RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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Indiana's appellate courts issued hundreds of opinions addressing issues of criminal law and procedure during the survey period October 1, 2004, to September 30, 2005. The General Assembly enacted legislation that largely responded to court opinions, and two Governors granted clemency to death row inmates. This article seeks to address the most significant developments in the courts, legislature, and even the Governor's office—the ones that broke new ground, resolved conflicts, or created concerns that are likely to require resolution or reconsideration in the future.

I. SEARCH & SEIZURE

Claims of unreasonable search and seizure under either the Fourth Amendment or its more generous analog—article I, section 11 of the Indiana Constitution—are among the most frequently litigated issues in criminal cases. During the survey period, the Indiana Supreme Court resolved the confusion surrounding searches of garbage left for collection, and the Indiana Court of Appeals took a tough stand against strip searches filmed for television.

A. Searches of Garbage

The Indiana Supreme Court resolved a split among panels of the court of appeals regarding searches of garbage left outside of a home in *Litchfield v. State*.[1] The Fourth Amendment permits the warrantless search of garbage left at the curb for pickup because the defendant does not have a "reasonable expectation of privacy" in garbage that is easily accessible to the public.[2] Article I, section 11 of the Indiana Constitution, however, provides a different methodology for searches, considering whether a police officer's conduct was reasonable under the "totality of the circumstances."[3] Synthesizing many of its recent cases, the Indiana Supreme Court explained that the reasonableness of a search or seizure under section 11 turns on the balancing of three factors: "1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of search or seizure imposes on citizen's ordinary activities, and 3) the extent of law enforcement needs."[4]

Reviewing its own precedent, the court acknowledged its discomfort with unbridled searches of garbage by police. Although the court had upheld a search of garbage a decade earlier in a case in which officers conducted themselves in

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1. 824 N.E.2d 356 (Ind. 2005).
2. *See* California v. Greenwood, 486 U.S. 35, 41 (1988).
3. *Litchfield*, 824 N.E.2d at 359.
4. *Id.* at 361.

a manner similar to trash collectors, it also noted that "Hoosiers are not entirely comfortable with the idea of police officers casually rummaging through trash left at curbside."[5]

The spate of court of appeals cases in recent years employed a variety of approaches, which is not surprising in light of the fairly nebulous standard of section 11. For example, in *State v. Stamper*,[6] the court of appeals held a search unreasonable when the police officer entered the defendant's property and seized the trash from a pile near a "No Trespassing" sign. The Indiana Supreme Court took issue with the approach of *Stamper* and more recent cases, reasoning that police entry upon property is not the proper focus: "Property lines are wholly irrelevant to the degree of suspicion of a violation or the need for enforcement and largely irrelevant to the degree of intrusion inflicted by the search or seizure."[7] But section 11 does impose limitations on police, as "it is not reasonable for law enforcement to search indiscriminately through people's trash."[8] The court concluded that police must not only retrieve trash in a manner substantially similar to trash collectors, but they must also have "articulable individualized suspicion" of criminal activity to ensure they are not merely going on fishing expeditions.[9] Because the issue of reasonable suspicion was not resolved at the trial court level, the supreme court remanded the case.[10]

Litchfield is significant not only because it resolved the considerable conflicts between court of appeals panels on the subject of searches of trash but also because it provides specific guidance to lower courts when reviewing challenge under section 11. The three factor approach for determining reasonableness and the requirement of individualized suspicion will likely lead to greater consistency than the far broader "reasonableness of police conduct" standard that, in the context of trash searches alone, led to disparate results when applied by different judges.

Just a few months after *Litchfield* was decided, the court of appeals easily applied the *Litchfield* approach to another trash search. In *Crook v. State*,[11] police collected trash bags without a warrant after an anonymous caller alerted them of illegal drug activity. The court began with *Litchfield*'s benchmark requirement of "articulable individualized suspicion," which is the same requirement for an investigatory automobile stop.[12] An anonymous tip alone does not generally create reasonable articulable suspicion, and the State's evidence in *Crook* pointed to nothing else.[13] Therefore, the search of the trash violated section 11, and the

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5. *Id.* (quoting Moran v. State, 644 N.E.2d 536, 541 (Ind. 1994)).
6. 788 N.E.2d 862 (Ind. Ct. App. 2003).
7. *Litchfield*, 824 N.E.2d at 362-63.
8. *Id.* at 363.
9. *Id.* at 364.
10. *Id.*
11. 827 N.E.2d 643 (Ind. Ct. App. 2005).
12. *Id.* at 646 (citing *Litchfield*, 824 N.E.2d at 364). *See generally* Terry v. Ohio, 392 U.S. 1, 19-22 (1968).
13. *Crook*, 827 N.E.2d at 846.

trial court erred in denying Crook's motion to suppress.[14]

In *Edwards v. State*,[15] the court of appeals again applied *Litchfield* in addressing a different scenario: police use of evidence found in a warrantless trash search to obtain a warrant for the search of a home. The court first concluded that the tip received from a confidential informant did not suggest that Edwards, the resident of the home, was going to commit a "specific, impending crime," and it did not provide information that could be corroborated by police.[16] Most importantly, the credibility of the confidential informant was never established.[17] Therefore, the reasonable suspicion requirement was not met.

Although the tip did not establish reasonable articulable suspicion for the trash search as required by *Litchfield*,[18] the court went on to determine if the evidence was obtained in good faith. Indiana Code section 35-37-4-5 prohibits the exclusion of evidence unlawfully obtained if the law enforcement officer obtained the evidence in good faith.[19] Evidence is obtained in good faith if "obtained pursuant to a state statute, judicial precedent, or court rule that is later declared unconstitutional or otherwise invalidated."[20] Based on its pre-*Litchfield* precedent existing at the time of the search in *Edwards*, the court concluded the search was not unreasonable and therefore the evidence could not be excluded under the Indiana good faith statute.[21]

Finally, the court considered whether probable cause supported the issuance of the warrant.[22] A detective had found "balled up" Saran Wrap and "remnants of marijuana," as well as some packaging material, in Edward's trash.[23] Relying heavily on the testimony of the detective, the court concluded that the combination of the packaging material, which could be used to receive large quantities of marijuana, and the presence of marijuana seeds, which is itself a crime, supported the finding of probable cause to issue a search warrant.[24]

B. Cops and Cameras Don't Mix

After the court of appeals' decision in *Thompson v. State*,[25] police will likely think twice about allowing the presence of a cameraperson for a television show in an undercover operation. There, an undercover police officer posed as a prostitute and crack addict when arranging a meeting with the defendant at a hotel

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14. *Id.*
15. 832 N.E.2d 1072 (Ind. Ct. App. 2005).
16. *Id.* at 1076.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* (quoting IND. CODE § 35-37-4-5(b) (2005)).
21. *Id.* at 1077.
22. *Id.*
23. *Id.* at 1078.
24. *Id.* at 1080.
25. 824 N.E.2d 1265 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 176 (Ind. 2005).

room. She told Thompson she wanted $100 worth of cocaine and would "make it worth his while" if he brought more.[26] Undercover officers waited in the hotel room along with a cameraperson from a television show called "Woman and the Badge."[27]

Immediately upon his arrival, Thompson was arrested for attempting to deal cocaine and was taken to the bathroom to be searched. With the camera rolling, the officer explained that he would be looking for "the crack that they [drug dealers] usually keep in the crack."[28] Thompson's pants were pulled down, he was ordered to bend over, and a package of cocaine was discovered between his buttocks.[29] The cameraperson "zoomed in" on the cocaine, and another officer soon brought gloves, which were used to retrieve the cocaine.[30]

The court of appeals began its analysis with the leading cases from the United States and Indiana Supreme Courts. In *Bell v. Wolfish*,[31] the Court described the "reasonableness" analysis of the Fourth Amendment that applies to strip searches of pre-trial detainees as not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.[32] Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the pace in which it is conducted.[33]

More recently, in *Edwards v. State*[34] the Indiana Supreme Court reiterated that a search incident to arrest may "involve a relatively extensive exploration of the person" but would be unreasonable if it were "extreme or patently abusive."[35] There, the court held that routine, warrantless strip searches were unreasonable for misdemeanor detainees but that a body search may be appropriate in light of a reasonable likelihood of discovery of evidence.[36]

Applying these and other precedents, the court in *Thompson* noted that a search incident to arrest, including a strip search, was reasonable in light of the charge for which Thompson was arrested and the conversation in which he agreed to provide the undercover officer with crack cocaine.[37] Nevertheless, the court found the facts surrounding the recording of the strip search for its airing on national television to be particularly relevant before asking, "Where should the

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26. *Id.* at 1266.
27. *Id.*
28. *Id.* at 1270 (alteration in original).
29. *Id.* at 1266.
30. *Id.*
31. 441 U.S. 520 (1979).
32. *Id.* at 559.
33. *Id.*
34. 759 N.E.2d 626 (Ind. 2001).
35. *Id.* at 629 (citations omitted).
36. *Id.*
37. Thompson v. State, 824 N.E.2d 1265, 1268 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 176 (Ind. 2005).

media line be drawn?"[38] The court concluded "the line should be drawn here," where a strip search occurred in a private area completely controlled by police who allowed a civilian to film "the strip search of a suspect naked below the waist."[39] Finally, because the search was a warrantless one and not predicated on a probable cause determination by a neutral and detached magistrate, the court held that the good faith exception to the exclusionary rule did not apply.[40]

II. CONFESSIONS

The court of appeals applied a significant United States Supreme Court case dealing with the police technique of questioning a suspect first and then providing *Miranda* warnings later, after admissions had been made. In *Missouri v. Seibert*,[41] police questioned an arson/murder suspect for thirty to forty minutes before she admitted that the death caused by the arson was not an accident.[42] She was given a twenty minute break, and police then turned on a tape recorder and gave her a *Miranda* warning. The Court held the ensuing statement inadmissible, reasoning that "it is likely that if the interrogators employ the technique of withholding warnings until after the interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation."[43] Put another way, "when *Miranda* warnings are inserted in the midst of a coordinated and continuing interrogation, they are likely to mislead and 'deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'"[44]

In *Drummond v. State*,[45] the court of appeals relied exclusively on *Seibert* to reverse a trial court's admission of a tape recorded statement in a child molestation case. In *Drummond*, a detective visited a man serving a prison sentence for molesting his son to question him regarding whether he had also molested his niece. For two hours in an unrecorded and non-*Mirandized* conversation, the detective shared "his experiences and commonalities with [the suspect] in order to convince him to open up" about his niece.[46] Only after the suspect made an inculpatory statement did the detective provide *Miranda* warnings and turn on a tape recorder.[47] The court reasoned that the "two-part interrogation appears to be exactly of the character that the *Seibert* court sought to avoid" in reversing the trial court.[48]

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38. *Id.* at 1270-71.
39. *Id.* at 1271.
40. *Id.*
41. 542 U.S. 600 (2004) (plurality opinion).
42. *Id.* at 604.
43. *Id.* at 613.
44. *Id.* (quoting Moran v. Burbine, 475 U.S. 412, 424 (1986)).
45. 831 N.E.2d 781 (Ind. Ct. App. 2005).
46. *Id.* at 782.
47. *Id.*
48. *Id.* at 784.

Seibert and *Drummond* represent somewhat of a break from the traditional totality of the circumstances approach to the voluntariness of a confession.[49] These cases draw a fairly bright light that police can easily follow, or, if they fail to follow, can lead to reversal without the uncertainty and likely inconsistent results of the totality-of-the-circumstances approach. Moreover, in all cases in which a confession is at issue, courts must scrutinize the voluntariness of the waiver and the confession carefully. In fact, the Indiana Supreme Court requires proof beyond a reasonable doubt that a defendant voluntarily and intelligently waived his *Miranda* rights and that the confession was voluntarily given.[50]

III. Improper Voir Dire Questions or Limitations

Trial courts and lawyers are generally afforded considerable latitude in questioning prospective jurors.[51] Therefore, three appellate reversals for three different types of voir dire errors—two of which were not even preserved by an objection at trial—comprise a fairly significant development in Indiana law.

In *Perryman v. State*,[52] the defendant objected to the prosecutor's voir dire questions on the grounds that they both "tried the State's case" and conditioned the jury to convict on factors other than the evidence. The supreme court had previously explained that voir dire questions may not condition prospective jurors to receive evidence "with seeds of suspicion firmly planted and anxiously awaiting germination" but should instead encourage "an open mind and resolution to give the defendant the benefit of the reasonable doubt."[53] In *Perryman*, a drug possession case, the prosecutor asked the jurors how they might expect drugs to be packaged and how they might distinguish between a drug dealer and drug user.[54] The court held that the hypothetical questions regarding the distinctions between dealers and users and the quantity of drugs possessed improperly "planted seeds of suspicion, based on the number of bags of cocaine the evidence later revealed Perryman possessed, that Perryman was a drug dealer, even though no such charge was before the jury."[55] In addition, the court held improper several additional questions that attempted to inculcate jurors of the severity of the "war against drugs," which included the following: "You think drugs are a scary problem here in the country?"; "Are you in agreement that, essentially, it's one of the biggest problems that we have in this country?"; and "Things like theft, robbery, battery, people doing things to one another. It's all

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49. *See, e.g.*, Ringo v. State, 736 N.E.2d 1209, 1212 (Ind. 2000).

50. The federal constitutional standard is merely a preponderance of the evidence, but the Indiana Supreme Court has made it clear that a higher standard applies in Indiana and "trial courts are bound to apply this standard when evaluating such claims." Luckhart v. State, 736 N.E.2d 227, 229 n.1 (Ind. 2000); Jackson v. State, 735 N.E.2d 1146, 1153 n.4 (Ind. 2000).

51. *See generally* Wentz v. State, 766 N.E.2d 351, 357 (Ind. 2002).

52. 830 N.E.2d 1005 (Ind. Ct. App. 2005).

53. *Id.* at 1010 (quoting Robinson v. State, 297 N.E.2d 409, 411 (Ind. 1973)).

54. *Id.*

55. *Id.*

related [to drugs]."[56]

Unlike in *Perryman*, defense counsel did not object to the voir dire improprieties in the two other cases. Therefore, reversal required a showing of "fundamental error"—error "so prejudicial to the rights of the defendant as to make a fair trial impossible."[57] In *Merritt v. State*,[58] the defendant was charged with possession of cocaine and drug paraphernalia, and the State's theory was that she constructively possessed the contraband, which was found inside a shoe in the minivan she was driving and in her purse.[59] After explaining that a possession conviction could be supported by actual or constructive possession, the trial court offered the following example:

> I would venture a guess . . . that most of you women who have purses . . . [M]ay have purses at your feet on the floor. I don't know that to be true because I can't see. I'm assuming that's where they are. You still have constructive possession of your purse because it is in a location under your control and you intend to control it there.[60]

The court of appeals held this voir dire example to constitute fundamental error because it was so "strikingly similar to the facts of this case" such that "the jury could easily have been tainted resulting in an unfair trial."[61]

Finally, in *Black v. State*,[62] the trial court granted the State's motion in limine to prohibit any questioning of prospective jurors regarding self-defense—the defendant's likely theory of defense in his trial for murder. Relying on death penalty precedent, the court noted that the State has a "valid right to exclude [a] person who cannot be fair to its position when seek[ing] a penalty of death."[63] Similarly, a defendant who plans to pursue self-defense must be able to assess whether jurors "have firmly-held beliefs which would prevent them from applying the law of self-defense to the facts of the case" and "exclude persons who cannot be fair" to a defendant's claim of self-defense.[64] Because the trial court's limitations failed to ensure a fair and impartial jury, the case was remanded for a new trial.[65]

IV. CONFRONTATION CLAUSE UNDER *CRAWFORD V. WASHINGTON*

As summarized in last year's survey issue, the Supreme Court in *Crawford*

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56. *Id.* (alteration in original).

57. Willey v. State, 712 N.E.2d 434, 444-45 (Ind. 1999) (citing Sauerheber v. State, 698 N.E.2d 796, 804 (Ind. 1998)).

58. 822 N.E.2d 642 (Ind. Ct. App. 2005).

59. *Id.* at 643.

60. *Id.* at 644 (omissions in original).

61. *Id.*

62. 829 N.E.2d 607 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d (Ind. 2005).

63. *Id.* at 611 (quoting Burris v. State, 465 N.E.2d 171, 177 (Ind. 1984)).

64. *Id.*

65. *Id.* at 612.

v. Washington,[66] broke new Sixth Amendment ground in holding that "the prosecution may introduce a 'testimonial' out-of-court statement against a criminal defendant only upon two showings: (1) the witness who made the statement is unavailable; and (2) the defendant had a prior opportunity to cross-examine the witness."[67] The initial response to the fairly sweeping language and apparent reach of *Crawford* in Indiana was "reticence to change longstanding practice."[68] The Indiana Supreme Court granted transfer in two of the early court of appeals opinions, however, and decisions in those and other cases began to bring some focus to *Crawford* in Indiana during this survey period.

First, in *Hammon v. State*,[69] the supreme court grappled with the scope of "testimonial" statements, which may not be used at trial without an opportunity to cross-examine. In *Hammon*, police responding to a domestic violence call questioned the complaining witness and then asked her to complete and sign a battery affidavit.[70] The court concluded that "statements to investigating officers in response to general initial inquiries are nontestimonial but statements made for purposes of preserving the accounts of potential witnesses are testimonial."[71] Put another way, "testimonial statements are those where a principal motive of either the person making the statement or the person or organization receiving it is to preserve it for further use in legal proceedings."[72]

Looking to "the intent of the declarant in making the statement and the purpose for which the police officer elicited the statement," the court concluded that the victim's oral statements to police were not testimonial but were simply part of the "preliminary investigation" of the officer who was responding to the emergency.[73] The court held that the battery affidavit, however, was testimonial and subject to *Crawford* because its purpose was to record the victim's account "and at least one principal reason to document [her account] was to provide a basis for its use as evidence or impeachment in [the defendant's] potential criminal prosecution."[74] Nevertheless, the court concluded that the erroneous admission of the affidavit was harmless in light of the "surrounding contrary physical evidence" and the victim's initial responses to police.[75]

On the same day *Hammon* was decided, the Indiana Supreme Court in *Fowler v. State*[76] addressed the narrower question of "whether a witness who is present

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66. 541 U.S. 36 (2004).

67. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 38 IND. L. REV. 999, 1014 (2005).

68. *Id.* at 1015.

69. 829 N.E.2d 444 (Ind. 2005), *rev'd sub nom.* Davis v. Washington, 126 S. Ct. 2266 (2006).

70. *Id.* at 446.

71. *Id.*

72. *Id.*

73. *Id.* at 457-58.

74. *Id.* at 458.

75. *Id.* at 459.

76. 829 N.E.2d 459 (Ind.), *reh'g denied* (Ind. 2005), *cert. denied*, 74 U.S.L.W. 3685 (U.S. Ind. June 12, 2006).

and takes the stand, but then refuses to testify with no valid claim of privilege, is a witness who 'appears for cross-examination' (as that term is used in *Crawford*) if no effort is made to compel the witness to respond."[77] The victim in *Fowler*, another domestic violence case, took the stand and said she did not want to testify.[78] Instead of presenting her testimony, the State presented evidence of the battery through a police officer's recounting of what the victim had told him when he responded to the scene. Because the defendant did not seek to compel the victim to answer questions on cross-examination or recall her after her statements were admitted through a police officer, the court held that she was not unavailable for cross-examination.[79] Therefore, Fowler's right to further cross-examination was forfeited.[80]

Although technically a win for the State, the court concluded its opinion in *Fowler* with a stern warning to police officers or others who threaten to have false-informing charges filed against domestic violence victims who do not testify at trial. The court agreed with the court of appeals that "a domestic violence victim should not be placed in the situation of being intimidated not only by the aggressor, but also by the State and its representatives."[81] It also went a step further in concluding that "to 'encourage' a witness by threatening prosecution of a person believed to be innocent is not only inappropriate, it is a crime," i.e., intimidation.[82]

Two months after the decisions in these significant domestic battery cases, the court of appeals applied *Crawford* and *Hammon* to the child molestation arena in two opinions. First, in *Anderson v. State*,[83] the court addressed the admissibility at trial of a three-year-old victim's out-of-court statements to her great-grandmother, to an Office of Family and Children (OFC) employee, and to a detective. The court held the child's statements to her great-grandmother were nontestimonial because they were not elicited for use in future legal proceedings.[84] Therefore, *Crawford* imposed no bar to their admissibility, which instead is determined by the Protected Persons Statute.[85]

The child's statements to the detective, however, were testimonial because the principal motive for the interview was an investigation, with the purpose of preserving the child's statements for use in future legal proceedings.[86] The statements to the OFC employee, who had specialized training in working with sexually abused children, were similarly testimonial because, under *Hammon*, "the motive of the questioner, more than that of the declarant, is determinative,

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77. *Id.* at 465.
78. *Id.* at 462.
79. *Id.* at 469.
80. *Id.* at 470.
81. *Id.* at 471.
82. *Id.*
83. 833 N.E.2d 119 (Ind. Ct. App. 2005).
84. *Id.* at 123-24.
85. *Id.* at 124-25; *see also* IND. CODE § 35-47-4-6 (2005).
86. *Anderson*, 833 N.E.2d at 125.

but if either is principally motivated by a desire to preserve the statement, it is sufficient to render the statement 'testimonial.'"[87]

Because the statements to the detective and OFC employee were testimonial, the court proceeded to the second *Crawford* step—determining whether the defendant was afforded an opportunity for cross-examination.[88] The child had been found "incapable of understanding the nature and obligation of an oath" and was therefore unavailable to testify at trial under the Protected Persons Statute.[89] However, *Crawford* sets a higher bar than the statute, as the court of appeals had previously explained in *Purvis v. State*.[90] Accordingly, the court in *Anderson* concluded that "at least under the circumstances of this case, a witness unable to appreciate the obligation to testify truthfully cannot be effectively cross-examined for *Crawford* purposes."[91] The court did not engage in harmless error analysis because it reversed the conviction on other grounds.[92]

The court employed a similar analysis in *D.G.B. v. State*,[93] where it held that a six-year-old child's statement to a detective was testimonial under *Crawford* because it was made as part of an official investigation and videotaped for possible use in prosecution.[94] The court further found that D.G.B. was not afforded an opportunity to cross-examine the child, who turned away from the judge when the judge tried to administer the oath, put her hands over her ears, and was then allowed to leave the courtroom.[95] Although the trial court erred in admitting the child's statement at trial, the court of appeals found that error to be harmless beyond a reasonable doubt based on the remaining properly admitted evidence.[96]

Although these cases suggest a fairly dramatic reshaping of the procedures and rules in light of *Crawford*, the effect will likely be even greater. The United States Supreme Court granted certiorari in *Hammon* on October 31, 2005, and will soon address the seemingly straightforward question: "Whether an oral accusation made to an investigating officer at the scene of an alleged crime is a testimonial statement within the meaning of *Crawford v. Washington*."[97]

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87. *Id.* (quoting *Hammon*, 829 N.E.2d at 456).

88. *Id.* at 126.

89. *Id.*

90. 829 N.E.2d 572 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 180 (Ind. 2005), *cert. denied*, 126 S. Ct. 1580 (2006).

91. *Anderson*, 833 N.E.2d at 126.

92. *Id.*

93. 833 N.E.2d 519 (Ind. Ct. App. 2005).

94. *Id.* at 528.

95. *Id.* at 525, 528.

96. *Id.* at 528.

97. Petition for Writ of Certiorari, *Hammon v. Indiana*, 126 S. Ct. 552 (No. 05-5705) (citation omitted).

V. *BLAKELY V. WASHINGTON* IN INDIANA: NOT SO MUCH OF AN EARTHQUAKE

Shortly after finding herself on the losing side of the Supreme Court's landmark sentencing decision in *Blakely v. Washington*,[98] Justice O'Connor referred to the decision as a "No. 10 earthquake."[99] Although its epicenter may have been Washington D.C., the quake's effects certainly reached Indiana. Early signs suggested dramatic changes in Indiana's sentencing procedures, but by the end of the survey period, *Blakely*'s impact on Indiana's sentencing scheme was minimal with any "damage" to the status quo caused not by *Blakely* itself but by the General Assembly's quick-fix, eleventh-hour response in the 2005 session.

As summarized in last year's survey article, *Blakely* posed a number of important questions in Indiana: (1) Does the case impact Indiana's presumptive sentencing scheme?; (2) If so, may the courts cure the unconstitutionality of the statutes and with what remedy?; and (3) Which defendants may reap the benefits of *Blakely* on appeal?[100] The Indiana Supreme Court addressed these—and another important question—in *Smylie v. State*.[101]

The supreme court had little difficulty in resolving the first question, finding that Indiana's statutory "fixed terms" are remarkably similar to Washington's presumptive ranges held to violate the Sixth Amendment in *Blakely*.[102] Indiana's sentencing statutes and case law require a "presumptive term for each class of crimes, except when the judge finds aggravating or mitigating circumstances deemed adequate to justify adding or subtracting years."[103] They require, as did the Washington scheme, trial judges to "engage in judicial fact-finding during sentencing if a sentence greater than the presumptive fixed term is to be imposed."[104]

Next, the court reiterated its power to "rescue[ ] constitutional portions of statutes, if possible, when other portions are held unconstitutional."[105] The court observed that, to comply with the Sixth Amendment, Indiana's system could take one of two paths: "(1) our present arrangement of fixed presumptive terms, modified to require jury findings on facts in aggravation, or (2) a system in which there is no stated 'fixed term' (or at least none that has legally binding effect) in which judges would impose sentences without a jury."[106] The court concluded that the first option was "probably more faithful" to the General Assembly's objectives in enacting the presumptive sentencing scheme in 1977 to "abandon

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98. 542 U.S. 296 (2004).

99. *See* Lyle Denniston, *Justices Agree to Consider Sentencing*, N.Y. TIMES, Aug. 3, 2004, at A14.

100. *See* Schumm, *supra* note 67, at 1019-24.

101. 823 N.E.2d 679 (Ind.), *cert. denied*, 126 S. Ct. 545 (2005). This author served as co-counsel for amicus, Marion County Public Defender Agency, in *Smylie*.

102. *Id.* at 682-83.

103. *Id.* at 683.

104. *Id.*

105. *Id.* at 685.

106. *Id.*

indeterminate sentencing in favor of fixed and predictable penalties."[107] Therefore, according to *Smylie* any fact that enhanced a sentence beyond the presumptive or "fixed term" requires a jury finding under the existing statutes.[108]

As to the third question, the court held that Smylie—and other similarly situated defendants—were entitled to raise *Blakely* challenges on appeal, even though no objection had been raised in the trial court and no *Blakely* claim had initially been raised on appeal.[109] First, the court explained that *Blakely* established a new rule of criminal procedure because it "radically reshaped our understanding of a critical element of criminal procedure and ran contrary to established precedent."[110] The court observed that waiver or forfeiture of *Blakely* claims could occur "through the application of the rules governing appellate procedure."[111] Claims are normally forfeited when no objection is lodged at trial.[112] Nevertheless, the court concluded that *Blakely* presented such novelty that "requiring a defendant or counsel to have prognosticated the outcome of *Blakely* or of today's decision would be unjust."[113] Therefore, the court adopted a "rather liberal" approach in which defendants who raised any argument regarding their sentence would be deemed to have adequately preserved a *Blakely* claim on appeal.[114] But "those defendants who did not appeal their sentence at all will have forfeited any *Blakely* claim."[115]

Finally, the court held that *Blakely* imposed no limitation on the imposition of consecutive sentences for multiple offenses.[116] Finding "no language in *Blakely* or in Indiana's sentencing statute that requires or even favors concurrent sentencing," the court concluded there was "no constitutional problem with consecutive sentencing so long as the trial court does not exceed the combined statutory maximums."[117] Although a fair reading of the Indiana statutes, this approach largely ignores decades of Indiana Supreme Court precedent that has required trial courts sentencing a defendant on multiple counts to find at least one aggravating circumstance in order to impose consecutive sentences.[118]

Because Smylie was sentenced to two years for each D felony count—six months above the "fixed" or presumptive term of the statute—the enhancement could not stand in the absence of jury findings.[119] Therefore, although the order

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107. *Id.* at 686.

108. *Id.*

109. *Id.* at 690-91.

110. *Id.* at 687.

111. *Id.* at 689.

112. *Id.*

113. *Id.*

114. *Id.* at 690.

115. *Id.* at 691.

116. *Id.* at 686.

117. *Id.*

118. *See, e.g.*, Ortiz v. State, 766 N.E.2d 370, 377 (Ind. 2002); Morgan v. State, 675 N.E.2d 1067, 1073 (Ind. 1996).

119. *Smylie*, 823 N.E.2d at 687.

to run the sentences consecutively was affirmed, the case was otherwise remanded "for a new sentencing hearing in which the State may elect to prove adequate aggravating circumstances before a jury or accept the statutory fixed term."[120]

As highlighted in cases that followed *Smylie*, the remedy for a successful *Blakely* claim was hardly a windfall for defendants: the State could pursue a new sentencing hearing in which aggravators were proved to a jury or stipulate to resentencing in light of aggravating circumstances that do not require a jury determination.[121] Moreover, several appellate opinions held that a defendant's criminal history is an exception to the requirement of jury fact-finding under the "fact of a prior conviction" exception mentioned in *Blakely* and its predecessors.[122] Therefore, defendants with a criminal history have largely seen their sentences affirmed on appeal, even if numerous improper aggravators were found by the judge instead of a jury, because "prior criminal history, standing alone, was sufficient to enhance [the defendant's] sentence."[123] Furthermore, assuming that *Blakely* errors are not structural and therefore are amenable to harmless error analysis, the usual burden rests with the State to show harmlessness beyond a reasonable doubt.[124] Nevertheless, the Indiana Supreme Court instead has posed the question as whether it could say with confidence that the trial court would have imposed the same sentence if considering only proper aggravating circumstances.[125]

Finally, defendants with multiple convictions will likely receive little, if any, relief based, ironically, on article VII, section 4 of the Indiana Constitution, which is generally thought to provide considerable *relief* to defendants on appeal. The Indiana Supreme Court had interpreted this provision to allow it to alter sentences "within the bounds of *Blakely*."[126] Therefore, a defendant who was convicted of aggravated battery and criminal confinement and sentenced to concurrent (but enhanced) sentences of twelve and three years respectively saw virtually the same sentence imposed when the court vacated the enhanced sentences but ordered instead "consecutive sentences of ten years for aggravated battery and one and a

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120. *Id.* at 691.

121. *See* Patrick v. State, 827 N.E.2d 30 (Ind. 2005).

122. Stott v. State, 822 N.E.2d 176, 179 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 741 (Ind. 2005); Krebs v. State, 816 N.E.2d 469, 475-76 (Ind. Ct. App. 2004).

123. *See, e.g.*, Muncy v. State, 834 N.E.2d 215, 218 (Ind. Ct. App. 2005) (quoting Williams v. State, 818 N.E.2d 970, 976 (Ind. Ct. App. 2004)).

124. *See id.* at 220 (Barnes, J., dissenting) (citing Freeze v. State, 827 N.E.2d 600, 604 (Ind. Ct. App. 2005)). Judge Barnes's opinion also offers a particularly thoughtful discussion of the forfeiture of *Blakely* claims for defendants sentenced after *Blakely* but before *Smylie*, noting that the Attorney General had "adamantly and consistently" argued that *Blakely* had no effect in Indiana and was now taking a position "diametrically opposed to its previous position," which "comes close to judicial estoppel." *Id.* at 219.

125. *See, e.g.*, Trusley v. State, 829 N.E.2d 923, 927 (Ind. 2005).

126. Williams v. State, 827 N.E.2d 1127, 1128 (Ind. 2005).

half years for criminal confinement."[127]

More significant than any of these court opinions, however, was the legislative response to the prospect of requiring juries to find aggravating circumstances in the wake of *Smylie*. Trial courts around the State were apparently prepared for the *Smylie* remedy, and months earlier had required the State to file a notice of aggravating circumstances and to present evidence in the second-phase of the jury trial to prove the aggravators beyond a reasonable doubt.[128] Indeed, the Sentencing Policy Study Commission had proposed legislation along these lines which had already passed the Indiana Senate when *Smylie* was issued.[129] On the morning of a hearing on the bill in the House committee, however, the bill was amended to adopt the vastly different option mentioned in *Smylie*.[130] Specifically, the proposed amendment, which unanimously passed the committee and ultimately both houses unanimously with little discussion, significantly changed Indiana's sentencing statutes by abandoning the presumptive or "fixed" term and replacing it with an "advisory" sentence that judges could "voluntarily consider."[131] Thus, the presumptive sentencing scheme under which each class of felony had a "fixed" term that could be altered only by the finding of aggravating or mitigating circumstances has been replaced with a broad range in which trial judges can choose any sentence without finding aggravating or mitigating circumstances.[132] For example, under the amended statute a trial judge sentencing a defendant for a Class B felony no longer needs any justification to deviate from the previous "fixed" term of ten years but may instead impose any sentence between six and twenty years.[133]

Although the new statute specifically allows the imposition of any sentence "authorized by statute . . . regardless of the presence or absence of aggravating circumstances or mitigating circumstances," the same provision also imposes the broad and less-than-entirely-clear requirement that the sentence be "permissible under the Constitution of the State of Indiana."[134] Presumably this refers to the far-reaching power of appellate revision that often begins with a presumptive term in deciding whether the sentence was "inappropriate" under Appellate Rule 7(B), which implements article VII, sections 4 and 6 of the Indiana

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127. *Id.* at 1129.

128. For example, on November 30, 2004, the judges of the Marion County Superior Court, Criminal Division adopted a policy that required the State to file a "Notice of Aggravating Circumstances" no later than ten days after the omnibus date that alleges "facts sufficient in law to support" the aggravator. Policy of the Marion Superior Court Criminal Division of Aggravating Circumstances (filed as Additional Authority in *Smylie*).

129. Michael R. Limrick, *Senate Bill 96: How the General Assembly Returned Problem* [sic] *of Uniform Sentencing to Indiana's Appellate Courts*, RES GESTAE, Jan./Feb. 2006, at 19.

130. *Id.* at 21-22.

131. IND. CODE § 35-50-2-1.3 (Supp. 2005).

132. *Id.* §§ 35-50-2-3 to -7.

133. *Id.* § 35-50-2-5.

134. *Id.* § 35-38-1-7.1(d).

Constitution.[135]

Considering the unanimous vote and some insider comments, the intended effect seems not nearly as dramatic as its plain language suggests. For example, Senator Long told the House Committee that he "believe[d] the Indiana Supreme Court [was] committed to uniform sentencing. He was confident that, under the amendment he proposed, appellate review would continue to prevent wide discrepancies in sentencing from one court to another."[136] Judge Jane Magnus-Stinson, who aptly referred to the amendment as a "leap of faith by the General Assembly," noted the statutes would likely need to be amended if they lead to increased sentences and greater prison overcrowding.[137]

Finally, the new sentencing scheme, regardless of its apparent good intentions of simplifying jury trials and maintaining the status quo pre-*Blakely* with a concern for uniform sentencing, is likely to cause an increase in sentencing appeals because of the seemingly broad new discretion afforded to trial court judges. Either the appellate courts will serve as an adequate check on that discretion or—as Judge Magnus-Stinson suggested—the General Assembly will need to reconsider the issue when the appellate dockets and prisons burgeon.

VI. BEYOND *BLAKELY*: THE OTHER WORLD OF SENTENCING

Although *Blakely* ultimately proved only a short-lived and narrow window of relief to criminal defendants without a criminal history, other sentencing and related provisions persist and afford relief in a variety of situations. The most frequently invoked and successful of these is Appellate Rule 7(B), which implements the sentence revision provisions of article VII, sections 4 and 6 of the Indiana Constitution. In addition, limitations are imposed on all aspects of sentences by other constitutional provisions and statutes, a few of which are discussed below.

A. Appellate Rule 7(B)

As noted in the past several survey articles, Appellate Rule 7(B), especially with its fairly broad language that authorizes the appellate court to revise any sentence that is "inappropriate in light of the nature of the offense and character of the offender," provides relief to many defendants each year. As the supreme court explained, the 2003 amendment to Rule 7(B) "changed its thrust from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied."[138]

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135. Limrick, *supra* note 129, at 23.

136. *Id.* (citing Indiana Judicial Center 2005 Friday Legislative Updates (Mar. 24, 2005)).

137. Charles Wilson, *Sentencing Law May Increase Appeals*, COURIER-JOURNAL (Louisville, Ky.), July 5, 2005, http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20050705/NEWS02/507050362.

138. Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005).

In *Ruiz v. State*,[139] for example, the Indiana Supreme Court reduced a maximum twenty-year sentence for child molesting imposed against an intoxicated twenty-year-old defendant for having sex with "a thirteen-year-old girl who described their relationship as boyfriend and girlfriend."[140] The only aggravating circumstance cited by the trial court was Ruiz's criminal history of four alcohol-related misdemeanors: driving while intoxicated, giving alcohol to a minor, and twice possessing alcohol as a minor.[141] The court found this history insignificant in relation to the Class B felony charge for which he was sentenced. "Although alcohol was involved in these offenses and also in the current crime, the latter is manifestly different in nature and gravity from the misdemeanors."[142] Reiterating that "appellate courts are reluctant to substitute their judgments for those of the trial court in sentencing," the court nevertheless held the twenty-year sentence was inappropriate based on the "unrelated and relatively insignificant prior convictions" and reduced the sentence to the presumptive term of ten years.[143]

The most significant question, still unanswered during this survey period, is the reach of Appellate Rule 7(B). As summarized in last year's article, there has been mounting confusion in the court of appeals regarding whether a defendant may challenge a sentence on appeal after pleading guilty, and if so, what is the content of that challenge.[144] To recap briefly, in *Gist v. State*,[145] the court held that a defendant who pleaded guilty to a Class B felony pursuant to an agreement with a cap of ten years "necessarily agreed that a ten-year sentence was appropriate," and the sentence was therefore unassailable on appeal under Appellate Rule 7(B).[146] Five months later, a different panel took issue with some of the language from *Gist*, reasoning that only defendants who sign agreements for "a specific term of years, or to a sentencing range other than the range authorized by statute" have forfeited a 7(B) claim.[147] Finally, yet another panel held in *Bennett v. State*[148] held that a defendant who is sentenced in accordance with any plea agreement "has implicitly agreed that his sentence is appropriate."[149]

Additional cases during this survey period added to the conflict and the confusion. The majority in *Mast v. State*[150] took issue with *Bennett*'s broad

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139. 818 N.E.2d 927 (Ind. 2004).

140. *Id.* at 927.

141. *Id.* at 929.

142. *Id.*

143. *Id.*

144. Schumm, *supra* note 67, at 1030-32.

145. 804 N.E.2d 1204 (Ind. Ct. App. 2004).

146. *Id.* at 1206-07.

147. Wilkie v. State, 813 N.E.2d 794, 804 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 981 (Ind. 2004).

148. 813 N.E.2d 335 (Ind. Ct. App. 2004).

149. *Id.* at 338.

150. 824 N.E.2d 429 (Ind. Ct. App. 2005).

prohibition on 7(B) sentencing challenges whenever a defendant pleads guilty. The *Mast* majority seemingly approved forfeiture for those cases in which a plea agreement "explicitly permits the trial court to sentence the defendant within a given range or caps a sentence" because those pleas included an "implicit waiver provision" that is "entirely logical."[151] But in plea agreements that impose no such limitations and leave sentencing entirely up to the trial court's discretion, the court reasoned that defendants are in a similar position to those convicted at trial.[152] Moreover, nothing in Mast's wide-open plea agreement suggested consent to an inappropriate sentence, and he did nothing otherwise to waive his sentencing challenge.[153] Nevertheless, the majority concluded that the sentence imposed was appropriate based largely on the defendant's "eight prior convictions."[154] Judge Bailey concurred in the result, adhering to *Bennett*'s view that defendants who plead guilty after being properly advised of the maximum and minimum sentences have implicitly agreed to a sentence within that range.[155]

In *Gornick v. State*,[156] the defendant pleaded guilty to charges in three separate cases pursuant to a plea agreement that allowed the trial court to sentence him to no more than thirty-eight years.[157] He received a thirty-eight year sentence, and the court of appeals concluded that he could challenge only the trial court's exercise of "discretion in weighing the aggravators and mitigators supporting a sentence within the range set forth by a fixed plea," but could not challenge the sentence under Rule 7(B) because he "would not [have] agree[d] to a sentencing range that would be so unjust as to be characterized as 'inappropriate.'"[158]

Finally, in *Reyes v. State*,[159] the court of appeals explained again that when a defendant pleads guilty pursuant to a plea agreement that "provides for a specific sentencing range, implicit in the defendant's agreement is his concession that a sentence within that range is appropriate."[160] The court continued that its holding "does not deny a defendant the opportunity to appeal his or her sentence; such a defendant is merely precluded from challenging his or her sentence as inappropriate under Appellate Rule 7(B)."[161] A defendant may still appeal "the trial court's exercise of its discretion in the finding and balancing of aggravators and mitigators as an abuse of discretion."[162]

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151. *Id.* at 431.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 431-32 (Bailey, J., concurring).

156. 832 N.E.2d 1031 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 184 (Ind. 2005).

157. *Id.* at 1033.

158. *Id.* at 1035.

159. 828 N.E.2d 420 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2005), *aff'd in part, vacated in part*, 848 N.E.2d 1081 (Ind. 2006).

160. *Id.* at 426.

161. *Id.*

162. *Id.*

Remarkably, none of these opinions make any mention of the Indiana Supreme Court's longstanding precedent or practice of addressing substantive sentencing claims on appeal, after either trial or guilty plea.[163] Some recent opinions, such as *Gornick*, acknowledge one of the court's opinions, but simply to say that a defendant may still "challenge the trial court's exercise of its sentencing discretion"—just not the appropriateness of the sentence.[164] The ability to challenge a sentence under the burdensome abuse of discretion standard is not an adequate consolation prize to defendants who plead guilty expecting the ability to challenge their sentence under the far more favorable—and constitutionally required—appropriateness standard. The Indiana Supreme Court granted transfer, after hearing oral argument, in two unpublished decisions on September 28, 2005.[165] The court's precedent, practice, policy, and practical concerns all suggest the court should adopt an even more expansive view than any of the court of appeals' decisions—allowing a sentencing appeal by any defendant who pleads guilty pursuant to a plea agreement that affords the trial court any discretion.

For more than two decades, the Indiana Supreme Court has addressed—without limitation—appellate claims for substantive sentence review in cases in which the defendant pleaded guilty pursuant to a plea agreement that afforded some degree of latitude to the trial court. In the earliest of these cases, a defendant pleaded guilty to B felony burglary in exchange for the State dismissing a theft count and habitual offender enhancement.[166] The court upheld the maximum twenty-year sentence as not being manifestly unreasonable, the often-difficult-to-meet standard governing claims before 2003,[167] but it said nothing of the defendant's acquiescence to that sentence or the waiver of his right to challenge it on appeal because of the guilty plea.[168]

A twenty-year sentence is certainly far preferable to the fifty or more years that defendant could have received, but other defendants have received far more beneficial plea agreements in the decades since. In *Rust v. State*,[169] a defendant pleaded guilty to felony murder, and the State dismissed a kidnapping charge and

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163. The court of appeals general practice of relying primarily on its own opinions rather than those of the Indiana Supreme Court has generated some recent scholarly commentary. *See* Dragomir Cosanici & Chris E. Long, *Recent Citation Practices of the Indiana Supreme Court and the Indiana Court of Appeals*, 24 LEGAL REFERENCE SERVICES Q. 103, 109 (2005) (noting that, unlike most other state intermediate appellate courts that cite "most often to the courts of last resort in their jurisdiction," the Indiana Court of Appeals "highly prefers citing to itself").

164. Gornick v. State, 832 N.E.2d 1031, 1035 (Ind. Ct. App.), *trans. denied* (Ind. 2005).

165. The cases are *Carroll v. State* and *Childress v. State*, and the oral arguments may be viewed on the court's website: http://www.in.gov/judiciary/supreme/index.html. This author co-authored an amicus brief on behalf of the Marion County Public Defender Agency in these cases.

166. Frappier v. State, 448 N.E.2d 1188, 1189 (Ind. 1983).

167. *See* Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005) (explaining the evolution of the "manifestly unreasonable" to "inappropriate" standard).

168. *Frappier*, 448 N.E.2d at 1189-90.

169. 477 N.E.2d 262 (Ind. 1985).

withdrew its request for the death penalty. The fifty-year sentence was upheld as not manifestly unreasonable.[170] In the ensuing years, several other defendants who faced the possibility of a death sentence entered into plea agreements with the State in exchange for the State not only dismissing the death penalty enhancement but, in some cases, even agreeing to concurrent sentences on the multiple counts covered by the plea agreement.[171] In more recent years, defendants have challenged the term of years imposed after the State agreed to dismiss a request for life imprisonment without parole.[172] Finally, still other defendants have entered into plea agreements in which the State agreed to dismiss other counts that could have been ordered consecutively,[173] or agreed to plead guilty to a lesser charge in exchange for the State dismissing a higher charge.[174] In many of these cases, even though the defendant received a considerable benefit by the State foregoing the death penalty, life imprisonment without parole, consecutive sentences, or a higher-level felony, the Indiana Supreme Court nevertheless fulfilled its duty to review the sentence imposed under article VII, section 4. In many of these cases, sentences were even reduced.[175] None of these opinions hinted, let alone found, that by pleading guilty under a plea agreement that afforded discretion to the trial court the defendant acquiesced, waived, or forfeited his or her constitutional right for appellate sentence review.

The only limitation the Indiana Supreme Court has imposed on the appeal of sentences is the timing of the challenge—not its content. In *Tumulty v. State*,[176] the court made clear that defendants who plead guilty may not challenge their convictions or the acceptance of their guilty plea on appeal, but direct appeal is the proper avenue for challenging the trial court's exercise of sentencing discretion and the manifest reasonableness of the sentence. A broad net was cast,

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170. *Id.* at 265.

171. *See, e.g.*, Tackett v. State, 642 N.E.2d 978, 979 (Ind. 1994) (plea required concurrent sentences); Adkins v. State, 561 N.E.2d 787, 788 (Ind. 1990) (same); Steele v. State, 569 N.E.2d 652, 653 (Ind. 1990) (noting that plea allowed trial court option of consecutive or concurrent sentences); *cf.* Penick v. State, 659 N.E.2d 484, 486 (Ind. 1995) (finding that trial court could determine sentence on a single count of murder).

172. *See, e.g.*, Sensback v. State, 720 N.E.2d 1160, 1162-63 (Ind. 1999); Jones v. State, 705 N.E.2d 452 (Ind. 1999).

173. *See, e.g.*, Johnson v. State, 734 N.E.2d 242, 244 (Ind. 2000); Scheckel v. State, 655 N.E.2d 506, 508 (Ind. 1995).

174. Ruiz v. State, 818 N.E.2d 927, 928 (Ind. 2004).

175. *See id.* at 929 (involving a sentence for a B felony child molesting that was reduced from twenty years to ten years); Francis v. State, 817 N.E.2d 235, 236 (Ind. 2004) (involving a sentence for A felony child molesting that was reduced to the presumptive term of thirty years); Widener v. State, 659 N.E.2d 529, 534 (Ind. 1995) (involving consecutive terms of sixty years for felony murder and ten years for conspiracy to commit robbery that were reduced to concurrent terms of fifty and ten years, respectively); Walton v. State, 650 N.E.2d 1134 (Ind. 1995) (involving consecutive sentences of sixty years for two counts of murder that were reduced to consecutive forty-year terms).

176. 666 N.E.2d 394 (Ind. 1996).

allowing sentencing challenges in any cases "where the [trial] court has exercised sentencing discretion."[177] More recently, in *Collins v. State*,[178] the court cited *Tumulty* in explaining that defendants who plead guilty pursuant to agreements "where the sentence is not fixed by the plea agreement" must challenge their sentence on direct appeal—and not in a post-conviction proceeding. Although a "fixed" plea agreement is not explicitly defined, the common understanding of the term is a specific number of years, e.g., eight years. A plea agreement for a B felony that, for example, sets a cap of twelve years with a floor of six (the statutory minimum) is no more "fixed" than an "open" plea that allows the trial court to impose a sentence within the statutory range of six to twenty years.

At first blush, the *Gornick* approach appears better than the hard-line approach of *Bennett*, which held that every defendant who is advised of the maximum and minimum sentence has acquiesced in a sentence such that it cannot be challenged on appeal. First, *Gornick* and company impose waiver only "when a plea explicitly permits the trial court to sentence a defendant within a set range and is not 'open.'"[179] The logic behind this seems to be that defendants in such cases have been induced to plead guilty by the benefit of a restricted sentencing range.[180] But *Gornick* does not go far enough. Defendants in the many Indiana Supreme Court cases cited above also received significant, if not greater, inducements to plead guilty, including the dismissal of death penalty and life without parole requests, dismissal of counts that could be ordered served consecutively, and even the dismissal of a higher level charge in exchange for a plea to a lesser charge.

Moreover, the court of appeals' application of the abuse of discretion standard for those defendants who plead to a capped sentence or range-of-years sentence, while finding review under Rule 7(B) waived, is not supported by practice or precedent. The court of appeals has explained the underlying logic as follows: "Although a trial court may abuse its discretion in weighing the aggravators and mitigators supporting a sentence within the range set forth by a fixed plea, a defendant would not agree to a sentencing range that would be so unjust as to be characterized as 'inappropriate.'"[181] As discussed below, this rationale fails for several reasons.

By entering into a plea agreement, the defendant has done nothing more than "agree" to the ground rules for the trial court. Defendants often believe that a sentence in the upper-range of a capped plea or range of years plea would be "unjust," and the decision to enter into the plea agreement is simply a decision to try to persuade the court to impose a sentence closer to the bottom of the range—with the understanding that an appeal and the generous "appropriateness" standard of Appellate Rule 7(B) is available if things do not go as planned.

The court of appeals' rationale enjoys no support in Indiana Supreme Court

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177. *Id.* at 396.

178. 817 N.E.2d 230, 231 (Ind. 2004).

179. Gornick v. State, 832 N.E.2d 1031, 1035 (Ind. Ct. App.), *trans. denied* (Ind. 2005).

180. *See, e.g.*, Wilkie v. State, 813 N.E.2d 794, 803 (Ind. Ct. App.), *trans. denied* (Ind. 2004).

181. *Gornick*, 832 N.E.2d at 1035.

precedent, because in each of the cases cited above, the court has never imposed a limitation on the types of sentencing claims that could be raised after a defendant pleads guilty. Similarly, review under the "abuse of discretion" standard is not a constitutionally adequate substitute for the "appropriateness" review under Rule 7(B). The court has recognized a distinction between (1) procedural challenges to the sentencing statement as relying on improper aggravating circumstances or overlooking significant mitigating circumstances and (2) substantive challenges to the length of the sentence as inappropriate (or, formerly, manifestly unreasonable).[182] Successful procedural challenges generally result in remand for a new sentencing statement,[183] while successful substantive challenges generally result in the appellate court ordering a reduced term of years.[184] As some of these cases make clear, however, a procedural challenge may fail because the trial court properly finds the aggravators and mitigators, but reduction is still appropriate under the substantive review standard because the number of years imposed fails to withstand the scrutiny of this court's sentencing principles or comparisons to "cases with roughly similar aggravating and mitigating circumstances."[185]

Since the 2003 amendment to Rule 7(B), however, a challenge to the appropriateness of a sentence is much more likely to result in relief than an "abuse of discretion" or procedural claim. Challenges to the trial court's finding of aggravating and mitigating circumstances, on the other hand, often fail because trial courts are not obligated to find mitigating circumstances unless they are both significant and clearly supported by the record,[186] and Indiana courts have long held that a single aggravating circumstance "is" or "may be" sufficient to uphold an enhanced, or even a maximum, sentence.[187] Moreover, a presumptive sentence is essentially unassailable under this standard, where it can lead to relief under Rule 7(B).[188]

Disparities can (and do) result from sentences imposed after a guilty plea every bit as much as they result from sentences imposed after trial. The Indiana Supreme Court summarized the laudable goal of the power to review and revise sentences under article VII and Rule 7(B) in *Serino v. State*: "[A] respectable legal system attempts to impose similar sentences on perpetrators committing the same acts who have the same backgrounds."[189] Sentencing principles geared to eradicating disparities between sentences can be applied equally to all sentencing appeals, whether post-trial or post-plea. For example, the Indiana Supreme Court

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182. *See, e.g.*, Noojin v. State, 730 N.E.2d 672, 678 (Ind. 2000) (citing Hackett v. State, 716 N.E.2d 1273, 1276 (Ind. 1999)).

183. *See, e.g.*, Dowdell v. State, 720 N.E.2d 1146, 1155 (Ind. 1999).

184. *See, e.g.*, Carter v. State, 711 N.E.2d 835, 843 (Ind. 1999).

185. *Id.* at 841.

186. *See, e.g.*, *Dowdell*, 720 N.E.2d at 1154.

187. *See, e.g.*, Willey v. State, 712 N.E.2d 434, 446 (Ind. 1999).

188. *See, e.g.*, Biehl v. State, 738 N.E.2d 337 (Ind. Ct. App. 2001) (reducing presumptive sentence of thirty years for voluntary manslaughter to the minimum sentence of twenty years).

189. 798 N.E.2d 852 (Ind. 2003).

has long held that the maximum sentence should generally be reserved for the worst offenses and worst offenders,[190] which applies with equal force when reviewing sentences imposed after trial and sentences imposed after a guilty plea.

Defendants who plead guilty in England, the model upon which Indiana's review and revise provision was based, may not only challenge their sentence on appeal, "the Court of Appeal has formulated the principle that . . . an offender's remorse, expressed in his plea of guilty, may properly be recognized as a mitigating factor."[191] The Indiana Supreme Court has taken a similar view, recognizing that an early guilty plea saves the victims from going through a full-blown trial and conserves limited prosecutorial and judicial resources; therefore, it is a mitigating circumstance entitled to significant weight.[192]

Finally, apart from these legal and constitutional concerns, there are significant practical questions at issue that could greatly alter the future of plea practice in Indiana courts. Defense lawyers counseling a client who has been offered a plea agreement are hard-pressed to advise the defendant about the possibility of challenging a sentence after the guilty plea. Trial judges engaged in a plea colloquy with the defendant about the waiver of rights walk a veritable minefield in explaining which rights have been forfeited. The confusion continues in advising the defendant of the right to appeal and in appointing appellate counsel.

Every year tens of thousands of criminal cases are resolved in Indiana by guilty plea. As it now stands, defendants confronted with strong evidence of guilt but concerned about the sentence they may receive often enter into a plea agreement, admit their guilt, and perhaps obtain the modest benefit of a reduced charge or restricted sentencing range. Many of these defendants are content with the sentence imposed and do not seek to appeal.[193] Others, however, have pursued appeals of the sentence, many of which have been successful. If the right to appeal the sentence is found to evaporate with the signing of all or some plea agreements, many defendants primarily concerned about their sentence have no reason to enter into a plea agreement. Although some defendants may be content to roll their dice with a forever-binding sentencing decision from the trial court, many will find little incentive to take such a plea if it means the trial court's sentence is unassailable on appeal.

In sum, the intent and purpose of the 1970 amendment that created the practice of substantive sentence review on appeal in Indiana, coupled with the practical realities of how those appeals have worked in the past and will work in the future, point in the same direction as the Indiana Supreme Court's

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190. *See, e.g.*, Buchanan v. State, 699 N.E.2d 655, 657 (Ind. 1998).

191. D.A. Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193, 194, 201 (1968).

192. Francis v. State, 817 N.E.2d 235, 238 (Ind. 2004).

193. Just over 1200 of the appeals decided by the court of appeals last year were criminal cases, and a large number of those appear to have been trials. *See* INDIANA COURT OF APPEALS, 2004 ANNUAL REPORT 5 (2005). This suggests that a very small percentage of the thousands of guilty pleas each year result in an appeal of the sentence.

longstanding precedent of allowing any defendant who pleads guilty pursuant to a plea agreement that does not fix the sentence at a specific number of years to appeal the appropriateness of that sentence under article VII, sections 4 and 6, as implemented by Appellate Rule 7(B). As with most constitutional rights, waiver of this right may be possible, but only after the defendant has been fully advised and makes a knowing, intelligent, and voluntary waiver.[194] An even simpler solution would be a greater frequency of "set" or "fixed" pleas, for example, twelve years executed, which would best advance the concept of mediation in the criminal justice system with the substantial benefit of finality.

B. Beyond Rule 7(B)

As noted above, even in the absence of a Rule 7(B) claim, the court of appeals has been fairly generous in considering procedural challenges to the trial court's finding of aggravating and mitigating circumstances. This might lead to a remand for a new sentencing statement with only the proper aggravators and mitigators weighed or, in rare cases, a reduction under the court's review and revise power.[195] Public Law 71, however, casts considerable doubt about the continued vitality of these requirements with its elimination of any requirement that trial courts find aggravating and mitigating circumstances before imposing sentences within a statutory range.[196]

Although directed more to convictions than sentences, violations of Indiana's Double Jeopardy Clause also provide fairly broad relief to criminal defendants, but the exact source of that protection remains somewhat in doubt.[197] As the court of appeals reiterated in *Caron v. State*,[198] the State must carefully decide how to charge multiple offenses and parse that evidence for juries at trial, lest the resulting multiple convictions be vacated on appeal if there was "a reasonable possibility that the evidentiary facts used by the fact-finder to establish the elements of one offense may also have been used to establish the essential elements of a second challenged offense."[199]

Moreover, Indiana Code section 35-50-1-2(c) imposes an important limitation on consecutive sentences by capping the aggregate sentence to the presumptive for the next higher class of felony when a defendant commits multiple non-violent offenses in a single episode of criminal conduct. In *Massey v. State*,[200] the court of appeals held that the trial court violated this provision in ordering a fifty-

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194. *See, e.g.*, Leone v. State, 797 N.E.2d 743, 750 n.3 (Ind. 2003).

195. *See generally* Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 34 IND. L. REV. 645, 665-66 (2001).

196. *See* supra notes 131-34 and accompanying text.

197. *See generally* Guyton v. State, 771 N.E.2d 1141 (Ind. 2002) (highlighting the considerable confusion surrounding the source and contours of the protection commonly referred to as "double jeopardy").

198. 824 N.E.2d 745 (Ind. Ct. App.), *trans. denied* (Ind. 2005).

199. *Id.* at 753-54 (quoting Davis v. State, 770 N.E.2d 319, 323 (Ind. 2002)).

200. 816 N.E.2d 979 (Ind. Ct. App. 2004).

year sentence for dealing cocaine fully consecutive to a twenty-year sentence for possession of a firearm by a serious violent felon. Because the defendant's possession of a firearm and possession of cocaine with intent to deal (a Class A felony) were part of a single criminal episode, his sentence for the two offenses was limited to the presumptive sentence for murder (fifty-five years).[201]

In *Mask v. State*,[202] the supreme court addressed the effect of the same statute on suspended sentences. There, the trial court sentenced the defendant to three consecutive three-year terms of imprisonment for D felony convictions committed as part of a single episode of criminal activity, but only three of the nine years were ordered executed. The presumptive sentence for a Class C felony is four years.[203] The supreme court reversed the sentence, holding that "[i]ncarceration in the context of subsection (c) does not mean the period of executed time alone. A suspended sentence differs from an executed sentence only in that the period of incarceration is delayed unless, and until, a court orders the time served in prison."[204] In holding that any suspended portion of a sentence must be included when applying subsection (c), the court relied on the rule of lenity, "which requires that criminal statutes be strictly construed against the state," noting that the General Assembly has not defined the phrase "term of imprisonment."[205]

C. GPS as a Condition of Home Detention

Although many sentencing appeals focus on challenges to the length of incarceration imposed, even defendants fortunate to have avoided time in the Department of Correction or county jail sometimes appeal other aspects of their sentences. In particular, cases decided during the survey period addressed challenges to high-tech monitoring as part of home detention and a variety of conditions imposed as part of probation.

Last year, the court of appeals in *Chism v. State*[206] held that a defendant serving a sentence on home detention could not be ordered to be monitored

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201. *Id.* at 990-91.

202. 829 N.E.2d 932 (Ind. 2005).

203. *Id.* at 936 (citing IND. CODE § 35-50-2-6 (2005)).

204. *Id.* Although *Mask* resolved the executed/suspended distinction in the context of Indiana Code section 35-50-1-2(c), there remains a division in the court of appeals regarding the import of a suspended sentence in reviewing a sentence for appropriateness under Appellate Rule 7(B). The supreme court cited Judge May's concurring opinion in *Beck v. State*, 790 N.E.2d 520, 523 (Ind. Ct. App. 2003) (Mattingly-May, J., concurring), where she expressed the view that the total length of the sentence is all that matters: "A year is still a year, and a sentence is still a sentence." More recently, however, Chief Justice Kirsch noted in dissent, "A year is, indeed, a year, but a suspended sentence is not the same as an executed sentence, and time spent on work release through a community corrections program is not the same as time spent in a state prison." Eaton v. State, 825 N.E.2d 1287, 1291 (Ind. Ct. App. 2005).

205. *Mask*, 829 N.E.2d at 936.

206. 813 N.E.2d 402 (Ind. Ct. App. 2004), *vacated*, 824 N.E.2d 334 (Ind. 2005).

through global positioning system (GPS) equipment, which would allow community corrections officials to identify his precise location at any given time with the aid of a satellite.[207] On transfer, the Indiana Supreme Court disagreed, interpreting Indiana Code section 35-28-2.5-3 as creating two categories of "monitoring device[s]": (1) devices that require an offender's consent to allow correction personnel to view or listen to activities within the home and (2) devices that may be used without an offender's consent and simply specify whether an offender is at home without revealing the more intimate information.[208] The court concluded that GPS falls in the second category, reasoning that the fact that it "will tell corrections where Chism is when he is not at home does not destroy its status as a device that broadcasts only location."[209]

In apparent response to the court of appeals' decision, and consistent with the thrust of the Indiana Supreme Court's decision, the General Assembly amended the statute, effective July 1, 2005, to specifically provide that conditions of home detention may "require the use of surveillance equipment and a monitoring device that can transmit information twenty-four (24) hours each day regarding an offender's precise location."[210]

D. Conditions of Probation

Even more common than the imposition of special conditions on a home detention sentence is the imposition of a variety of conditions on a probationary term and the court of appeals has upheld the imposition of many types of conditions. For example, in *Stott v. State*,[211] the trial court forbade a defendant convicted of child molesting from "any contact with children under the age of 18 and from entering within 1000 feet of any school or daycare center."[212] In *Taylor v. State*,[213] the trial court ordered a defendant convicted of D felony operating a vehicle while intoxicated to establish paternity for a child he had always supported financially and who had not required public assistance. Although trial courts retain relatively broad discretion to grant probation and establish conditions "to create law-abiding citizens and to protect the community," those conditions must "have a reasonable relationship to the treatment of the accused and the protection of the public."[214]

As an initial matter, both *Stott* and *Taylor* seem to suggest that the defendants should have objected to the conditions of probation at sentencing. The court in

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207. *Id.* at 408-11.

208. Chism v. State, 824 N.E.2d 334, 334-35 (Ind. 2005).

209. *Id.* at 335.

210. IND. CODE § 35-38-2.5-7 (Supp. 2005).

211. 822 N.E.2d 176 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 741 (Ind. 2005). The author of this article served as appellate counsel for Mr. Stott.

212. *Id.* at 179.

213. 820 N.E.2d 756 (Ind. Ct. App.), *trans. denied* (Ind. 2005).

214. *Id.* at 760 (quoting Jones v. State, 789 N.E.2d 1008, 1010 (Ind. Ct. App. 2003)).

Stott cites *Spears v. State*,[215] a case that addressed a challenge to failing to replace a juror after extra-judicial contact, a situation in which a timely objection would have permitted inquiry, admonishment, or corrective action. Although immediate correction of trial errors is essential because the trial is continuing to unfold, objections to sentencing errors seem unnecessary because the game is already over. Requiring an objection to each probation condition would likely transform the trial court's solemn rendering of its decision into something quite different and contentious.

Although Stott challenged his probation conditions as overly broad, the court of appeals focused on vagueness, holding that the conditions were specific and accurately defined.[216] Its analysis did not squarely address whether the probation conditions tread too heavily on constitutionally protected rights, such as Stott's fundamental right to parent his own daughter or to travel freely and leave his home without fear of unwittingly entering within 1000 feet of a school or daycare center. The latter condition went beyond the statutory condition of barring a probationer from living within 1000 feet of a school, which has been previously upheld,[217] and it would seem the conditions were not reasonably related to rehabilitation when less restrictive means could have been employed.

The requirement in *Taylor* that a defendant who was convicted of operating a vehicle while intoxicated establish paternity for his child seems to bear little relationship to protecting the public.[218] The court relied on *Gordy v. State*,[219] a case in which the defendant was required to establish paternity for four children after attempting to cash an AFDC check issued to the children's mother. There, the condition was related to the offense and the concern that he support his dependents. In cases involving a plethora of other charges, such as in *Taylor*, the nexus is far more attenuated.

The decisions in *Taylor* and *Stott* signal broad discretion for trial courts in imposing probation conditions.[220] Transfer was denied in both cases, and the Indiana Supreme Court has not yet set forth a test for constitutional challenges of probation conditions. Professor Andrew Horowitz has summarized the two basic approaches of other courts.[221] The court of appeals has adopted the first of these,

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215. 811 N.E.2d 485, 488 (Ind. Ct. App. 2004).

216. A statute or probation condition is void for vagueness "if its prohibitions are not clearly defined." Klein v. State, 698 N.E.2d 296, 299 (Ind. Ct. App. 1998). Overbreadth, however, is "designed to protect innocent persons from having the legitimate exercise of their constitutionally protected freedoms fall within the ambit of a statute written more broadly than needed to proscribe illegitimate and unprotected conduct." Matheney v. State, 688 N.E.2d 883, 904 (Ind. 1998).

217. *See* Carswell v. State, 721 N.E.2d 1255, 1259-60 (Ind. Ct. App. 1999); *see also* IND. CODE § 35-38-2-2.2 (2003).

218. *Taylor*, 820 N.E.2d at 760.

219. 674 N.E.2d 190 (Ind. Ct. App. 1996).

220. Indiana is not unique in this regard. *See generally* Andrew Horowitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75 (2000).

221. *Id.* at 99-109.

i.e., the three-part test of *United States v. Consuelo-Gonzales*,[222] which requires only that probation conditions be "reasonably related" to the purpose of probation by inquiring into the "purposes sought to be served by probation, the extent to which the full constitutional guarantees available to those not under probation should be accorded probationers, and the legitimate needs of law enforcement."[223] As noted by Horowitz and others, "It is hard to imagine a constitutional standard that could be less definitive or more subject to a result-oriented approach."[224]

The other approach—the "unconstitutional conditions" doctrine—appears to be at least a slight improvement.[225] It employs a balancing test that permits the "infringement of liberties" only when state action is "reasonably related to legitimate policy objectives and substitute measures are unavailable."[226] The following four factors are balanced: "(1) the nature of the right affected; (2) the degree of the infringement of the right; (3) the nature of the benefit conferred; and (4) the nature of the state's interest in conditioning the benefit."[227] Adopting and expounding on one of these tests or some variation of them would seemingly be a useful exercise of the court's transfer jurisdiction in light of the frequency with which such claims arise.

E. Sentencing After Probation Revocation

In *Stephens v. State*,[228] the court of appeals surprised many trial judges and lawyers in applying a plain reading to the probation revocation statute—a reading that conflicted with longstanding practice. There, the defendant was originally sentenced to ten years imprisonment with four years suspended to probation. His probation was later revoked because he missed a counseling session and had been convicted of driving with a suspended license. He was sentenced to three years imprisonment—not the four initially suspended at sentencing.[229]

Indiana Code section 35-38-2-3(g) provides three options that trial courts "may" pursue once a petition to revoke probation is filed: (1) continue probation with or without modifying the conditions, (2) extend the period of probation up to a year, or (3) "order execution of the sentence that was suspended at the time of initial sentencing."[230] Agreeing with the State's argument on cross-appeal, the court of appeals held that once probation was revoked, the trial court must order execution of the entire sentence originally suspended at the time of sentencing.[231] However, the court held that the trial court retained the statutory authority to

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222. 521 F.2d 259 (9th Cir. 1975).
223. *Id.* at 262; *see also Patton v. State*, 580 N.E.2d 693, 698 (Ind. Ct. App. 1991).
224. Horowitz, *supra* note 220, at 101 & nn.151-52.
225. *Id.* at 105.
226. *Id.*
227. *Id.* at 106.
228. 801 N.E.2d 1288 (Ind. Ct. App.), *vacated*, 818 N.E.2d 936 (Ind. 2004).
229. *Id.* at 1289.
230. IND. CODE § 35-38-2-3(g) (Supp. 2005).
231. *Stephens*, 801 N.E.2d at 1292.

continue probation with the same or modified terms, and Indiana Code section 35-38-2-2.3(c) permits imprisonment as a condition of probation.[232]

In reversing the court of appeals and upholding the three-year sentence, the Indiana Supreme Court took issue with the court of appeals' interpretation, which "permits the trial court to order an additional three-year term if it keeps Defendant on probation, but it does not permit the trial court to order a three-year term if it revokes probation."[233] The court relied heavily on the purpose of probation and its view of legislative intent, concluding that to achieve probation's "humane purposes of avoiding incarceration and of permitting the offender to meet the offender's financial obligations" the statutes allow trial courts "to order the same amount of executed time following a probation violation whether or not it actually revokes probation."[234]

The court's ultimate reiteration of its holding, however, is likely to cause some confusion in the lower courts and require reconsideration in the future: "[A] trial court has the statutory authority to order executed time following revocation of probation that is less than the length of the sentence originally suspended, so long as, when combined with the executed time previously ordered, the total sentence is not less than the statutory minimum."[235] In Stephens' B felony case, the statutory minimum was six years,[236] which had previously been served. Therefore, the three additional years posed no problem. In other cases, however, this will not be the case.

For example, assume a defendant's first felony is forgery for signing another person's name to a check, even though for a relatively small amount of money. The trial court imposes the minimum sentence—two years for a class C felony—and suspends all of it. If the defendant later violates his probation by missing a couple of appointments with his probation officer or picking up a minor, unrelated misdemeanor offense, the trial court would seemingly be required, according to *Stephens,* to sentence him to the entire two-year suspended sentence if it revokes his probation. However, the sentencing statutes provide that the minimum term of imprisonment does not have to be executed, except for certain offenses or defendants with certain criminal histories.[237] A requirement of ordering execution of the entire previously suspended sentence in such a case would seem contrary to legislative intent and the flexible purposes of probation

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232. *Id.*

233. Stephens v. State, 818 N.E.2d 936, 941 (Ind. 2004).

234. *Id.* at 941-42. Shortly after *Stephens*, in *Sandlin v. State*, 823 N.E.2d 1197 (Ind. 2005), the supreme court left open the possibility for challenges of sentences imposed upon the revocation of probation. Because some pre-*Stephens* court of appeals cases had suggested that trial courts were required to impose the entire amount of suspended time, the supreme court suggested that remand "might well be appropriate" in some such cases. *Id.* at 1198. But the trial court in *Sandlin* had said nothing to suggest it subscribed to that view, so the supreme court presumed the trial court acted appropriately and affirmed the sentence. *Id.*

235. *Stephens*, 818 N.E.2d at 942.

236. *Id.* at 943 (citing IND. CODE § 35-50-2-5 (2003)).

237. *See* IND. CODE § 35-50-2-2(b) (2003).

cited elsewhere in *Stephens*. Considering the large number of probation revocations each year—6500 in felony cases during 2003 alone—this issue seems likely to surface again soon.[238]

Finally, although arguably unnecessary after the supreme court's opinion in *Stephens*, the General Assembly amended Indiana Code section 35-38-2-3 in 2005 to explicitly allow trial courts to order execution "of *all or part of* the sentence that was suspended at the time of the initial sentencing."[239] This does not address the apparent new requirement of *Stephens* that requires imposition of the minimum term upon any revocation of probation.

VII. DEATH PENALTY

As highlighted above, the focal point of developments in the realm of criminal law and procedure is generally the courts, although the legislature is often a significant player as well. The executive branch, however, is seldom thought to be an equal—or at least equally active—player in these issues. Although Governors sign and occasionally propose or push important legislation, the starkest example of executive power in relation to the death penalty is in the realm of clemency. Although the General Assembly did not amend Indiana's death penalty statute during the survey period, both the Indiana Supreme Court and the executive branch were fairly busy in the death penalty realm.

A. Mental Retardation

Since 1994, Indiana has exempted mentally retarded individuals from eligibility for the death penalty.[240] The current version of the statue provides fairly detailed pretrial procedures under which a defendant may raise, and trial courts may adjudicate, claims of mental retardation.[241] The statute places the burden on defendants to "prove by clear and convincing evidence that the defendant is a mentally retarded individual."[242]

In *Pruitt v. State*,[243] however, the Indiana Supreme Court held that the State may not require proof of mental retardation by clear and convincing evidence.[244] The court grounded its decision in *Cooper v. Oklahoma*,[245] which held unconstitutional a state's requirement that a defendant prove incompetence to stand trial by clear and convincing evidence and in *Atkins v. Virginia*,[246] which broadly held that the execution of a mentally retarded defendant violates the

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238. *See Stephens*, 818 N.E.2d at 942 n.7.

239. PUB. L. 13-2005, 2005 IND. ACTS 1329-30.

240. IND. CODE § 35-36-9-6.

241. *Id.* §§ 35-36-9-1 to -7.

242. *Id.* § 35-36-9-4.

243. 834 N.E.2d 90 (Ind.), *reh'g denied* (Ind. 2005), *cert. denied* (No. 05-10540) (U.S. Ind. June 26, 2006).

244. *Id.* at 103.

245. 517 U.S. 348 (1996).

246. 536 U.S. 304 (2002).

Eighth Amendment. Moreover, the court in *Pruitt* noted that "only a relatively small number of jurisdictions follow Indiana in requiring clear and convincing evidence or an even higher standard."[247] Nevertheless, the trial court had well anticipated the possibility of a lower standard of proof and had specifically found that Pruitt had failed to make the requisite showing under the appropriate preponderance of the evidence standard.[248]

Pruitt was required to prove both "significantly subaverage intellectual functioning" and "substantial impairment of adaptive behavior" under the statute.[249] Although the court affirmed the trial court's ultimate finding that Pruitt was not mentally retarded because it was supported by a lack of evidence of subaverage intellectual functioning, the court addressed his claim regarding substantial impairment of adaptive behavior in considerable detail.[250] As to the second prong, the court agreed with Pruitt that the trial court's standard, which relied on the approach taken by its expert, "was too restrictive" and its findings were therefore "not supportable."[251]

B. Severe Mental Illness

Arthur Baird's execution was set for August 31, 2005, but Governor Daniels granted clemency just two days before the scheduled execution—and the issue of executing the mentally ill assumed new significance in Indiana.[252] Baird murdered his pregnant wife and his parents in 1985. Expert opinion was divided about his sanity at the time of the offenses, and Baird had litigated issues related to mental illness for the past two decades.[253]

A clemency decision was required after the Indiana Supreme Court denied Baird permission to file a successive petition for post-conviction relief ("PCR"), just six days before his scheduled execution, to litigate his claim of incompetence to be executed under *Ford v. Wainwright*.[254] The three-justice majority concluded that, although Baird may be suffering from a mental illness and be uncommunicative or in denial about his pending execution, he understood he was about to be executed for the murder of his parents.[255]

Justice Boehm, joined by Justice Rucker, dissented, and would have allowed Baird to file a successive PCR "to explore the issue never adjudicated in his earlier appeals, namely his current mental condition judged by the Eighth

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247. *Pruitt*, 834 N.E.2d at 102.

248. *Id.* at 103.

249. *Id.* at 103 (quoting IND. CODE § 35-36-9-2 (2004)).

250. *Id.* at 106-10.

251. *Id.* at 110.

252. *See* Kevin Corcoran, *Daniels Spares Mentally Ill Killer: Man Who Was Set to Die This Week Will Spend Life in Prison; Debate on Issue Likely to Grow*, INDIANAPOLIS STAR, Aug. 30, 2005, at A1.

253. Baird v. State, 833 N.E.2d 28 (Ind.), *cert. denied*, 126 S. Ct. 312 (2005).

254. *Id.* at 30-31 (citing Ford v. Wainwright, 477 U.S. 399 (1986)).

255. *Id.* at 31.

Amendment standard that prohibits execution of the insane."[256] The dissent acknowledged the lack of a clear standard regarding mental illness and the death penalty in the wake of *Atkins v. Virginia*,[257] which held that execution of the mentally retarded violates the Eighth Amendment, and *Roper v. Simmons*,[258] which held the Eighth Amendment also bars the execution of juveniles.[259] *Atkins* left the standard for mental retardation and procedural issues to the States to determine, and the same is arguably true of the definition for insanity.[260] In any event, the dissent concluded that it should "exercise extreme caution in executing a person whose mental health is plainly questionable unless we can be certain the person does not meet the *Ford* standard, much less the more restrictive standard that may now apply in light of *Atkins* and *Roper*."[261]

Although the issue of executing a person suffering from severe mental illness was ultimately resolved in Baird's favor with the grant of clemency, the underlying concerns persist. The dissent noted the absence of any "statutory provision addressing either the standard of insanity or any procedural requirements to guard against execution of the insane."[262] Other states have specific procedures requiring prison officials or others to examine death row inmates when sanity is in doubt, and the General Assembly may well wish to consider adopting similar provisions here.[263]

C. Clemency: No Parole Board Required

In addition to the grant of clemency for Baird by Governor Daniels, Governor Kernan also granted clemency to a death row inmate during the survey period. Just days before leaving office, Governor Kernan granted clemency to Michael Daniels, who had been on death row for nearly twenty-five years.[264] The decision was notable not only for its substance but for its timing. Daniels had a pending habeas claim in federal court and no execution date set, but his lawyers and those for eight other death row inmates filed petitions for clemency directly with outgoing Governor Kernan shortly before he left office.[265] Kernan granted only Daniels' petition, noting concerns of Daniels' mental illness and "lingering questions about whether he was the triggerman."[266] Moreover, Daniels' two

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256. *Id.* at 34 (Boehm, J., dissenting).
257. 536 U.S. 304 (2002).
258. 543 U.S. 551 (2005).
259. *Id.* at 575.
260. *Baird*, 833 N.E.2d at 35.
261. *Id.*
262. *Id.* at 34.
263. *Id.* at 35.
264. *Id.*
265. Richard D. Walton, *Kernan Commutes Man's Death Sentence*, INDIANAPOLIS STAR, Jan. 8, 2005, at A1.
266. *Id.*

codefendants had already been released from prison.[267]

Although each clemency grant in Indiana has been grounded in the unique facts of the case and supported by detailed statements from the Governor, the three grants of clemency in little over a year—Darnell Williams[268] and Michael Daniels by Governor Kernan, and Arthur Baird by Governor Daniels—all have one additional similarity: Each was preceded by a 3-2 opinion of the Indiana Supreme Court, with a dissent by Justice Boehm and Justice Rucker that highlighted at least some of the concerns that ultimately were cited by the Governor in granting clemency.[269]

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267. *Id.*

268. The grant of clemency to Darnell Williams was discussed in last year's survey. *See* Schumm, *supra* note 67, at 1027-28.

269. *See Baird*, 833 N.E.2d at 32-35 (Boehm, J., dissenting); Williams v. State, 793 N.E.2d 1019, 1030-33 (Ind. 2003) (Boehm, J., dissenting & Rucker, J., dissenting); Daniels v. State, 741 N.E.2d 1177, 1191-95 (Ind. 2001) (Boehm, J., dissenting).