Recent Developments in Indiana Criminal Law and Procedure

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Introduction

In 1993, a number of important statutory amendments became effective and questions concerning their applicability have been raised, meriting discussion in this Note. The Indiana Supreme Court once again issued a significant number of decisions affecting procedural areas of criminal law and analyzing the Indiana Constitution. This Note will discuss the statutory amendments first, followed by an analysis of significant case law.

I. Statutory Enactments

Following a spate of decisions dismissing appeals from convictions and sentences entered by magistrates or commissioners,[1] the Indiana General Assembly recently amended several statutory provisions, enlarging the power of such court personnel. The amendments affect sections four, seven and eight of Indiana Code 33-4-7.

The amendment to Indiana Code section 33-4-7-4, setting forth the enumerated powers of magistrates, additionally provides that magistrates may: "[e]nter a final order, conduct a sentencing hearing, and impose a sentence on a person convicted of a criminal offense as described under section 8 of this chapter."[2] Indiana Code section 33-4-7-7 also has been amended to except from the limitations on magistrates, actions provided for in the amended Indiana Code section 33-4-7-8,[3] and Indiana Code section 33-4-7-8 now provides that "[i]f a magistrate presides at a criminal trial, the magistrate may do the following: (1) Enter a final order. (2) Conduct a sentencing hearing. (3) Impose a sentence on

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1. *See, e.g.*, Hill v. State, 611 N.E.2d 133 (Ind. Ct. App. 1993); Scruggs v. State, 609 N.E.2d 1148 (Ind. Ct. App. 1993); Walls v. State, 603 N.E.2d 903 (Ind. Ct. App. 1992); Richardson v. State, 602 N.E.2d 178 (Ind. Ct. App. 1992); Schwindt v. State, 596 N.E.2d 936 (Ind. Ct. App. 1992).

2. Ind. Code § 33-4-7-4(14) (1993).

3. Ind. Code § 33-4-7-7 (1993).

a person convicted of a criminal offense."[4] Prior to these amendments, the above-referenced statutes provided that magistrates did not have the power of judicial mandate and could not enter a final appealable order unless sitting as a judge pro tempore or special judge, and that he or she was to report findings, etc. to the court, which would enter the final order.

Under the newly amended statutes, it would appear that magistrates and commissioners would have the power to enter valid convictions and sentences without requiring approval and adoption by the elected judge, and that convictions and sentences so entered would be appealable final orders. There is, however, a question as to whether the legislature may enact such legislation consistent with the Indiana Constitution.

In *Shoultz v. McPheeters*,[5] the court struck down an old statute purporting to give master commissioners "all of the power of any judge in vacation."[6] The court found this statute to be in direct conflict with the letter and spirit of the Indiana Constitution, and utterly void.[7] More recently, the Indiana Supreme Court ruled on similar legislation in *State ex rel. Smith v. Starke Circuit Court*,[8] dealing with statutes providing for the appointment of commissioners in various Indiana counties.[9] The court found these statutes were also violative of the Indiana Constitution because they attempted to authorize master commissioners to perform plainly judicial acts, and created offices with essentially the same authority and powers as the constitutional courts of general jurisdiction.[10]

Relying upon *Shoultz*, the *Smith* court found the statutes at issue went further in conferring powers on the master commissioners than was constitutionally permissible, and were constitutionally deficient because they established an office having virtually equivalent authority to courts established by the constitution.[11] The court held that "a commissioner who is selected in this manner must have substantially fewer powers and duties than those granted by the statutes in question" and must have "significantly limited jurisdiction, or his authority must be confined to the performance of non-judicial acts."[12]

It would seem that the recently enacted amendments conferring the power to enter judgments of conviction and sentence criminal defendants also confer essentially judicial powers. If this is the case, it would appear that the Indiana Constitution may prohibit such delegation of power, and any final judgments and

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4. IND. CODE § 33-4-7-8(b) (1993).
5. 79 Ind. 373 (1881).
6. *Id.* at 374 (citing Ind. Rev. Stat. 1881, § 1404).
7. *Id.*
8. 417 N.E.2d 1115 (1981).
9. The statutes at issue were IND. CODE § 33-4-1-74.3 through 33-4-1-74.9. *Smith,* 417 N.E.2d at 1116.
10. 417 N.E.2d at 1122.
11. *Id.* at 1123.
12. *Id.*

sentences of commissioners or magistrates entered under the provisions of the amended statutes are open to challenge in the appellate courts.

On July 1, 1993, new provisions for habitual offender enhancements of sentences also became effective. Significant changes in three statutes were involved in this legislation. First, the category of D felony habitual offenders was eliminated with the repeal of Indiana Code section 35-50-2-7.1.[13] Second, Indiana Code section 35-34-1-5 was amended to require that when the State intends to seek enhancement of a felony sentence because the defendant is a habitual offender, this enhancement must be alleged in the information no later than ten days after the omnibus date. The third, and most significant, legislation created major revisions in the "regular" habitual offender statute, Indiana Code section 35-50-2-8.

This section now provides that it is the underlying offense that controls the length of an enhancement,[14] hence the abolition of the D felony habitual offender provision. If the underlying felony is class D, the habitual offender enhancement must be in a range from one and one-half to four and one-half years.[15] If the underlying felony is class C, the enhancement must be in a range from four to twelve years.[16] If the underlying felony is class B, the enhancement must be in a range from ten to thirty years,[17] and if the underlying felony is class A, the enhancement must be thirty years.[18]

These provisions are a considerable change from the older statutory provisions which called for a basic enhancement of thirty years whenever either the underlying felony or the prior felonies were greater than class D,[19] and to the older D felony enhancement of eight years, used when both the underlying and prior felonies were class D felonies.[20] Although both of the older statutes allowed for reductions in the habitual offender enhancements, such reductions

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13. IND. PUB. L. 164 - 1993.

14. The provision, as amended, now reads: "The court shall sentence a person found to be a habitual criminal to an additional fixed term that is not less than the presumptive sentence for the underlying offense nor more than three (3) times the presumptive sentence for the underlying offense. However, the additional sentence may not exceed thirty (30) years." IND. CODE § 35-50-2-8(e) (1993).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. IND. CODE § 35-50-2-8 (1990).

20. IND. CODE § 35-50-2-7.1 (1990).

were discretionary only if certain conditions were met,[21] unlike the totally discretionary ranges available under the amended statute.

Questions have arisen as to the new statute's applicability to persons whose crimes were alleged to have been committed prior to July 1, 1993, but who were being tried and sentenced after that date. Although generally the law in effect at the time a crime is committed controls sentencing, the "Doctrine of Amelioration" holds that if an ameliorative amendment reducing a penalty is enacted subsequent to commission of the crime, but prior to trial and sentencing, it can be applied.[22]

Key to determining the applicability of the doctrine in given circumstances is a determination of the legislature's intent as to whether it applies.[23] The legislation amending Indiana Code section 35-50-2-8 does not have a separate savings clause, nor is its applicability specifically stated.[24] Although Indiana has a general savings clause,[25] it has been held that "[t]his section was enacted to indicate the legislative intent when no intent is expressed or necessarily implied."[26] The question then becomes whether the legislature's intent for the statute's application is "necessarily implied." In *Lewandowski v. State*,[27] the Indiana Supreme Court ratified the "Doctrine of Amelioration" when it agreed that enactment of an ameliorative sentencing amendment is, in itself, sufficient indication of legislative intent that it be applied where constitutionally permissible, and obviates any need to apply the general savings statute.[28]

Given the doctrine, it is necessary to determine whether the new habitual offender provisions are "ameliorative" in nature. In *Dowdell*, the court noted that when determining whether one sentence is greater than another, the measure to be used is the maximum severity of the penalty, and not the possible duration of imprisonment.[29] When the underlying offense is a class A felony, the length of the new enhancement would stay the same as in the past, and when the underlying offense is a B felony, the maximum enhancement could be as great as that previously imposed. Where the underlying offense is a C or D felony,

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21. For example, the D felony habitual enhancement could be reduced by up to four years if three years or more had passed since the defendant was discharged from probation, imprisonment, or parole for the last prior unrelated felony. IND. CODE § 35-50-2-7.1(e) (1990). Additionally, the regular habitual enhancement could be reduced by up to twenty-five years under similar circumstances if ten years had elapsed, and could also be reduced if either a prior conviction or underlying conviction was a class D felony. IND. CODE § 35-50-2-8(e) (Supp. 1990).

22. Terrell v. State, 390 N.E.2d 208 (Ind. Ct. App. 1979).

23. Dowdell v. State, 336 N.E.2d 699 (Ind. Ct. App. 1975).

24. IND. PUB. L. 164 - 1993.

25. IND. CODE § 1-1-5-1 (1993).

26. *Dowdell*, 336 N.E.2d at 702.

27. 389 N.E.2d 706 (Ind. 1979).

28. *Id.* at 707.

29. 336 N.E.2d at 702.

however, the new penalty is definitely less than that which could have been previously imposed.

Therefore, it would appear that the degree of amelioration involved will depend on the special facts of each case, including any reductions the defendant would have been eligible for under the previous statute. It is clear, however, that in no case could a defendant receive a greater *maximum* enhancement than that available previously.[30] It would also seem plausible that any defendant who would have received a reduction in the habitual enhancement under the old system, would likely receive less than the maximum enhancement under the new system.

In other legislation, the time period for bringing sex-related charges has been significantly increased under Indiana Code section 35-41-4-2.[31] For acts committed after June 30, 1988,[32] charges may be brought any time before the alleged victim becomes thirty-one years old.[33] The only exception to this period is that when a person alleged to have committed child molesting is at least sixteen years old, and the alleged victim is not more than two years younger than the perpetrator, the prosecution must be commenced within five years after commission of the offense.[34]

Although no one contests the tragedy of childhood sexual abuse, the issue of the reliability of previously "repressed" memories would seem to have considerable impact in light of this legislation.[35] An extended statute of limitations may raise concerns about the malleable nature of human memory and its reliability, especially if the memory only surfaces many years after the alleged event.[36]

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30. IND. CODE § 35-50-2-8 (1993).

31. IND. CODE § 34-41-4-2 (1993) provides in pertinent part:

(c) A prosecution for the following offenses is barred unless commenced before the date that the alleged victim of the offense reaches thirty-one (31) years of age:

(1) IC 35-42-4-3(a) (Child molesting).

(2) IC 35-42-4-5 (Vicarious sexual gratification).

(3) IC 35-42-4-6 (Child solicitation).

(4) IC 35-42-4-7 (Child seduction).

(5) IC 35-46-1-3 (Incest).

32. IND. PUB. L. 232-1993, § 4, provides: "IC 35-41-4-2, as amended by this act, only applies to crimes committed after June 30, 1988."

33. IND. CODE § 35-41-4-2(c) (1993).

34. IND. CODE § 35-41-4-2(d) (1993). Under prior law the class of the offense determined the statute of limitations for child molest offenses; five years after the commission of a Class B, C, or D felony, and no limit for a Class A felony. IND. CODE § 35-41-4-2(a) (1985).

35. Dr. Elizabeth Loftus, a psychology professor at the University of Washington at Seattle and noted expert on childhood memories, cautioned professionals about suggestive probing and uncritical acceptance of repressed memories that return through therapy, noting that tools have not yet been created to distinguish true from false repressed memories. Dr. Elizabeth Loftus, Address at the Centennial Meeting of the American Psychological Association (Aug. 1992).

36. Trial lawyers often use cross-examination to illuminate the unconscious mistakes of

Additionally, it would seem that this extended time in which to bring sex-related charges may cause both the state and the defendant to encounter problems with disappearing or deceased witnesses, lost evidence, and general memory impairment. For example, it would be nearly impossible for a defendant to mount a credible alibi defense to a charge that might have occurred close to thirty years previously. Further, considerable time could be consumed in trials with expert testimony on the accuracy of old memories. Just what kinds of problems may be forthcoming and how frequently very old allegations will be prosecuted remains to be seen.

Indiana's death penalty statute, Indiana Code section 35-50-2-9, was also amended during this session.[37] Although the amendment, which became effective July 1, 1993, contains a specific proviso that it apply only to murders committed after June 30, 1993,[38] it will be interesting to see if any of its provisions are applied to murders committed before that date.

The legislation contains three main provisions. One amendment provides that the murder of a victim listed by the state or known by the defendant to be a witness against the defendant, with the intent of preventing the victim from testifying, is now an aggravating circumstance supporting a sentence of death.[39] In addition, probation and parole officers, community corrections workers, and home detention workers were added to the categories of law enforcement-related victims whose murder constitutes an aggravating circumstance.[40] It seems clear that even without the clause specifically limiting application of the amendment to murders committed after June 30, 1993, applying these provisions to murders committed before that date would raise *ex post facto* problems.

It is not so clear, however, whether the legislature can restrict application of the other amended provisions to murders committed after June 30, 1993. Perhaps the most significant amendment is the addition of life without parole as an alternative to death.[41] One Superior Court judge found that refusing an instruction on life without parole to a defendant, merely because he was charged with a murder committed before July 1, 1993, would be a denial of equal protection.[42] The State took an interlocutory appeal of this ruling, and the

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witnesses. "Very often, too, the wish to believe is a strong factor in bringing about false testimony." FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 166 (4th ed. 1962). Additionally, studies show that with the passage of time, alleged victims may create false memories, and distort, confuse and embellish their memories. ELIZABETH F. LOFTUS, WITNESS FOR THE DEFENSE (1991).

37. IND. CODE § 35-50-2-9 (1993), *as amended by* IND. PUB. L. 250-1993 § 2.

38. IND. PUB. L. 250-1993, § 3.

39. IND. CODE § 35-50-2-9(b)(13) (1993).

40. IND. CODE § 35-50-2-9(b)(6) (1993).

41. IND. CODE § 35-50-2-9(e), (g) (1993).

42. Judge Carr Darden, of Marion County Criminal Court Six, issued this ruling in the case of State v. Alcorn, Cause No. 49G06-9112-CF-170715.

Indiana Supreme Court will rule on it in 1994.[43] The amendment also contains a "truth-in-sentencing" provision, requiring that the judge instruct the jury on the full sentencing range available for the defendant.[44] It is questionable whether there is any state interest that would justify refusing the application of this provision to trials of those whose offenses were committed before July 1, 1993.

The 1993 death penalty amendment provided that the state may not seek a sentence of life imprisonment without parole (LWOP) unless they seek the death penalty, and death penalty filings have decreased significantly over the last few years, in part due to the high costs involved in trying them.[45] Effective July 1, 1994, however, a direct request for a sentence of LWOP will be available in certain circumstances, even if the death penalty has not been sought.[46]

It is presently assumed that in cases where LWOP is sought as an alternative to death, the cases will be exempt from the coverage of Criminal Rule 24, thus reducing the cost of the trial. With this new LWOP alternative, it is anticipated that there may be continued debate centering around whether LWOP, like the death penalty, is qualitatively "different" from all other punishments so as to require special rules to protect defendants' rights and ensure fairness and reliability in its application. One may certainly argue that the finality of the sentence, with no possibility of parole, and the rigors of a penalty hearing requiring full consideration and weighing of aggravating and mitigating circumstances by the jury, would suggest a qualitative difference. The answer remains to be seen.

In the same Act passed during the 1994 short session, the Indiana General Assembly also added a new chapter to the Indiana Code. This statute, Indiana Code section 35-36-9, also effective July 1, 1994, concerns the application of the death penalty to those who are mentally retarded. The new section, in combination with amendments to Indiana Code section 35-36-2-5 and several

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43. State v. Alcorn, Cause No. 49S00-9305-DP-585.

44. IND. CODE § 35-50-2-9(d) (1993).

45. In 1990, there were twenty-four death penalty requests filed in Indiana. In 1991 there were twenty-five. Effective January 1, 1992, provisions of Criminal Rule 24 were adopted requiring the appointment of two attorneys to be paid a minimum of seventy dollars per hour, and also requiring provision of adequate investigative, expert, and other assistance. IND. R. CRIM. P. 24(A), (C). Death penalty requests subsequently dropped to eleven in 1992 and eight during the first eleven months of 1993. *See also Accused Won't Face the Death Penalty*, INDPLS. STAR Aug. 18, 1993, at A1.

46. Indiana Code section 35-50-2-9 was amended to allow the state to directly seek a sentence of life imprisonment without parole as an alternative to death, whenever the defendant is otherwise eligible for the death penalty. Pub. L. 158-1994. The same act also added a new section to the Indiana Code, section 35-50-2-8.5. *Id.* This section provides that if a person is convicted of a felony listed under Indiana Code section 35-50-2-2(b)(4) (various serious non-suspendable felonies), and has accumulated two prior unrelated felony convictions (under the same section 2(b)(4)), the state may seek life imprisonment without parole. *Id.* This provision is popularly referred to as "Three strikes and you're out."

other statutes, precludes the application of the death penalty or LWOP alternative to those who meet the criteria for mental retardation.[47]

Because the enactment of these provisions is so recent, they will not be discussed here in depth, but it does appear that the application of the death penalty in Indiana, and the procedures used in its application, are subject to continuing controversy and change. The influence of political, economic, and moral factors will probably never be absent where such a severe and irreversible sanction is involved.

II. Case Law Decisions

A. Double Jeopardy

In 1993, the United States Supreme Court overturned its rather short-lived decision in *Grady v. Corbin*,[48] concerning double jeopardy considerations in which subsequent prosecutions were involved. Traditionally, the Double Jeopardy Clause had prohibited multiple convictions and subsequent prosecutions where two or more offenses involved only the same elements.[49] This principle became known as the *Blockburger*[50] test. In *Grady*, however, the Court held that in addition to passing the *Blockburger* test, subsequent prosecutions must also pass a "same conduct" test to survive double jeopardy analysis.[51] The "same conduct" principle held that if, to establish an essential element of an offense in a subsequent prosecution, the government must prove conduct constituting an offense for which the defendant has already been prosecuted, double jeopardy barred the subsequent prosecution.[52]

This "same conduct" test was rejected in 1993, in *United States v. Dixon*,[53] in favor of adherence to the original *Blockburger* test. The Court, with multiple concurrences and dissents, found the *Grady* decision to have become unworkable and to have produced confusion.[54] The majority believed *Grady* to have been badly reasoned, and not constitutionally-rooted.[55] In Indiana, however, the

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47. Section 2 of Indiana Code section 35-36-9 defines a mentally retarded individual as one "who, before becoming twenty-two (22) years of age, manifests: (1) significantly subaverage intellectual functioning; and (2) substantial impairment of adaptive behavior; that is documented in a court ordered evaluative report." The new provision also provides that determination of whether a defendant is mentally retarded is to be made by the court after a pretrial hearing (sections 4 and 5), and that if the court finds the defendant is mentally retarded, the portion of the charge seeking the death sentence shall be dismissed (section 6). P.L. 158-1994.

48. 495 U.S. 508 (1990).

49. Neither offense had a unique element that was not a part of the other offense.

50. Blockburger v. United States, 284 U.S. 299 (1932).

51. *Grady*, 495 U.S. at 510.

52. *Id.*

53. 113 S. Ct. 2849 (1993).

54. *Id.* at 2860-64.

55. *Id.*

impact of this return to the traditional *Blockburger* analysis is somewhat diminished.

In *Shipley v. State*,[56] the court considered multiple convictions for murder and neglect of a dependent, and found convictions for both offenses were precluded by the double jeopardy provisions of Article I, Section 14 of the Indiana Constitution.[57] The court recognized the recent decision in *United States v. Dixon*,[58] but found it was bound by the Indiana Supreme Court's interpretation of double jeopardy in light of the Indiana Constitution.[59] Although different statutory elements underlay the offenses of murder and neglect of a dependent, the court found an examination of the factual bases alleged to support the offenses was also required.[60]

The information against Shipley for murder alleged that between certain dates she knowingly or intentionally killed her daughter.[61] The information for neglect of a dependent alleged that between the same dates she placed her daughter in a situation that may have endangered her life or health, resulting in serious bodily injury.[62] The court determined that both charges were based on the same acts occurring over the same time period, and that double jeopardy precluded convictions for both because "one offense was the instrument by which the other was committed."[63] Essentially, the murder was committed through the pattern of neglect. In reaching this conclusion, the court distinguished other cases where the pattern of neglectful acts was independent from the acts actually causing death.[64]

In *Derado v. State*, the Indiana Supreme Court also considered the importance of examining the way in which offenses are charged.[65] In *Derado*, the court found that multiple convictions for dealing in cocaine and for conspiracy to deal cocaine were precluded. The court also found that while double jeopardy does not necessarily bar convictions for both a conspiracy to commit a felony and the underlying felony, it does bar such convictions if the overt acts alleged in furtherance of the conspiracy are the same acts supporting the conviction for the underlying felony.[66] Derado did not actually deliver any cocaine; his convictions for dealing were based upon accomplice liability. The information charging him with dealing alleged that he and a co-defendant

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56. 620 N.E.2d 710 (Ind. Ct. App. 1993).
57. *Id.* at 718.
58. 113 S. Ct. 2849.
59. *Shipley*, 620 N.E.2d at 717, n.2.
60. *Id.* at 717.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 718. *See, e.g.*, Bean v. State, 460 N.E.2d 936 (Ind. 1984); Gasaway v. State, 547 N.E.2d 898 (Ind. Ct. App. 1989).
65. 622 N.E.2d 181 (Ind. 1993).
66. *Id.* at 184.

knowingly delivered cocaine to various persons on five occasions.[67] The conspiracy information alleged the same parties agreed to commit the offense of dealing, with the overt acts in furtherance of the conspiracy being the delivery of the cocaine by the co-defendant.[68] Therefore, Derado's acts relative to the conspiracy were the same acts giving rise to his accomplice liability for the offense.

Although cognizant of the "same elements," or *Blockburger* test,[69] the court noted that the manner in which offenses are charged must also be considered,[70] and that where, *as charged*, the acts involved the same necessary elements, double jeopardy will preclude multiple convictions.[71] Although the offense of dealing in cocaine requires actual delivery, and conspiracy to deal does not require delivery, but does require proof of an agreement to deal plus an overt act in furtherance of the conspiracy; in this case the State chose to allege commission of the dealing as the overt act in furtherance of the conspiracy. Therefore, the State was required to prove no facts to obtain a conviction for dealing beyond those necessary to obtain a conspiracy conviction.[72]

The court limited its holding, however, to those instances in which the information and instructions relied upon the same facts to prove both accomplice liability on the underlying offense and the overt act in furtherance of the conspiracy.[73] The decision therefore did not necessarily affect the case law holding that convictions for both an underlying felony and conspiracy to commit that felony were possible.[74]

B. Confessions and Admissions

The Indiana Supreme Court considered the admissibility of a juvenile's confession in *Stidham v. State*.[75] After allegedly killing the decedent, Stidham and his friends drove to Illinois where he was arrested and gave a statement.[76] Illinois, unlike Indiana, does not require a guardian or parent to be present when a suspect under eighteen years of age waives his or her *Miranda* rights. Therefore, the confession would have been admissible under Illinois law.[77] The

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67. *Id.* at 182.
68. *Id.*
69. *See supra* notes 50-53 and accompanying text (discussing *Blockburger*).
70. *Derado*, 622 N.E.2d at 183 (citing Tawney v. State, 439 N.E.2d 582 (Ind. 1982)).
71. *Id.* at 184.
72. *Id.*
73. *Id.*
74. *Id. See, e.g.*, United States v. Felix, 112 S. Ct. 1377 (1992); Witte v. State, 550 N.E.2d 68 (Ind. 1990).
75. 608 N.E.2d 699 (Ind. 1993).
76. *Id.* at 700.
77. *Id.*

Indiana Supreme Court, however, found the confession inadmissible under Indiana law and reversed Stidham's conviction.[78]

Indiana Code section 31-6-7-3 makes a juvenile's statement inadmissible at trial unless his counsel, custodial parent, guardian, or guardian *ad litem* is present and both the child and his advisor waive the right to be silent.[79] Although the State argued that because the confession was admissible where taken, it should be admissible in Indiana, the court noted that the question was the admissibility of the statement in Indiana, not Illinois.[80] The court also rejected authority from other jurisdictions that would have found the statement admissible because Indiana Code section 31-6-7-3 is quite specific about requirements for admissibility.[81] The fact that Stidham was an emancipated minor also had no impact on the court's decision because there was no such exception in the statute.[82]

The Indiana Court of Appeals ruled another juvenile's confession admissible, however, in *Sevion v. State*.[83] Although the confession was admissible because seventeen year-old Sevion was not "in custody," making the safeguards of Indiana Code section 31-6-7-3 inapplicable, the court also addressed whether the safeguards were met in the situation presented.[84]

Before taking Sevion's statement, the officer tried to reach his relatives, but his parents were both incarcerated and his mother had placed him in the care of an eighteen year-old.[85] He was accompanied to the police station by the eighteen year-old, and both were advised of his rights and signed the waiver form.[86] Subsequently, Sevion gave a videotaped statement admitting to shooting the victim.[87]

Although the eighteen year-old was a witness to the crime and his car was nearby, the court found there was no evidence he had a gun in his possession, and that he only heard the shot.[88] The court therefore determined that his custodian did not have an interest adverse to Sevion.[89] The court found that the State was placed in an awkward position because Sevion's custodian was also a witness, but determined that the situation could have been remedied only by the appointment of a guardian *ad litem*. Such an appointment, however, would have defeated the purpose of having someone familiar and friendly with whom

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78. *Id.* at 701.
79. IND. CODE § 31-6-7-3 (1993).
80. *Stidham*, 608 N.E.2d at 701.
81. *Id.*
82. *Id.*
83. 620 N.E.2d 736 (Ind. Ct. App. 1993).
84. *Id.* at 738-39.
85. *Id.* at 739.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 739. If the custodian had an adverse interest, he would not have met the requirements of IND. CODE § 31-6-7-3 to be a proper advisor.

the juvenile could consult.[90] While basing the admissibility of the confession on the non-custodial nature of the interrogation, the court also concluded that the procedures followed complied with the statute's protections.[91]

In *Thomas v. State*,[92] the court held that the defendant's admission contained in a Child in Need of Services (CHINS) Agreed Entry was admissible in his subsequent criminal trial.[93] Thomas and his wife, with the advice of counsel, entered into an agreement in the CHINS proceeding, stipulating that their daughters were the victims of sex offenses.[94] In Thomas' subsequent trial for child molesting, the agreement was entered against him, although he argued it was an involuntary confession.[95]

The court noted that in *Hastings v. State*, a statement given to a welfare worker as part of a requirement to regain child custody was ruled involuntary and inadmissible in the defendant's criminal trial because the caseworker was acting as an agent of the government in the course of securing a conviction.[96] The *Thomas* court distinguished *Hastings*, however, because in Thomas' case the document specifically indicated that he was aware of its contents and signed it voluntarily with the advice of counsel.[97] The document contained language advising the parties that they could not be compelled to enter into the agreement against their will and that they were entering into the agreement of their own free will, without any threats, promises or coercion.[98] Because Thomas gave the statement voluntarily, it was therefore admissible against him in his criminal trial.[99]

C. Procedural Decisions

In *Campbell v. State*,[100] the Indiana Supreme Court held that the exclusion of a defendant's own alibi testimony, due to a failure to comply with Indiana Code section 35-36-4-1,[101] was an unconstitutional infringement on the right of the accused to testify, as guaranteed by Article I, Section 13 of the Indiana Constitution.[102] Campbell was precluded at trial from introducing any

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90. *Id.*
91. *Id.*
92. 612 N.E.2d 604 (Ind. Ct. App. 1993).
93. *Id.*
94. *Id.* at 606.
95. *Id.* (citing Hastings v. State, 560 N.E.2d 664 (Ind. Ct. App. 1990)).
96. *Id.* at 607.
97. *Id.*
98. *Id.* at 606-07.
99. *Id.* at 607.
100. 622 N.E.2d 495 (Ind. 1993).
101. This section provides that when a defendant plans to offer evidence of alibi, he must file notice of his intention not later than twenty days prior to the omnibus date if he is charged with a felony. IND. CODE § 35-36-4-1 (1993).
102. This section provides in part that: "[i]n all criminal prosecutions, the accused shall

evidence related to his alibi defense, including his own testimony, because he did not timely file a notice of alibi.[103] In an offer to prove at the close of the State's case, Campbell stated he was at his sister's home during the time the crimes were committed, and that they would both testify to that fact.[104]

After looking at decisions from other jurisdictions and reviewing its past position on this issue,[105] the court looked to Article I, Section 13 of the Indiana Constitution, finding its language placed a "unique value upon the desire of an individual accused of a crime to speak out personally in the courtroom and state what in his mind constitutes a predicate for his innocence of the charges."[106] The court also found that surprise testimony by a defendant is rarely overwhelming, and that a continuance for the State would be appropriate to meet any surprise.[107]

The court concluded that in light of the strong constitutional bias in favor of personal testimony of the accused and the remedy of a continuance, exclusion of the testimony was an unjustified and overbroad intrusion on the right of an accused to testify on his own behalf.[108] Because in Campbell's case the crucial issue was the credibility of the victim and her identification of her attacker, the court also determined that the exclusion of his alibi testimony was not harmless error.[109]

This decision once again illustrates how the Indiana Constitution is a unique document distinct from the United States Constitution. It appears that at trial and on initial appeal, the arguments were based solely upon federal constitutional grounds.[110] The court, however, recognizing that the Indiana Constitution was implicated, ordered supplemental briefs to be filed.[111] Additionally, in his concurrence to the decision, Chief Justice Shepard made it clear that the decision was being based upon Indiana's Bill of Rights.[112]

In *Bell v. State*,[113] the court considered the admissibility of a confession given during questioning as part of a failed plea agreement.[114] During processing following his arrest, Bell initially denied being present at the crime scene and told the detective he would make a statement only if he received a

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have the right . . . to be heard by himself and counsel." IND. CONST. art. I, § 13.

103. *Campbell*, 622 N.E.2d at 497.

104. *Id.*

105. The court observed that in *Lake v. State*, 274 N.E.2d 249 (Ind. 1971), it adopted reasoning precluding such testimony, but that it was going to reconsider its position. *Id.* at 498.

106. *Id.*

107. *Id.*

108. *Id.* at 499.

109. *Id.*

110. *Id.*

111. *Id.* at 497-98.

112. *Id.* at 501 (Shepard, C.J., concurring).

113. 622 N.E.2d 450 (Ind. 1993).

114. *Id.* at 451.

"deal."[115] Eventually the prosecutor was called and after negotiations, they arrived at a plea agreement.[116]

The agreement, which the prosecutor signed, also required Bell to make a truthful and factual statement and testimony.[117] After accepting the agreement, Bell gave a recorded statement confessing to hitting and robbing the victim, but refused to sign it once the statement was transcribed.[118] His confession was subsequently admitted at his trial, over his objection.[119]

The court agreed with Bell that his statement was given in the course of discussing a plea agreement and therefore could not be used against him at trial, finding the confession both involuntary under the Fifth Amendment to the United States Constitution,[120] and privileged under Indiana Code section 35-35-3-4, which makes verbal or written communication concerning plea agreements inadmissible at trial if the agreement does not culminate in approval by the court.[121] The purpose of Indiana Code section 35-35-3-4 is to facilitate the final disposition of charges through the communicative process of a negotiation free of legal consequences, and this policy protects both the State and the defendant.[122] "Statements made as part of plea negotiations as well as evidence of actual agreements, and all of their parts, are declared inadmissible."[123]

The court held that judicial approval and acceptance of an agreement were the lone events that could lift the "protective cloak" that generally rendered confessions during negotiations inadmissible.[124] Because Bell refused to sign the confession, and consequently there was no judicial approval of the agreement, the statute rendered it inadmissible at trial.[125] The court also found the confession involuntary and inadmissible under the Fifth Amendment privilege providing protection against compulsory self-incrimination, because Bell's statement, when made, resulted from the prosecutor's direct or implied promises.[126]

In *Farrell v. State*,[127] the court recognized limitations on the length of jury deliberations.[128] The Indiana Supreme Court granted transfer of a court of

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115. *Id.* at 452.
116. *Id.*
117. *Id.* n.2.
118. *Id.* at 452.
119. *Id.*
120. *Id.* at 453.
121. *Id.*
122. *Id.*
123. *Id.* The court found this rule of inadmissibility mirrors its federal counterpart, FED. R. CRIM. P. 11(e)(6)(D). *Id.* Additionally, it is consistent with Indiana Rule of Evidence 410, effective January 1, 1994. *Id.* n.3.
124. *Id.* at 453.
125. *Id.*
126. *Id.*
127. 622 N.E.2d 488 (Ind. 1993) [hereinafter *Farrell II*].
128. *Id.*

appeals decision[129] to hold that the trial court abused its discretion in not calling a recess and sequestering a jury that had deliberated for thirty hours without sleep.[130] The jury began deliberations after three days of trial.[131] During deliberations the jury presented several questions to the trial court, and there was concern both with the ability of the jury to reach a unanimous decision and with whether the jury was too tired to continue its deliberations.[132] Because the jury had reached verdicts on some counts, however, the judge allowed them to continue deliberations even though they already had been deliberating through the night.[133] After approximately thirty hours without sleep, the jury returned verdicts of guilty on all counts.[134]

Although rejecting Farrell's argument that the trial court abused its discretion in refusing to earlier declare a hung jury, the court did find an abuse of discretion in expecting the jury to deliberate so long without sleep.[135] While a trial court is generally given sound discretion to determine how long a jury should be permitted to deliberate, it must also conduct trials to ensure fairness and protect the rights of all concerned.[136] The court noted that verdicts must be based on the evidence presented, not the ability of jurors to remain awake and rational for thirty hours, and that trial courts must be careful not to let economic considerations outweigh the process of fairness.[137] After noting the effects of sleep deprivation on judgment, the court found Farrell was entitled to a new trial because of the possibility that the verdict was suspect.[138] The court recognized that giving the jurors a break would have meant more expense to the county due to sequestration, but while not mandating curfews for juries, it stated that "[w]e have dispensed with trial by ordeal for litigants, and should do so for jurors as well."[139]

In *State v. Owings*,[140] the Indiana Supreme Court found that the trial court had erred in ruling the deposition of an unavailable witness inadmissible.[141] Upon the State's successful appeal of the trial court's ruling,[142] Owings petitioned for transfer. The Indiana Supreme Court agreed with the court of

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129. Farrell v. State, 612 N.E.2d 124 (Ind. Ct. App. 1993) [hereinafter *Farrell I*].
130. *Farrell II*, 622 N.E.2d at 493.
131. *Id.* at 490.
132. *Id.* at 490-92.
133. *Id.* at 492.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 493.
139. *Id.*
140. 622 N.E.2d 948 (Ind. 1993).
141. *Id.* at 953.
142. State v. Owings, 600 N.E.2d 568 (Ind. Ct. App. 1992).

appeals that the use of the deposition at trial would not deny Owings' right of confrontation, and that it was sufficiently reliable to be admitted.[143]

As part of pretrial discovery, Owings' counsel deposed an essential prosecution witness who later committed suicide.[144] Owings had visited her son in prison and allegedly passed him two balloons filled with cocaine.[145] The witness was another inmate who testified in the deposition that Owings' son said Owings had smuggled cocaine in to him.[146] Owings did not attend the deposition, nor did she request to be present, although the deposition took place at the prison and defense counsel indicated she had been banned from that facility.[147] The trial court denied use of the deposition at trial based on its unreliability and that it would constitute a denial of the right to confrontation.[148]

The supreme court reviewed the right to confrontation under both the Sixth Amendment of the United States Constitution and Article I, Section 13 of the Indiana Constitution, and found that although the Indiana Constitution is more protective of that right than the United States Constitution,[149] neither provision has been interpreted to guarantee defendants all rights of confrontation at every trial for every witness.[150] The court then noted that criminal defendants generally have no constitutional right to attend depositions because the confrontation right applies only to proceedings where defendants may suffer the loss of liberty or property.[151] A deposition for discovery is not considered such a proceeding.[152] The court recognized that admission at trial of a deposition that a defendant was not permitted to attend, taken by the State and given by an unavailable witness, may violate the right of confrontation.[153] The right is an individual privilege relating to trial procedure, however, and may be waived if there is an intentional relinquishment or abandonment of that right.[154] Waiver may occur by word or deed, and where the record does not show that the defendant is unable to attend a deposition, or that he objects to it, he waives his confrontation right, even if the witness is unavailable to testify at trial.[155]

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143. 622 N.E.2d at 950-53.
144. *Id.* at 950.
145. *Id.*
146. *Id.*
147. *Id.* at 953.
148. *Id.* at 950.
149. *Id.* at 950-51 (citing Brady v. State, 575 N.E.2d 981 (Ind. 1991)).
150. *Id.* at 951.
151. *Id.*
152. *Id.* at 951-52.
153. *Id.* at 952.
154. *Id.* (citing Phillips v. State, 543 N.E.2d 646, 648 (Ind. Ct. App. 1989)).
155. *Id.*

Where defense counsel takes the deposition and actively participates, the right to confrontation may be deemed waived.[156]

To render a deposition admissible at trial, the statement must bear sufficient "indicia of reliability."[157] This reliability requirement is generally satisfied where the testimony is taken by defense counsel who comprehensively questions the witness about his memory and perception of the crime, possible bias, and veracity of his testimony.[158] The focus is not on whether the court believes the witness is telling the truth, but on the process by which the statement was obtained, and decisions on the admission of depositions will be reversed only for abuse of discretion.[159]

The court found that here the trial court abused its discretion because the witness was definitely unavailable, and the deposition had sufficient indicia of reliability because it was given under oath, subject to penalties for perjury, and recorded by a court reporter.[160] Although defense counsel argued that officials banned Owings from the place of deposition, the court found no specific request was made to enter the institution for the deposition, or that it be taken elsewhere.[161] Under the circumstances, therefore, the court found Owings waived her right to face-to-face confrontation, and that the deposition should be admissible at trial.[162]

In his dissent, Justice DeBruler argued that a waiver of the confrontation right should be declared only when there is an intelligent personal decision to forego the right, without coercion, and with full awareness of the right.[163] The court did not address the fact that the deposition was taken for purposes of discovery only. Therefore it seems clear that defense counsel will have to be very careful about their clients' participation in any kind of deposition in the future. The use of a record to establish agreements on the purposes and admissibility of depositions might be one way to deal with this issue. This decision, however, would seem to have applicability to civil law as well as criminal law, because of the common practice of making a distinction between "discovery" depositions and those taken to preserve testimony, even though the trial rules make no such distinction.[164] It also raises a question about whether the rules should be amended to make such a distinction.

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156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 953.
161. *Id.*
162. *Id.*
163. *Id.* (DeBruler, J., dissenting).
164. Trial Rule 32(A)(3)(A) provides that a deposition may be used by any party for any purpose if the witness is dead.

In *Harrell v. State*,[165] the state filed an information against a defendant in October, 1986, but did not arrest him until February, 1992. The defendant argued that the delay violated his constitutional right to a speedy trial.[166] In an interlocutory appeal, the court discussed this claim in light of both *Doggett v. United States*[167] and *Barker v. Wingo*.[168] The court noted that the speedy trial right does not come into play until a person in some way becomes "accused," and found Harrell assumed this role when the information was filed against him in October, 1986.[169] Once a defendant becomes the accused, the conduct of both the prosecution and the defendant are weighed. The court found Harrell met the threshold test of *Doggett*, by showing the interval between the accusation and trial had become presumptively prejudicial, thus mandating further inquiry.[170]

Although the State claimed it was unable to serve Harrell's warrant because he had moved around and was absent from the state for considerable periods of time, the court found that the record did not show the State had attempted with reasonable diligence to serve the warrant.[171] Because the ultimate responsibility to bring a defendant to trial rests with the State, the court found the government was more to blame for the delay than was Harrell.[172] The court also noted that Harrell asserted his right shortly after his arrest, and the State did not contest the balancing of this factor in his favor.[173]

During her deposition, the alleged victim displayed an apparent and substantial lack of clarity in her memory about the alleged incidents.[174] Because the evidence in the case would be based largely upon her credibility versus Harrell's, the court concluded that he was likely prejudiced by the lapse of time due to difficulty in cross-examining and impeaching the alleged victim.[175] Overall, the court found that an absence of reasonable diligence by the state, coupled with a demonstrated lack of clarity in the alleged victim's memory due to the delay, constituted sufficient prejudice to show a violation of Harrell's constitutional right to a speedy trial.[176] The court noted, however, its preference for making such rulings subsequent to trial rather than during the pretrial stage, and concluded that to prevail at this early stage, defendants must

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165. 614 N.E.2d 959 (Ind. Ct. App. 1993).
166. *Id.* at 962.
167. 112 S. Ct. 2686 (1992).
168. 407 U.S. 514 (1972).
169. *Harrell*, 614 N.E.2d at 963.
170. *Id.* at 965.
171. *Id.* at 964.
172. *Id.*
173. *Id.*
174. *Id.* at 965.
175. *Id.* at 966.
176. *Id.* at 967.

show the demonstrable prejudice caused by delay is unlikely to be overcome by events at trial.[177]

In *Lahr v. State*,[178] however, the court found no unreasonable delay in the defendant's retrial after a successful appeal.[179] The time limitations of Indiana Criminal Rule 4(C) do not apply in retrial situations, and retrial must occur only within a "reasonable" time based on constitutional speedy trial rights.[180] The relevant period to consider is that which elapses from certification of the appellate decision to the time of retrial.[181] In Lahr's case, that period was a little over eighteen months.[182]

In determining whether the period was reasonable, the court relied primarily upon *Barker v. Wingo*[183] and *O'Neill v. State*,[184] noting that the length of a presumptively prejudicial delay is dependent upon the peculiar circumstances of a case.[185] The court also found no question that Lahr's eighteen month delay was sufficient to trigger further inquiry.[186] Under the *Barker* test, the court should consider the following factors: length of delay, reasons for delay, timeliness and vigor of the assertion of speedy trial rights, and any prejudice to the defendant from the delay.[187] In Lahr's case, the court concluded that the reasons for delay did not weigh in his favor, and that his assertion of rights was not particularly vigorous or timely because he did nothing prior to objecting to the trial setting and requesting discharge.[188] The court also found insufficient prejudice to Lahr, even though he claimed the memory of one of his witnesses may have been eroded by the lapse of time, and that his levels of anxiety and concern had been unnecessarily and exponentially increased by the delay.[189] The court dismissed the first claim because the witness was able to answer some questions even though she had some memory loss.[190] Because Lahr was not incarcerated during the period, concerns about his anxiety also were not sufficient to find the delay unreasonable.[191] The court therefore concluded that Lahr was not denied his constitutional right to a speedy trial.[192]

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177. *Id.*
178. 615 N.E.2d 150 (Ind. Ct. App. 1993).
179. *Id.* at 154.
180. *Id.* at 151.
181. *Id.* at 151-52.
182. *Id.* at 152.
183. 407 U.S. 514 (1972).
184. 597 N.E.2d 379 (Ind. Ct. App. 1992).
185. *See also Lahr*, 615 N.E.2d at 152, n.3 (court discusses various decisions finding and failing to find prejudice).
186. *Id.* at 152.
187. *Id.* (citing *Barker*, 407 U.S. at 530).
188. *Id.* at 153.
189. *Id.*
190. *Id.*
191. *Id.* at 153-54.
192. *Id.* at 154.

D. Sentencing Issues

In 1992, the "earned credit time" statute, Indiana Code section 35-38-1-23, was enacted, allowing criminal defendants to petition for a reduction of their sentence under certain circumstances.[193] Even defendants with nonsuspendible sentences may receive a reduction in their remaining sentences if "the person has successfully completed an educational, a vocational, or a substance abuse program that the department has determined to be appropriate."[194] Shortly after passage of this statute, its applicability to persons sentenced under plea agreements was questioned.[195]

In *Thompson v. State*,[196] the court of appeals held that those sentenced under a plea agreement calling for a term of years are not entitled to a sentence reduction under the earned credit time statute.[197] The court emphasized the contractual nature of plea agreements, a rationale also relied upon by the supreme court in *State ex rel. Goldsmith v. Marion County Superior Court.*[198] The court in *Thompson* presumed that the legislature knew specified sentences in plea agreements could not be modified under the rationale of *Goldsmith* at the time it enacted the reduction of sentence statute.[199] Therefore, it assumed the legislature would have included a specific provision extending the statute's coverage to plea agreements, if such had been the legislature's intent.[200]

The *Thompson* court, however, did not discuss the fact that the role of the prosecutor in the shock probation statute,[201] discussed in *Goldsmith*, is substantially different from that of the prosecutor in the earned credit time statute.[202] The earned credit time statute does not call for the approval or even the participation of the prosecutor, as does the sentence modification statute. This difference would seem to suggest a legislative intent that the two statutes are to be treated differently.

In *Scheckel v. State*,[203] the Indiana Supreme Court vacated a sixty year sentence for Class A felony murder because the trial court had listed no

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193. IND. CODE § 35-38-1-23 (1993).

194. IND. CODE § 35-38-1-23(a)(4) (1993).

195. Susan D. Burke, *Update-Criminal Law and Procedure*, 26 IND. L. REV. 891 (1992). One of the issues raised was that the statute on its face addresses rehabilitation shown during the period of incarceration, something that could not have been known at the time of the plea bargaining and sentencing.

196. 617 N.E.2d 576 (Ind. Ct. App. 1993).

197. *Id.* at 578.

198. *Id.* (citing State ex rel. Goldsmith v. Marion County Superior Court, 419 N.E.2d 109, 114 (Ind. 1981)).

199. *Id.* at 579.

200. *Id.*

201. IND. CODE § 35-38-1-17 (1993).

202. IND. CODE § 35-38-1-23 (1993).

203. 620 N.E.2d 681 (Ind. 1993).

mitigating circumstances.[204] The trial court either erroneously overlooked or did not properly consider substantial evidence of mitigation in the record.[205] During the sentencing hearing, fourteen persons, including a co-worker, a pastor, and family members, testified that Scheckel was loving, trusted, caring, helpful, and not mean-natured.[206] The witnesses also portrayed him as a good worker with much promise, and as one who served as a hospital orderly, volunteered in a children's tumbling program, and assisted with church activities.[207] Additionally, defense counsel presented evidence that Scheckel had been sexually molested as a child, and was involved in a car accident in which a mother of two was killed.[208] He received no counseling for either event.[209]

The trial court's only statement about this mitigation evidence was that none existed.[210] The court noted that "[w]hile a trial court is not obligated to explain why it has not chosen to make a finding of mitigation, . . . [it] may not ignore facts in the record which would mitigate the offense."[211] Accordingly, the court vacated the sentencing order and remanded the case because evidence of mitigators was overlooked or not properly considered.[212]

E. Substantive Criminal Offenses

The offense of Resisting Law Enforcement (RLE) was examined in several decisions. In *Spangler v. State*,[213] the Indiana Supreme Court clarified the meaning of the RLE statute, Indiana Code section 35-44-3-3.[214] When a deputy sheriff attempted to serve Spangler with a protective order and related papers, a verbal altercation ensued.[215] After Spangler refused to accept service, he was first arrested for disorderly conduct, and subsequently for RLE.[216] It was agreed that Spangler's resistance to the deputy was active, not passive, but

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204. *Id.* at 686. The opinion also explains how the trial court erred in considering certain circumstances as aggravators. *Id.* at 684. *See also* Stover v. State, 621 N.E.2d 664 (Ind. Ct. App. 1993) (in imposing enhanced sentence, trial court failed to particularly identify relevant aggravating and mitigating factors, therefore case remanded for imposition of presumptive sentences or a particularized statement in support of aggravation).

205. *Id.* at 686.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 685.

212. *Id.* at 686.

213. 607 N.E.2d 720 (Ind. 1993).

214. IND. CODE § 35-44-3-3 states in part: "Sec. 3(a) A person who knowingly or intentionally: . . . (2) forcibly resists, obstructs, or interferes with the authorized service or execution of a civil or criminal process or order of a court commits resisting law enforcement. . . ."

215. *Spangler*, 607 N.E.2d at 722.

216. *Id.*

that it did not involve physical force.[217] At issue was whether the resistance was "forcible" as defined in the statute.[218]

The court noted that "forcibly" appears directly before the word "resists" in the statute, and concluded that it is a required element of the crime.[219] Mere action to resist, absent a showing of force, does not fall within the prohibitions of the statute.[220] The court also concluded that "forcibly" modifies and applies to the entire string of verbs in the statute: resists, obstructs, or interferes.[221]

In considering what constitutes force, the court found the common denominators of all definitions are the use of strength, power, or violence, applied by someone to accomplish a desired end.[222] Additionally, Indiana Code section 35-41-1-11 consistently defines a forcible felony as one involving the use or threat of force against another, or in which there is imminent danger of bodily injury to another.[223] The court therefore concluded that: "[w]e believe that one 'forcibly resists' law enforcement when strong, powerful, violent means are used to evade a law enforcement official's rightful exercise of his or her duties."[224] Although Spangler's resistance was active, the court determined it was not "forcible" as defined by statute, and reversed his conviction.[225]

The court of appeals also considered the offense of RLE in *Touchstone v. State*,[226] when it held that where three officers were involved in subduing and transporting the defendant who resisted arrest, only one of three convictions for RLE could stand because RLE is an offense against lawful authority, not a person.[227] The court rejected the State's argument that separate incidents of resisting occurred when Touchstone was placed under arrest and when they arrived at the police station, finding the facts supported only a single incident of resisting even though Touchstone apparently stopped resisting during the drive to the station.[228]

In *Price v. State*,[229] the Indiana Supreme Court conducted a lengthy exposition interpreting Article I, Section 9 of the Indiana Constitution as it impacts on the offense of disorderly conduct. That section states: "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write or print, freely, on any subject whatever: but for the

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217. *Id.*
218. *Id.*
219. *Id.* at 723.
220. *Id.* at 724.
221. *Id.* at 723.
222. *Id.*
223. IND. CODE § 35-41-1-11 (1993).
224. *Spangler*, 607 N.E.2d at 723.
225. *Id.* at 725.
226. 618 N.E.2d 48 (Ind. Ct. App. 1993).
227. *Id.* at 49.
228. *Id.*
229. 622 N.E.2d 954 (Ind. 1993).

abuse of that right, every person shall be responsible."[230] Price was convicted under the statutory section that made it illegal to make an unreasonable noise and continue to do so after being asked to stop.[231]

Price was arrested in the early morning hours of New Year's day.[232] Her arrest arose from a noisy altercation between police and multiple "party-goers" when she "screamed" profanities at an officer while objecting to another's arrest and then to her own.[233] After several verbal exchanges, the officer told Price to desist or he would arrest her for disorderly conduct, and she responded, "F—- you. I haven't done anything."[234] The Indiana Court of Appeals upheld her conviction in *Price v. State*.[235]

Pursuant to a transfer petition, the supreme court took the opportunity to expound on the free speech provision of the Indiana Constitution. The court first examined what constituted "abuse" of the right of free speech, and concluded that "[t]o the extent that Ind. Code Ann § 35-45-1-3(2) permits the State to impose a material burden upon the free exercise of political speech, it cannot stand."[236] The court noted that although violation of a rational statute generally would constitute "abuse" of the rights extended in the constitution, the State cannot punish expression, if to do so would impose a "material burden upon a core constitutional value."[237]

After examining the history surrounding the Indiana Constitution and its amendments, the Indiana Supreme Court concluded that political speech did constitute a "core constitutional value."[238] The court next determined that when political speech that does not harm any particular individual is treated and punished as abuse, there is a material burden placed on this core constitutional value.[239] To determine when such speech is properly considered as abusive, the court looked to tort law, and held that "political expression becomes 'unreasonably noisy' for purposes of Ind. Code Ann. § 35-45-1-3(2) when and only when it inflicts upon determinant parties harm analogous to that which would sustain tort liability against the speaker."[240]

In examining the facts of Price's conviction, the court first determined that her act constituted political speech, primarily because it was a protest concerning the legality and appropriateness of police conduct.[241] The court concluded that

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230. IND. CONST. art. I, § 9.
231. IND. CODE § 35-45-1-3(2) (1993).
232. *Price*, 622 N.E.2d at 956.
233. *Id.* at 956-57.
234. *Id.* at 957.
235. 600 N.E.2d 103 (Ind. Ct. App. 1992).
236. *Price*, 622 N.E.2d at 963.
237. *Id.* at 960.
238. *Id.* at 963.
239. *Id.* at 964.
240. *Id.*
241. *Id.* at 961.

while Price's behavior would support finding she created a public nuisance, and that her "victims," the neighborhood residents, were identified with sufficient specificity, the harm that was suffered did not rise above a fleeting annoyance.[242] Therefore, punishment for her actions under Indiana Code section 35-45-1-3(2) was impermissible under the Indiana Constitution.[243]

The court also examined Price's conviction under the First and Fourteenth Amendments to the United States Constitution, and concluded that the code section at issue was not overbroad or vague in violation of these provisions.[244] Because there was insufficient evidence to support her conviction under the constitutionally permissible interpretation of Indiana Code section 35-45-1-3(2), however, the case was remanded for entry of acquittal on the disorderly conduct charge.[245] In a dissent by Justice Dickson, joined in by Justice Givan, the majority opinion was construed to be sending a message that anyone confronted by imminent arrest could react with unlimited noise and vulgarity, so long as a protest about police conduct is included.[246] It will be interesting to see how this decision is used in future cases, especially in light of its extensive constitutional interpretation and language reminiscent of that used in more mellifluous legal opinions of the past.[247]

An opportunity to consider the reach of the *Price* decision may be forthcoming, if further action is taken on a previous disorderly conduct decision, *Borchert v. State*.[248] Borchert was convicted under the identical provision of the disorderly conduct statute, Indiana Code section 35-45-1-3(2), for making unreasonable noise.[249] His conviction arose out of an abortion protest conducted with approximately twenty-five others, in a public alley nearly 150 feet from an abortion clinic.[250] Protestors yelled at escorts leading patients from their cars to the clinic.[251]

An off-duty police officer, acting as a security guard, received complaints from those inside the clinic that Borchert could specifically be heard above the rest, and that he was disturbing patients and staff, shouting things like, "Mommy don't kill me."[252] The officer approached Borchert, informed him that he could

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242. *Id.* at 964.
243. *Id.* at 964-65.
244. *Id.* at 967.
245. *Id.*
246. *Id.* at 969 (Dickson, J., dissenting).
247. *See, e.g.*, "[t]he machinery of democracy produces a sonorous cacophony, not a drone. . . . [T]he efficacy of political speech often depends upon its ability to jar and galvanize." *Id.* at 963.
248. 621 N.E.2d 657 (Ind. Ct. App. 1993).
249. *Id.* at 658.
250. *Id.* at 657.
251. *Id.*
252. *Id.* at 658.

be heard inside the building, and warned him to quiet down.[253] When the same problem subsequently arose, the officer attempted to arrest Borchert, and he was eventually charged and convicted of disorderly conduct.[254]

The court rejected Borchert's argument that his conviction violated his right to engage in constitutionally protected free speech, relying in large part on the overruled *Price*[255] decision for the proposition that the prosecution of unreasonable noise constituting a public nuisance did not violate free speech rights.[256] It was specifically noted that in *Price* the court had recognized that Indiana's Constitution seemed to enable the state to enact statutes punishing unreasonably loud speech.[257] The court concluded that while evidence of loudness alone does not constitute unreasonable noise, and reasonableness must be determined in the context of the circumstances, the facts presented supported a finding that Borchert did utilize unreasonable noise.[258] Therefore, the court concluded that there was no violation of the right to free speech and upheld his conviction.[259]

Under the analysis of the new *Price*[260] decision, it would appear that whether the court of appeals' decision will stand depends largely on whether Borchert's speech is considered reflective of a "core constitutional value." If it is, it would seem that his conviction would impose a "material burden" on the exercise of his rights *if* the harm to identifiable victims is not significant enough to give rise to liability under tort theory.[261] This last hurdle may, however, distinguish Borchert's situation from that present in *Price*. It certainly seems conceivable that the damage to the "victims" in *Borchert* could be considered more significant than that suffered by Price's neighbors. If the protesters dissuaded any patients from entering the clinic, or if the patients or staff inside suffered any significant emotional distress, it would seem that these two cases could be easily distinguished. Whether this will occur remains to be seen.

In *Miller v. State*,[262] the court reversed the defendant's conviction for Class B felony confinement because of a fatal variance between the charging information and the proof at trial.[263] Evidence adduced at trial showed that when confining the victim, Miller used a pellet gun.[264] Although pellet and BB guns have been considered deadly weapons,[265] the court found the evidence

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253. *Id.*
254. *Id.*
255. 600 N.E.2d 103.
256. *Borchert*, 621 N.E.2d at 658-59.
257. *Id.* at 658.
258. *Id.* at 659.
259. *Id.* at 660.
260. 622 N.E.2d 954.
261. *See* discussion of *Price*, 622 N.E.2d at 964, *supra* note 236.
262. 616 N.E.2d 750 (Ind. Ct. App. 1993).
263. *Id.* at 755-56.
264. *Id.* at 755.
265. *See, e.g.*, Glover v. State, 441 N.E.2d 1360 (Ind. 1982); Williams v. State, 451

insufficient to support elevation of the crime to a Class B felony because the information specifically charged Miller with confinement with a *handgun*.[266] Indiana Code section 35-42-3-3 provides that the crime of confinement is a Class B felony if it is committed while armed with a deadly weapon,[267] but here the state chose to specify that the deadly weapon at issue was a handgun.[268]

After examining the definition of a "handgun," the court concluded that the state clearly established that Miller's pellet gun did not fit the definition.[269] Consequently, there was a variance between the crime as charged and the evidence at trial.[270] During trial, defense counsel relied on the information as charged and the fact that a pellet gun was not a firearm.[271] Therefore, the variance at issue required reversal of Miller's conviction for the enhanced confinement.[272]

F. Impact of Federal Decisions

In *Tague v. Richards*,[273] the court held that exclusion, under Indiana's Rape Shield Statute,[274] of testimony suggesting that a child molest victim had prior hymenal damage violated the accused's Sixth Amendment right to effective cross-examination.[275] However, the court held that the Confrontation Clause error in this habeas proceeding was harmless because the victim's venereal disease directly supported her allegations that the defendant had molested her.[276]

Indiana's Rape Shield Law prohibits a defendant charged with a sex crime from introducing any evidence of the victim's past sexual conduct.[277] There are three exceptions.[278] On direct examination of the examining physician, the

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N.E.2d 687 (Ind. Ct. App. 1983).

266. *Miller*, 616 N.E.2d at 756.

267. IND. CODE § 35-42-3-3 (1993).

268. *Miller*, 616 N.E.2d at 754.

269. *Id.* at 754-55.

270. *Id.* at 755.

271. *Id.*

272. *Id.* at 755-56.

273. 3 F.3d 1133 (7th Cir. 1993).

274. IND. CODE § 35-37-4-4 (1993).

275. *Tague*, 3 F.3d. at 1138.

276. *Id.* at 1140. Tague would not be entitled to habeas relief based on a trial error unless he could establish that it resulted in "actual prejudice." *Id.* This new standard overrules the harmless beyond a reasonable doubt standard previously applied to determine whether a Confrontation Clause error requires a grant of habeas relief. *See* Brecht v. Abrahamson, 113 S. Ct. 1710, 1722 (1993) (citing the standard announced in Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

277. IND. CODE § 35-37-4-4(a) (1993).

278. These exceptions are: (1) evidence of past sexual conduct with the defendant, (2) evidence which in a specific instance of sexual activity shows some other person committed the crime, and (3) evidence that the victim's pregnancy was not caused by the defendant. IND. CODE

state introduced evidence that the child victim had an enlarged hymen, which was consistent with her having been sexually abused.[279] However, on cross-examination, the trial court excluded the doctor's testimony that the child reported prior sexual activity with her father.[280] Additionally, the court excluded expert opinion that such unwanted sex with the father was consistent with the damage to the hymen.[281] The Indiana Supreme Court upheld the exclusion of this evidence as not falling within any exceptions to the Rape Shield Statute.[282]

The Seventh Circuit Court of Appeals concluded that while Indiana's rape shield statute has been held facially constitutional, the constitutionality of the law as applied to preclude exculpatory evidence remains subject to examination on a case by case basis.[283] In this case, excluding evidence indicating another possible source of hymenal damage significantly hampered Tague's efforts to rebut the source of that damage. The court found that in the absence of any testimony of prior sexual experience, the jury would likely presume that hymenal damage to an eleven-year-old girl was the result of the alleged molestation.[284] Thus, the application of the rape shield law denied Tague the right to ensure that evidence admitted against him is "reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings."[285] The court held this infringement on Tague's confrontation right was harmless, however, because there was an inadequate showing that exclusion of the testimony substantially prejudiced the result of the trial.[286]

In *Splunge v. Clark*,[287] Splunge, a black male, was convicted of murder and robbery.[288] The prosecutor used two of his peremptory challenges to exclude the only two black venire members from the jury.[289] A divided

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§ 35-37-4-4(b)(1)-(3). There may be a fourth exception. *See* Rhom v. State, 558 N.E.2d 1100, 1103 (Ind. 1990) (court indicated it was inclined to hold the Rape Shield Act inapplicable to evidence of the complainant's intent to engage in sexual conduct in the future).

279. *Tague*, 3 F.3d. at 1136.

280. *Id.*

281. *Id.*

282. Tague v. State, 539 N.E.2d 480 (Ind. 1989).

283. Tague v. Richards, 3 F.3d. at 1137.

284. *Id.* at 1138. *See also* United States v. Begay, 937 F.2d 515, 523 (10th Cir. 1991) (when the prosecution specifically relied on an enlarged hymen as evidence of molestation, the Confrontation Clause required admission of cross-examination testimony regarding another sexual assault that provided an alternative explanation of the condition).

285. *Id.* (quoting Maryland v. Craig, 497 U.S. 836, 846 (1990)).

286. *Id.* at 1140. The court found that even if the excluded testimony had been admitted, it would not explain evidence of a vaginal discharge which began to appear shortly after the alleged assaults by Tague. *Id.*

287. 960 F.2d 705 (7th Cir. 1992).

288. *Id.* at 706.

289. *Id.*

Indiana Supreme Court affirmed the conviction.[290] However, on petition for a Writ of Habeas Corpus, the Seventh Circuit Court of Appeals affirmed the district court's grant of the writ, unless Splunge was retried within 120 days.[291] The court found the prosecutor had excluded one black citizen from jury service solely due to her race.[292]

First, the court applied the criteria set forth in *Batson v. Kentucky*[293] and determined that Splunge had established a *prima facie* case of purposeful race-based discrimination.[294] The court noted that the burden then shifts to the state to furnish a neutral explanation for challenging black jurors.[295] The *Splunge* court found the prosecutor's explanation to be a pretext for race-based discrimination that did not meet this burden of the state.[296] The court stated, "this circuit has taken a deadly serious approach to Batson."[297] It added that the state of Indiana "might have adopted a like commitment to observing this constitutional safeguard if it so adamantly desired to avoid relitigation."[298]

III. CONCLUSION

Although many of the significant decisions this year focused on evidentiary principles, such as the refinement of "other misconduct" evidence in light of *Lannan v. State*[299] and its progeny, one judicial thread woven through many of the criminal law decisions is the increased use of the Indiana Constitution as a basis for holdings. Indiana's Constitution was strongly reflected in *Shipley v. State*,[300] *Derado v. State*,[301] *Campbell v. State*,[302] *State v. Owings*,[303] and

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290. Splunge v. State, 526 N.E.2d 977 (Ind. 1988).

291. *Splunge*, 960 F.2d at 710.

292. *Id.* at 709.

293. 476 U.S. 79 (1986). Batson stands for the proposition that when the state puts a black defendant on trial before a jury from which members of his race have been purposefully excluded, it denies him equal protection of the law. To meet the test of Batson, the defendant must show that: 1) he or she is a member of a cognizable racial group, 2) the prosecutor exercised peremptory challenges to remove persons of the defendant's race from the venire, and 3) the facts and relevant circumstances raise an inference that the prosecution used those challenges to exclude members of the venire from the petit jury on the basis of race. *Splunge*, 960 F.2d at 707.

294. *Id.*

295. *Id.* at 708.

296. *Id.* at 708-09. The court noted that the prosecution asked only black venire members whether their race would influence their decision in the case, and asked one black venire member whether anyone he knew had been charged with robbery or murder, while asking the next three white venire members whether they or their friends had been victims of robbery. *Id.* at 707-08.

297. *Id.* at 709.

298. *Id.*

299. 600 N.E.2d 1334 (Ind. 1992).

300. 620 N.E.2d 710 (Ind. Ct. App. 1993).

301. 622 N.E.2d 181 (Ind. 1993).

302. 622 N.E.2d 495 (Ind. 1993).

probably most notably and extensively in *Price v. State*.[304] Given the history of individualism in Indiana, this reliance on its Constitution seems appropriate. It is also clear that the courts will be looking to arguments based on the Indiana Constitution, and that those who forget its reach may pay a price.

303. 622 N.E.2d 948 (Ind. 1993).
304. 622 N.E.2d 954 (Ind. 1993).