutional right to counsel, and that he had been entitled to both counsel and a jury in all proceedings.[156]

An adequate waiver of the jury trial right was found in *Goody v. State*,[157] however. In *Goody*, even though the defendant did not personally speak, the record reflected his concurrence in the prosecution's waiver of a jury.[158] Additionally, in *Leonard v. State*,[159] the Indiana Supreme Court held that the guidelines set forth in *Dowell v. State*[160] to determine a knowing, intelligent and voluntary waiver of the right to counsel, although appropriate and preferable, are not mandatory so long as they are adequate under controlling precedent.[161]

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151. *Id.*
152. *Id.*
153. Carr v. State, 591 N.E.2d 640, 641-42 (Ind. Ct. App. 1992).
154. *Id.* at 641.
155. *Id.*
156. *Id.* at 642.
157. 587 N.E.2d 172, 173 (Ind. Ct. App. 1992)
158. *Id.* at 172-73.
159. 579 N.E.2d 1294 (Ind. 1991) (on transfer from 573 N.E.2d 463 (Ind. Ct. App. 1991)).
160. 557 N.E.2d 1063 (Ind. Ct. App. 1990).
161. 579 N.E.2d at 1296.

The related issue of the waiver of a defendant's right to be present at trial was discussed in several cases in 1992. In *Miller v. State*,[162] in contrast to several prior recent decisions,[163] the circumstantial evidence of the defendant's knowledge of the trial date was found sufficient to show a knowing and voluntary waiver of his right to be present.[164] It was also held in *Jenkins v. State*[165] that the defendant, by becoming intoxicated, effectively waived his right to be present on the second day of trial.[166]

D. Substantive Law

Several decisions dealing with sexually related crimes were issued in 1992. The interplay of the various statutes dealing with prostitution-related offenses was considered in *State v. Hartman*,[167] in which the Indiana Supreme Court held that a lone prostitute who directed someone to his or her place of business could not be convicted for promoting prostitution under Indiana Code section 35-45-4-4.[168] The court noted that three statutes, Indiana Code section§ 35-45-4-2, 3, and 4 proscribe the activities of prostitutes, their patrons, and pimps, respectively.[169] Hartman was charged under the promotion statute because he called a potential patron and gave him directions to his home, where he allegedly fondled the patron. While acknowledging that the plain meaning of the word "direct," as used in the promoting statute, was consistent with the defendant's action, the court found that interpretation to be inconsistent with the legislative intent that Indiana Code section 35-45-4-4 be applied only to the conduct of a third party in facilitating prostitution.[170] The court also discussed the fact that the legislature did not intend, in

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162. 593 N.E.2d 1247 (Ind. Ct. App. 1992).

163. *See, e.g.*, McCaffrey v. State, 577 N.E.2d 617 (Ind. Ct. App. 1991) (finding that evidence, including defendant's absence at trial despite actual knowledge of the trial date, was insufficient to constitute a waiver); Reel v. State, 567 N.E.2d 845 (Ind. Ct. App. 1991); Fennell v. State, 492 N.E.2d 297 (Ind. 1986) (finding evidence insufficient to constitute a waiver).

164. 593 N.E.2d at 1249-51.

165. 596 N.E.2d 283 (Ind. Ct. App. 1992).

166. *Id.* at 285.

167. 602 N.E.2d 1011 (Ind. 1992).

168. *Id.* at 1013-14 (reversing 594 N.E.2d 830 (Ind. Ct. App. 1992), which had affirmed the defendant's conviction).

169. *Id.* at 1012-13.

170. *Id.* at 1013 (relying on comments of the Criminal Law Study Commission, included in its proposed final draft of the 1976 penal code revision, to ascertain legislative intent).

these circumstances, to give prosecutors the discretion to charge one of several different offenses with different penalties.[171] It will be interesting to see if the same rationale will be used in ruling on other statutory schemes which arguably allow for similar discretion.

In a decision dealing with rape, the supreme court, in *Jones v. State*,[172] held that where there was no evidence of the use of force or threats to encourage intercourse, the evidence was insufficient to support the conviction for rape.[173] Although the defendant did not have a weapon, and the alleged victim had refused the defendant's request for sex twice before finally "just letting him have it," she did not think to hit him or cry out for help or yell.[174] The court found that although the alleged victim said she was afraid to yell for help, there was no evidence that her fear was occasioned by threats or force from the defendant.[175] The court concluded that although the force necessary to compel intercourse "by force or imminent threat of force" does not have to be physical and may be implied from the circumstances, the evidence in this case could not adequately lead to an inference of constructive or implied force.[176]

A comparable force was also found missing in *Scott-Gordon v. State*.[177] In *Scott-Gordon*, the supreme court found evidence that the defendant approached the victim from behind and grabbed his buttocks, but stepped away after the victim hit him, was insufficient to support a conviction for sexual battery.[178] Not all touching intended to arouse or satisfy sexual desires is sexual battery, only such touching that includes an element of force. While acknowledging that the defendant's touching may have constituted battery, the court found it did not support a conviction for sexual battery.[179]

The refusal of an instruction on sexual battery as a lesser-included offense (LIO) of child molesting was found to be error in *Pedrick v. State*.[180] The charging information did not preclude a battery conviction, and the court found there was a serious evidentiary dispute as to the

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171. *Id.*
172. 589 N.E.2d 241 (Ind. 1992).
173. *Id.* at 243.
174. *Id.*
175. *Id.*
176. *Id.* at 242-43. Compare, Hughes v. State, 600 N.E.2d 130, 132 (Ind. Ct. App. 1992) (holding that sexual touching, positioning, or attempting to remove clothing is not necessary to support a conviction for attempted rape, so long as there is a substantial step of some type).
177. 579 N.E.2d 602 (Ind. 1991).
178. *Id.* at 604.
179. *Id.*
180. 593 N.E.2d 1213, 1217 (Ind. Ct. App. 1992).

element distinguishing the two offenses.[181] All of the actions alleged against Pedrick involved touching outside of clothing, and the defendant denied any intent to arouse or satisfy sexual desires. The court found that although battery is not an inherently LIO of child molesting, the information alleging performance or submission to touching or fondling did contain the elements of battery.[182] Additionally, the court found there was a serious dispute as to whether there was a sexually motivated intent—the element distinguishing child molesting from battery—and therefore held the refusal of the LIO instruction was error.[183]

Two other decisions dealing with child molesting offenses also bear mention. In *Barger v. State*[184] the court held that when it is difficult to prove whether the victim was eleven or twelve at the time of the offense, it is sufficient to charge and convict the defendant of the lesser, class D felony, child molesting, because the victim is clearly under the age of sixteen.[185]

In *Acuna v. State,*[186] the court held where a single act of intercourse underlay convictions for both incest and child molesting by intercourse, double jeopardy concerns prohibit multiple convictions.[187] The *Acuna* decision is especially noteworthy because it contains an extensive discussion of the concept of merger in sex offense cases and reviews prior case law. Additionally, in a footnote, the court noted that the decision in *Ellis v. State*[188] appeared to impliedly overrule an earlier decision in *Snider v. State*[189] that stood for the proposition that one act of intercourse *could* support a conviction for both child molesting and incest.[190]

The intent issue in murder and attempted murder cases also received scrutiny recently. In *Nunn v. State*[191] the court held that evidence revealing that the defendant and victim did not exchange words, that the defendant struck the victim once in the back of the neck with his hand and then walked away, and that the victim died from the unusual injury of severance of her cerebral artery was insufficient to support a conviction for murder.[192] The court found the crucial question was whether the

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181. *Id.* at 1216-17.
182. *Id.* at 1217.
183. *Id.*
184. 587 N.E.2d 1304 (Ind. 1992) (on transfer of decision at 576 N.E.2d 621 (Ind. Ct. App. 1991), which had reversed the defendant's conviction).
185. *Id.* at 1307-08.
186. 581 N.E.2d 961 (Ind. Ct. App. 1991).
187. *Id.* at 965.
188. 528 N.E.2d 60 (Ind. 1988).
189. 412 N.E.2d 230 (Ind. 1980).
190. 581 N.E.2d at 965, n.5.
191. 601 N.E.2d 334 (Ind. 1992).
192. *Id.* at 339.

defendant acted with the requisite intent, to knowingly kill another human being, when he struck the victim.[193] The court answered this question in the negative by finding the evidence presented was sufficient only to support a conviction for involuntary manslaughter.[194] The court then exercised its authority to order modification of the conviction to the lesser included offense.[195] This decision was based on the insufficiency of the evidence, but its discussion of the requisite intent for murder may prompt future litigation based on the type of instruction required in murder prosecutions.[196]

Several recent decisions have ruled on various issues involved in drug offense prosecutions. It has become clear, for example, that the mere possession of cocaine, packaged in multiple small bags, will not be sufficient to sustain a conviction for possession of cocaine with intent to deliver. In *Johnson v. State,*[197] evidence that the defendant possessed 1.76 grams of cocaine packaged in small packets was found insufficient for conviction, because the defendant was known to be a frequent drug user and there was no other circumstantial evidence to support an intention to sell the drugs. The court determined that given the defendant's own drug use, the amount of cocaine found supported personal consumption, rather than intent to sell.[198]

A similar result was reached in *Isom v. State,*[199] in which evidence that the defendant possessed only 0.88 grams of cocaine, even though packaged in ten separate baggies, was found insufficient to support the dealing charge.[200] It appears that despite the war on drugs, the courts will be hesitant to find defendants guilty of the high penalty dealing

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193. *Id.*

194. *Id. But see* Green v. State, 587 N.E.2d 1314 (Ind. 1992) (finding circumstantial evidence sufficient to support an inference that the defendant have a motive to kill the victim).

195. *Nunn*, 601 N.E.2d at 339-40.

196. The issue of instructions on intent in attempted murder prosecutions was also addressed extensively this year. *See, e.g.*, Brown v. State, 587 N.E.2d 693, 695-96 (Ind. Ct. App. 1992) (finding the failure to include a requirement for specific intent to kill in an attempted murder instruction was fundamental error, and applying the requirement announced in Smith v. State, 459 N.E.2d 355 (Ind. 1984) and Abdul-Wadood v. State, 521 N.E.2d 1299 (Ind. 1988), retroactively). *See also* Woodcox v. State, 591 N.E.2d 1019, 1022-23 (Ind. 1992). *But see* Allen v. State, 575 N.E.2d 615, 616-17 (Ind. 1991) (finding the error in the instruction not to be fundamental).

197. 594 N.E.2d 817 (Ind. Ct. App. 1992).

198. *Id.* at 817-18 ("The facts . . . reflect that Johnson had 1.76 grams of cocaine in his possession [and] . . . the cocaine was packaged consistent with "'sale on the street.'" . . . This inference, however, is diluted, if not destroyed, by the inverse proposition that the cocaine was packaged consistent with "'having been bought on the street.'").

199. 589 N.E.2d 245 (Ind. Ct. App. 1992).

200. *Id.* at 247-48.

charges where the amount of drug possessed is consistent with personal consumption.[201]

Convictions for maintaining and visiting a common nuisance were also attacked recently. The requirement of "knowledge of selling" under Indiana Code section 35-48-4-13(b)(2)[202] was strictly enforced in *Holmes v. State*.[203] The court held that absent evidence the defendant knew cocaine was being sold in her house, the presence of a large volume of drug paraphernalia and guns, the fact Holmes' close relatives sold drugs from the home, and the fact she was present at the time of the sale, were all insufficient to support a conviction for maintaining a common nuisance.[204]

Knowledge was also crucial to the decision in *Braster v. State*,[205] in which Braster's conviction for visiting a common nuisance was overturned because the evidence was insufficient to show he knew the residence was involved in the unlawful use of controlled substances.[206] Although drug paraphernalia was present in the lower level of the home and the defendant was found in the kitchen on that level, the fact that the paraphernalia was in plain view of the police officers did not indicate that it was in plain view of the defendant, and therefore did not show the requisite knowledge on the defendant's part.[207]

Two additional decisions that found error in the failure to give lesser-included offense (LIO) instructions were also significant this year. Such error was found in *Aschliman v. State*[208] in the trial court's refusal to give an instruction on conversion as a LIO of theft.[209] This decision appears to hold that where there is evidence to support commission of a LIO which is inherently included in the greater offense, the State can never preclude a LIO instruction if it is requested.[210] The decision also

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201. In contrast, however, decisions uniformly upheld convictions for drug dealing within 1,000 feet of a school, despite various challenges. *See, e.g.*, Reynolds/Herr v. State, 582 N.E.2d 833, 838 (Ind. Ct. App. 1991) (upholding the constitutionality of IND. CODE §§ 35-48-4-1 and 35-48-4-6 in the face of equal protection, vagueness, and overbreadth challenges). *See also* Bailey v. State, 603 N.E.2d 1376 (Ind. Ct. App. 1992), and Steelman v. State, 602 N.E.2d 152 (Ind. Ct. App. 1992) rejecting other attacks on these statutes and convictions.

202. IND. CODE § 35-48-4-13(b)(2) (1977), *amended by id.* § 35-48-4-13(b)(2) (1991).

203. 583 N.E.2d 180 (Ind. Ct. App. 1991).

204. *Id.* at 182-84.

205. 596 N.E.2d 278 (Ind. Ct. App. 1992).

206. *Id.* at 280.

207. *Id.* at 279. The court also noted there was no evidence paraphernalia was found in the kitchen. *Id.*

208. 589 N.E.2d 1160 (Ind. 1992), *rev'g*, 578 N.E.2d 759 (Ind. Ct. App. 1991).

209. *Id.* at 1162.

210. *Id.*

appears to impliedly overrule an earlier decision in *Compton v. State*[211] on this issue.[212]

In *Sandilla v. State*,[213] the defendants were charged with involuntary manslaughter by alleging that they killed the victim while attempting to commit the crime of battery. The trial court refused their tendered instruction on battery as a LIO.[214] The court of appeals first found the wording of the charging information and statute defining the crime rendered battery an inherently LIO of involuntary manslaughter.[215] It then held that to justify a LIO instruction on battery in a voluntary manslaughter case, there must be a serious evidentiary dispute as to either whether the victim actually died, or whether the battery was the cause of the victim's death.[216] The court determined in this case that there was such a dispute as to whether the beating by the defendants actually caused the victim's death. Therefore, failure to give the LIO on battery was error.[217] In so ruling, the court relied extensively on *Aschliman*.[218]

Other recent decisions dealing with substantive offenses also merit brief note. In *Wagerman v. State*,[219] the court held that knowledge of alteration is a necessary element of the crime of possession of a handgun with an altered serial number under Indiana Code section 35-47-2-18.[220] Although the statute does not contain a specific *mens rea* element, the court utilized the presumption favoring the inclusion of an intent element, due in large part to the seriousness of the sanctions for commission of the offense.[221] The court also stated in a footnote that the analysis and holding of this decision would apply equally to other crimes under Indiana Code section 35-37-2-18.[222]

In *Alexander v. State*,[223] firefighters were not excluded from the statutory[224] definition "bodily injury or serious bodily injury to any

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211. 465 N.E.2d 711 (Ind. 1984).

212. Although *Compton* was not mentioned by the court, its holding that the defendant could not have been entitled to, *inter alia*, an instruction on criminal conversion as a LIO of theft because the State had drafted its information to preclude such instruction, seems to be in direct conflict with the holding in *Aschliman*.

213. 603 N.E.2d 1384 (Ind. Ct. App. 1992).

214. *Id.* at 1386.

215. *Id.* Furthermore, the court of appeals noted that IND. CODE § 35-42-1-4(3) defines involuntary manslaughter as killing another human being while committing or attempting to commit battery.

216. 603 N.E.2d at 1387.

217. *Id.* at 1388.

218. *Id.* at 1386-88.

219. 597 N.E.2d 13 (Ind. Ct. App. 1992).

220. *Id.* at 16.

221. *Id.*

222. *Id.* at 16 n.3.

223. 600 N.E.2d 549 (Ind. Ct. App. 1992).

224. IND. CODE § 35-43-1-1(a) (1977).

person other than the defendant" that elevates arson to a class A felony.[225] The court rejected the defendant's argument that because firefighters respond to nearly every fire and endanger their lives in every arson, including them within the definition of "any person" would render other sections of the statute meaningless. The court looked to the plain and ordinary meaning of the words, and found that the defendant's interpretation would require finding firefighters do not fall in the common definition of "persons" or "humans."[226]

In another arson case, *Williams v. State*,[227] it was held that smoke and soot damage to the wall of the basement of a house was sufficient to constitute "damages" under the same statute,[228] and therefore the defendant was properly convicted of arson.[229] Again, the court relied in part on the plain and ordinary meaning of the statutory language to reach its definition of "damages."[230]

E. Procedural and Trial Issues

A number of decisions were rendered in 1992 which dealt with various procedural or trial-related issues. In *Sewell v. State*,[231] the court considered the implications of *Brady v. Maryland*[232] regarding exculpatory evidence, and held that due process concerns entitled a defendant pursuing postconviction relief to obtain the State's rape kit for laboratory testing and possible DNA analysis.[233] Sewell was convicted of rape in 1981, when DNA comparisons were unavailable. In 1990 he filed discovery motions seeking the previously prepared rape kit and laboratory records to subject them to further analysis.

Although noting that defendants may waive pretrial discovery rights by not exercising them and ordinarily a second opportunity to discover the same evidence would be precluded, the court found that because DNA comparisons were unavailable at the time of the original trial, finding a waiver on the part of the defendant would be equivalent to requiring him to anticipate forensic scientific advances.[234] After reviewing

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225. 600 N.E.2d at 553.

226. *Id.*

227. 600 N.E.2d 962 (Ind. Ct. App. 1992).

228. IND. CODE § 35-43-1-1(a) (1976) applies to a "person who, by means of fire or explosive, knowingly or intentionally damages: (1) a dwelling of another," but the statute does not define the term "damages."

229. 600 N.E.2d at 964-65.

230. *Id.*

231. 592 N.E.2d 705 (Ind. Ct. App. 1992), *trans. denied.*

232. 373 U.S. 83 (1963).

233. 592 N.E.2d at 707-08.

234. *Id.* at 707.

the applicability of *Brady* to posttrial proceedings during which exculpatory evidence is first discovered, the court stated,

> [a]dvances in technology may yield potential for exculpation where none previously existed. The primary goals of the court when confronted with a request for the use of a particular discovery device are the facilitation of the administration of justice and the promotion of the orderly ascertainment of the truth.[235]

The court then found under the circumstances presented, permitting Sewell's requested discovery would meet those ends.[236] No other cases dealing with this type of issue were forthcoming in 1992, but it would appear that the decision may spawn related creative arguments in the future.

Although a number of decisions were issued in the area of the right to a speedy trial and commitment, three are of particular note. In *In re Woods v. State*,[237] the Indiana Supreme Court held that a trial court loses jurisdiction over the defendant for purposes of committing him to prison, if it does not act within a reasonable time after the defendant's conviction is affirmed on appeal.[238] In this case, the defendant appealed his conviction, but it was upheld, and nothing was done to initiate his commitment until five and one-half years after the appellate decision was certified. The court applied the principle it had earlier stated in *Taylor v. State*,[239] that "'[a]n American citizen is entitled to live without a Damocles sword hanging over his head,'"[240] and found the trial court had waited too long to execute the defendant's sentence.[241]

In *Crosby v. State*,[242] the court recognized that the State's failure to provide timely discovery responses and its extremely late amendment of the charges, could place a defendant in the untenable position of either waiving his right to a speedy trial or proceeding to trial without adequate preparation.[243] Crosby had filed a speedy trial request pursuant to Criminal Rule 4(B). Just before trial, the State amended the information to add several additional counts and belatedly furnished Crosby with voluminous discovery. Although the trial court granted the defen-

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235. *Id.* at 708.
236. *Id.*
237. 583 N.E.2d 1211 (Ind. 1992).
238. *Id.* at 1212-13.
239. 120 N.E.2d 165 (Ind. 1954).
240. *Woods* 583 N.E.2d at 1212 (citing *Taylor*, 120 N.E.2d at 167).
241. *Id.* at 1212-13.
242. 597 N.E.2d 984 (Ind. Ct. App. 1992).
243. *Id.* at 988-89.

dant's request to have his necessary continuance charged to the State, when the new trial date arrived, the trial was postponed to a date outside of the seventy day limit due to a congested court calendar.[244] The court of appeals held that the trial court's denial of Crosby's subsequent motion for discharge was erroneous because at the time of the continuance necessitated by the State's actions, the calendar was not crowded.[245] This decision contains an extensive analysis of speedy trial issues and the problems occurring when discovery deadlines are not followed and late amendments to charges are allowed. It is one of the few recent decisions which recognizes that these actions may place defendants in very difficult positions, and is likely to be cited often by defense counsel.

One other decision of brief note was rendered in *State v. Roth*[246] in which the court held that when a defendant requests a speedy trial under Crim. R. 4(B) following a mistrial or reversal on appeal, he is entitled to discharge if not brought to trial within seventy days.[247] The court interpreted *Young v. State*[248] to mandate that where a specific request is made under Crim. R. 4(B) upon retrial, the time limits of the rule apply—even though the other provisions of Crim. R. 4 require only that the defendant be retried within a reasonable time in this context.[249]

F. Search and Seizure

Although no search and seizure cases in 1992 established new law, several decisions indicated that the Indiana appellate courts may be maintaining a more protective view of Fourth Amendment rights than the one currently held by the United States Supreme Court. In both *Everroad v. State*[250] and *Dolliver v. State*[251] the Indiana Supreme Court found the affidavits used to obtain search warrants were inadequate and based on insufficiently corroborated hearsay, and refused to apply the "good faith" exception to preserve the validity of the searches.[252] In

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244. *Id.* at 986.

245. *Id.* at 988.

246. 585 N.E.2d 717 (Ind. Ct. App. 1992).

247. *Id.* at 718-19.

248. 482 N.E.2d 246 (Ind. 1985). This decision held that after a mistrial, the defendant must make a renewed request for speedy trial under C.R. 4(B). *Id.* at 249.

249. 585 N.E.2d at 718-19.

250. 590 N.E.2d 567 (Ind. 1992) (on transfer from 570 N.E.2d 38 (Ind. Ct. App. 1991)).

251. 598 N.E.2d 525 (Ind. 1992).

252. *Everroad*, 590 N.E.2d at 570-71, and *Dolliver*, 598 N.E.2d at 528-29. *But see* Wood v. State, 592 N.E.2d 740, 743-45 (Ind. Ct. App. 1992) (holding that a search warrant was not defective, despite an allegedly defective affidavit).

Terry v. State,[253] the court held that the trial court erred in failing to suppress evidence found in an alleged "inventory" search, because this second inventory search by Indiana officials occurred after such a search had already been conducted by officials in the state discovering the defendant's car.[254] The court found the later search was really an investigatory search, not a routine inventory search.[255] The trial court had ruled that a search warrant obtained was invalid,[256] and the State did not assert the "good faith" exception to an invalid warrant. Therefore the court of appeals ruled that the failure to suppress the evidence obtained was error, because there was no valid inventory search.[257]

The courts also ruled in the defendants' favor in two other cases. In *Sanders v. State,*[258] the court found a confidential informant's tip was insufficient to establish probable cause to search the defendant's car when stopping him for a traffic infraction.[259] Subsequently, in *Cash v. State,*[260] it was determined that the defendant's actions were insufficient to establish reasonable suspicion he had violated the law, and therefore the officer did not have cause to make an investigatory stop.[261]

In contrast, however, reasonable suspicion for an investigatory stop was found in *Platt v. State,*[262] *English v. State,*[263] and *Thurman v. State.*[264] Additionally, in *State v. Nixon,*[265] evidence obtained from a warrantless search of the defendant's purse, discovered in a warrantless search of the car in which she was riding, was found admissible because the warrantless search of the car was supported by probable cause.[266] Furthermore, in *Andrews v. State,*[267] the court found that probable cause to believe the defendant committed a crime approximately three months earlier was sufficient to justify a warrantless arrest.[268] The court acknowledged, however, that obtaining an arrest warrant would have been the better practice.[269]

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253. 602 N.E.2d 535 (Ind. Ct. App. 1992).
254. *Id.* at 546.
255. *Id.*
256. *Id.* at 545.
257. *Id.* at 546.
258. 576 N.E.2d 1328 (Ind. Ct. App. 1991).
259. *Id.* at 1329.
260. 593 N.E.2d 1267 (Ind. Ct. App. 1992).
261. *Id.* at 1269-70.
262. 589 N.E.2d 222, 226 (Ind. 1992).
263. 603 N.E.2d 161, 162-63 (Ind. Ct. App. 1992).
264. 602 N.E.2d 548, 551 (Ind. Ct. App. 1992).
265. 593 N.E.2d 1210 (Ind. Ct. App. 1992).
266. 593 N.E.2d at 1212-13 (relying primarily on California v. Acevedo, 111 S. Ct. 1982 (1991)).
267. 588 N.E.2d 1298 (Ind. Ct. App. 1992).
268. *Id.* at 1303.
269. *Id.*

III. Conclusion

It would seem that the amendment of Indiana Rule of Appellate Procedure 4 in 1990, which relieved the Indiana Supreme Court of the mandatory review of criminal cases with sentences of fifty years or less, has given that court the flexibility and time to consider significant criminal law issues brought before it on Petitions to Transfer. There were a large number of such decisions rendered in 1992, and the Indiana Supreme Court seemed more willing to consider significant alterations in criminal procedure and substantive law than it had in the past.

This willingness to more closely scrutinize trial court actions and reconsider relatively long-term principles seems especially apparent in the areas of evidence, sentencing, and general procedural aspects of criminal law. The ability of the court to devote significant analysis to complex criminal law issues, rather than routinely rely on established, but possibly flawed, legal principles is to be applauded. It is incumbent upon those dealing with appeals, however, to make the effort to bring such issues before the court through Petitions to Transfer in appropriate cases. It is interesting indeed, to deal with an area of law where so much is in flux, and practitioners will need to work diligently to stay informed.