

# RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

JOEL M. SCHUMM\*

The General Assembly and Indiana's appellate courts confronted several significant criminal law issues during the survey period October 1, 2012, to September 30, 2013. Some of the most notable developments are explored below.

## I. LEGISLATIVE DEVELOPMENTS

The 2013 so-called long session of the General Assembly created a few new offenses and enhancements, but the main event was House Enrolled Act 1006—the first major overhaul of the criminal code since the 1970s. With an effective date of July 1, 2014, however, HEA 1006 remained somewhat of a work in progress subject to further changes in the 2014 short session, and thus is best summarized in detail in its true final form in next year's survey article. This survey instead focuses on the many changes outside HEA 1006.<sup>1</sup>

### A. Changes to Sex Crimes and the Sex Offender Registry

1. *Rape Broadened to Include Criminal Deviate Conduct.*—Apart from HEA 1006, another significant change to the criminal code is not effective until July 1, 2014, but seems unlikely to be changed in the 2014 session. The separate offense of criminal deviate conduct will be eliminated and rolled into the offense of rape. For many decades, a person who engaged in deviate sexual conduct (involving the mouth, sex organ, anus, or object) committed criminal deviate conduct.<sup>2</sup> This offense could involve defendants whose victims were of the opposite or same sex. Under the amended statute, the crime of rape—which was previously limited to those had “sexual intercourse with a member of the opposite sex”—has been broadened to include those who knowing or intentionally cause “another person to perform or submit to deviate sexual conduct.”<sup>3</sup>

2. *Child Seduction.*—Although the age of consent for sexual conduct is

---

\* Clinical Professor of Law, Indiana University Robert H. McKinney School of Law. B.A., 1992, Ohio Wesleyan University; M.A., 1994, University of Cincinnati; J.D., 1998, Indiana University Robert H. McKinney School of Law.

1. Although this section discusses most of the changes to the criminal code during the 2013 session, space limitation preclude a detailed discussion of every change. For example, a new crime of possession or delivery of a synthetic drug or synthetic lookalike substance was created and is no longer part of the marijuana statute. Senate Enrolled Act 536 includes several related changes. This Article also does not discuss the expansion through House Enrolled Act 1392 of the so-called expungement statute to include restriction on access to infractions, which are considered civil according to statutory and decisional law. See generally *Cunningham v. State*, 835 N.E.2d 1075, 1077 (Ind. Ct. App. 2005).

2. IND. CODE §§ 35-42-4-2 (listing elements of the offense); 35-41-1-9 (2013) (defining “deviate conduct”).

3. *Id.* § 35-42-4-1(a).

generally sixteen, the child seduction statute imposes criminal liability for sexual conduct with sixteen or seventeen year olds when the perpetrator has a special relationship with the child, such as a teacher or the child's custodian.<sup>4</sup> That list was broadened in 2013 to include a person who has a "professional relationship" with the child, "may exert undue influence on the child because of the person's professional relationship with the child," and uses that professional relationship to engage in sexual conduct with the child.<sup>5</sup> The statute also includes factors the trier of fact may consider in making this assessment, which include (1) the age difference between the defendant and victim, (2) whether the defendant occupied a position of trust, (3) whether the defendant committed any ethical occupational/professional ethical violations, (4) the authority of the defendant over the child, (5) whether the defendant exploited any particular vulnerability of the child, and (6) "any other evidence relevant to the defendant's ability to exert undue influence over the child."<sup>6</sup>

3. *Exposed Female Nipples and Child Exploitation.*—The definition of sexual conduct was broadened to include exhibition of "the female breast with less than a fully opaque covering of any part of the nipple,"<sup>7</sup> and the child exploitation statute was similarly broadened to include that language in criminalizing such things as the managing, taping, or distribution of performances that involve the uncovered genitals or female nipples of those under eighteen.<sup>8</sup>

4. *Child Solicitation and Related Offenses.*—In response to a January 2013 Seventh Circuit opinion that struck down the statute banning certain sex offenders access to social media on First Amendment grounds,<sup>9</sup> the General Assembly amended the child solicitation statute in a number of ways. First, specific definitions of "instant messaging or chat room program"<sup>10</sup> and "social networking web site"<sup>11</sup> were added.

The legislation also requires as a condition of probation or parole for a sex offense:

the court shall prohibit the convicted person from using a social networking web site or an instant messaging or chat room program to communicate, directly or through an intermediary, with a child less than sixteen (16) years of age. However, the court may permit the offender to communicate using a social networking web site or an instant messaging or chat room program with:

- (1) the offender's own child, stepchild, or sibling; or
- (2) another relative of the offender specifically named in the court's

---

4. *Id.* § 35-42-4-7.

5. *Id.* § 35-42-4-7(n).

6. *Id.* § 35-42-4-7(o).

7. *Id.* § 35-42-4-4(4)(c)(i)

8. *Id.* § 35-42-4-4(b)

9. *Doe v. Marion Cnty. Prosecutor*, 705 F.3d 694 (7th Cir. 2013).

10. IND. CODE § 35-31.5-2-173 (2013).

11. *Id.* § 35-31.5-2-307.

order.<sup>12</sup>

Violations of the statute are not simply a reason to revoke probation or parole but also constitute a misdemeanor (or, if committed a second time, a felony) “sex offender internet offense.”<sup>13</sup>

Unrelated to the Seventh Circuit opinion, the legislation also amended the general attempt statute to make clear how it applies in child solicitation cases:

a person engages in conduct that constitutes a substantial step if the person, with the intent to commit a sex crime against a child or an individual the person believes to be a child:

- (1) communicates with the child or individual the person believes to be a child concerning the sex crime; and
- (2) travels to another location to meet the child or individual the person believes to be a child.<sup>14</sup>

5. *Statute of Limitations for Certain Sex Crimes.*—Although the criminal statute of limitation for Class B, C, and D felonies is five years,<sup>15</sup> new legislation extended that period for several sex crimes listed in Indiana Code section 11-8-8-4.5.<sup>16</sup> If the crime is not a Class A felony or is not listed in subsection (e) of the statute, criminal charges may be pursued up to the later of (1) ten years after the offense or (2) four years after the victim ceases to be a dependent of the perpetrator.<sup>17</sup>

6. *Sex Offender Registry.*—Finally, under legislation passed in 2013, the Department of Correction is now required by statute to remove deceased persons and those no longer required to register from the public portal of the sex offender registry.<sup>18</sup> Some administrative changes were also made to the registry, including reporting changes in status within 72 hours and reporting vehicle identification numbers.<sup>19</sup>

### B. Intimidation

The General Assembly made several changes to the intimidation statute, including addition of a definition for “communicates,” which had been defined in case law as knowing or having reason to believe the threat would be made known to the target.<sup>20</sup> The new statutory definition does not codify that general language but instead contemplates modern technology, as it “includes posting a

---

12. *Id.* § 35-38-2-2.7

13. *Id.* § 35-42-4-12(b).

14. *Id.* § 35-41-5-1(c).

15. *Id.* § 35-41-4-2(a). There is no statute of limitations for Class A felonies. *Id.* § 35-41-4-2(c).

16. *Id.* § 35-41-4-2(m).

17. *Id.*

18. *Id.* § 11-8-2-13(b)(3).

19. *Id.* § 11-8-8-8(a)(1) & (c).

20. *Ajabu v. State*, 677 N.E.2d 1035, 1042 (Ind. Ct. App.1997).

message electronically, including on a social networking web site (as defined in IC 35-42-4-12(d)).<sup>21</sup>

Intimidation was also broadened to include interfering with the occupancy of a vehicle, dwelling, building, or other structure (a class A misdemeanor)<sup>22</sup> and threats communicated to owners of buildings open to the public employees as well as employees of a hospital, school, church, or religious organization (a class D felony).<sup>23</sup> Previously a D felony, intimidation of a judge or bailiff of a court or prosecuting attorney or deputy prosecutor is now a Class C felony.<sup>24</sup>

### C. School Resource Officers

Early in 2013, the Indiana Supreme Court reversed a juvenile adjudication for resisting law enforcement while noting

We recognize it is somewhat anomalous that two uniformed law-enforcement officers responding to the same school incident could be treated differently for purposes of resisting law enforcement, if one was purely an “outside” officer while the other was a school-resource officer. School-resource officers serve a vitally important role in maintaining school safety and order against a growing range of discipline problems and threats, and we in no way diminish the value of their work. Yet we are also reluctant to risk blurring the already-fine Fourth Amendment line between school-discipline and law-enforcement duties by allowing the same officer to invisibly “switch hats”—taking a disciplinary role to conduct a warrantless search in one moment, then in the next taking a law-enforcement role to make an arrest based on the fruits of that search.

We note, though, that it would be within the Legislature’s prerogative to conclude that evolving threats to school security and discipline warrant expanding the resisting law enforcement statute to apply to forcible resistance, obstruction, or interference “with a law enforcement[, school liaison, or school resource] officer[, or a person assisting the officer[, while the officer is lawfully engaged in the execution of the officer’s duties.” See I.C. § 35-44.1-3-1(a)(1). Not only is such a policy judgment about the changing role of school officers best reserved to a politically responsive branch of government, it would be less likely than common law to cause unintended Fourth Amendment consequences. The Legislature may wish to consider such a change.<sup>25</sup>

The General Assembly quickly took up the suggestion, amending the definition of law enforcement officer to include “a school resource officer (as defined in IC 20-26-18.2-1) and a school corporation police officer appointed under IC 20-26-

---

21. IND. CODE § 35-45-2-1(c).

22. *Id.* § (a)(3)(B).

23. *Id.* § (b)(1)(viii) & (ix).

24. *Id.* § (b)(2)(B).

25. *K.W. v. State*, 984 N.E.2d 610, 613 (Ind. 2013).

16.”<sup>26</sup> The statute includes an exception, however, for resisting a school resource officer by fleeing.<sup>27</sup>

Although the statutory change would seem to allow a conviction for forcibly resisting a school resource officer—the issue left unresolved in the supreme court opinion—the broader problems about “switching hats” largely persist. Amended language added to Title 20 now provides that a

school resource officer may:

- (1) make an arrest;
- (2) conduct a search or a seizure of a person or property using the reasonable suspicion standard;
- (3) carry a firearm on or off school property; and
- (4) exercise other police powers with respect to the enforcement of Indiana laws.<sup>28</sup>

Indiana decisional law had made a distinction between general law enforcement officers, who must comply with the Fourth Amendment, and school resource officers acting to enforce school rules or school officials, who are generally held to a lower standard of “reasonableness.”<sup>29</sup>

#### *D. Other Changes*

Likely in response to the *Bisard* case discussed in last year’s survey,<sup>30</sup> changes were made to the statutes governing the collection of bodily substance samples. First, a law enforcement officer may not obtain a blood sample from another law enforcement officer who has been involved in an accident or alleged crime.<sup>31</sup> Apart from law enforcement officers, the previously restrictive language regarding those who could collect a bodily substance sample was broadened to allow “any person qualified through training, experience, or education” to collect such samples.<sup>32</sup>

Finally, the deadline for the State to file the habitual offender enhancement was changed from ten days before the omnibus date to at least thirty days before trial.<sup>33</sup> The provision allowing a later filing at any time before trial “upon a showing of good cause” was amended to include the language “if the amendment

---

26. IND. CODE § 35-31.5-2-185(d) (2013).

27. *Id.* § 35-44.1-3-1 (f) (“A person may not be charged or convicted of a crime under subsection (a)(3) if the law enforcement officer is a school resource officer acting in the officer’s capacity as a school resource officer.”).

28. *Id.* § 20-26-18.2-3.

29. *T.S. v. State*, 863 N.E.2d 362, 369 (Ind. Ct. App. 2007).

30. Joel M. Schumm, *Recent Developments in Indiana Criminal Law & Procedure*, 46 IND. L. REV. 1033, 1042-43 (2013) [hereinafter Schumm, *2013 Recent Developments*].

31. IND. CODE § 9-30-6-6(k) (2013).

32. *Id.* § 9-30-6-6(j)(6).

33. *Id.* § 35-34-1-5(e).

does not prejudice the substantial rights of the defendant.”<sup>34</sup> When a habitual enhancement is filed less than thirty days before trial courts must grant a continuance to the State for good cause shown or to the defendant for any reason.<sup>35</sup>

## II. SIGNIFICANT DECISIONAL LAW DEVELOPMENTS

Last year’s survey period included the retirements of Chief Justice Shepard and Justice Sullivan. They were replaced by Justices Mark Massa and Loretta Rush. This year’s survey includes an unusually high number of unanimous opinions from the newly constituted Indiana Supreme Court. Although the types of cases taken on transfer and approach to decisions was largely similar to previous years, a couple of exceptions stand out. First, a decision on bail in murder cases shows the willingness of at least three members of the court—including two of the three newest members—to overrule long-standing precedent in some circumstances. Second, in a major shift from the Shepard-led court, under Chief Justice Dickson the justices have shown little interest in reducing sentences under Appellate Rule 7(B) and have even shown a willingness to vacate reductions ordered by the court of appeals.

Because a comprehensive survey of every criminal case is not possible, this section includes most of the Indiana Supreme Court decisions as well as court of appeals’ decisions on issues that are especially significant, unsettled, or likely to recur.

### A. Pretrial Bail

1. *Bail in Felony Cases and the Appellate Remedy.*—Previous Survey articles have discussed seldom-brought appeals of excessive bail,<sup>36</sup> which present challenges with mootness because of the months-long appellate process. This Survey period includes yet another successful challenge to pretrial bail. In *Lopez v. State*,<sup>37</sup> the court of appeals reversed a trial court’s decision to set bail at \$3,000,000 surety plus \$250,000 cash for a defendant charged with several Class C and D felonies involving allegations to report and pay business taxes.<sup>38</sup> The appellate court applied the statutory factors in Indiana Code section 35-33-8-4(b), concluding “the extraordinary bail set here is at an amount significantly higher than reasonably calculated to assure Lopez’s presence in court.”<sup>39</sup> The court remanded “with instructions for the trial court to set a reasonable bond amount based upon the relevant statutory factors.”<sup>40</sup>

In a footnote, the court explained: “Bail should be established by the trial

---

34. *Id.*

35. *Id.*

36. Schumm, *2013 Recent Developments*, *supra* note 30, at 1041-42.

37. 985 N.E.2d 358 (Ind. Ct. App. 2013).

38. *Id.* at 360.

39. *Id.* at 362.

40. *Id.*

court and not by this Court on appeal.”<sup>41</sup> Other cases, however, have reduced bail to a specific amount, which is generally the better approach.<sup>42</sup> The court of appeals has before it more than ample information to select an amount, just as it does in reducing sentences to a specific term of years. Moreover, by failing to set a specific bail amount, another appeal seems quite possible. For example, the trial court in *Lopez* could decide the \$3,000,000 surety plus \$25,000 cash bond should be reduced to \$2,000,000 or some other amount that remains excessive. The defendant would then be required to initiate another appeal and wait months longer for a decision.

Although not part of the published opinion in *Lopez*, the court of appeals’ online docket shows that a petition for appellate assistance in setting bond was filed just three days after the opinion was issued and was granted five days later.<sup>43</sup> The court of appeals ordered the trial court to set a bond hearing within ten days of the order or set bond at \$100,000 surety with a 10% cash option.<sup>44</sup>

2. *Murder Cases.*—The bail statute cited in *Lopez* governs the thousands of felony cases filed every year in Indiana, but in *Fry v. State*<sup>45</sup> the Indiana Supreme Court confronted the far less common issue of bail in a couple hundred murder cases filed annually. According to the Indiana Constitution, “Offenses, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong.”<sup>46</sup> Codifying Indiana Supreme Court precedent dating back to 1866,<sup>47</sup> a 1981 statute provides that “A person charged with murder has the burden of proof that he should be admitted to bail.”<sup>48</sup>

In *Fry*, a three-justice majority overruled that precedent and declared Indiana Code section 35-33-8-2 unconstitutional, holding that defendants cannot be required to disprove the State’s case pre-trial.<sup>49</sup> Rather, it the State must present competent evidence of guilt by preponderance of evidence.<sup>50</sup> Chief Justice

---

41. *Id.* (quoting *Reeves v. State*, 923 N.E.2d 418, 422 (Ind. Ct. App. 2010)).

42. *See generally* *Winn v. State*, 973 N.E.2d 653, 656 (Ind. Ct. App. 2012) (“We reverse and remand with instructions that the trial court grant Winn’s motion [to reduce a \$25,000 cash bond to a \$25,000 10% bond.]”); *Sneed v. State*, 946 N.E.2d 1255, 1260 (Ind. Ct. App. 2011)). (“Sneed’s \$25,000 bail is not excessive, but the trial court abused its discretion by requiring cash only bail and denying Sneed’s request for the option of a surety bond.”).

43. The online docket may be accessed at <https://courttapps.in.gov/Docket/Search/RefineSearch>, archived at <http://perma.cc/EP3H-6THA>. The appellate case number for *Lopez* is 15A01-1212-CR-00550.

44. *Id.*

45. 990 N.E.2d 429 (Ind. 2013). This decision is a significant Indiana constitutional law opinion and also discussed in that survey article. Jon Laramore & Daniel E. Pulliam, *Indiana Constitutional Developments: Small Steps*, 47 IND. L. REV. 1015, 1019-22 (2014).

46. IND. CONST. art. 1, § 17.

47. *Fry*, 990 N.E.2d at 435.

48. *Id.* at 435 & n.3 (quoting IND. CODE § 35-33-8-2).

49. *Id.* at 451.

50. *Id.* at 448, 451.

Dickson, joined by Justice Rush, concurred but wrote separately to make clear the text of the state constitution is controlling: “Ensuing contrary opinions of this Court, or statutory attempts to codify such opinions, are contrary to the text of the Constitution and cannot prevail.”<sup>51</sup> Justices Rucker and Massa each wrote separate dissents.

*Fry* is significant for at least two reasons. First, it establishes an easier path to bail for defendants charged with murder and may lead to some appeals on the issue of pretrial bail in murder cases. Second, and more broadly, the case demonstrates the willingness of three justices to overrule nearly 150 years of precedent, noting “‘because that’s the way we’ve always done it’ is a poor excuse . . . for continuing to do it *wrong*.”<sup>52</sup> Whether that approach will be followed in other areas of the court’s criminal law jurisprudence will be seen in the coming years.

### B. Speedy Trials with Pro Se Motions

Criminal defendants generally speak through counsel once counsel is appointed.<sup>53</sup> But sometimes defendants are unhappy with appointed counsel and may file *pro se* motions or seek to discharge counsel. In *Schepers v. State*,<sup>54</sup> a defendant represented by appointed counsel filed a *pro se* appearance, a motion to remove his appointed counsel, and a request for a speedy trial.<sup>55</sup> Because appointed counsel “was still representing Schepers when the pro se motions were filed,” the court of appeals held the subsequently filed motion to dismiss was properly denied.<sup>56</sup>

The issue remains a potential thicket, though, as highlighted by some of the precedent discussed in *Schepers*. For example, a 2012 court of appeals’ case distinguished an earlier case where the trial court had refused a *pro se* motion because the defendant was represented by counsel, disagreeing “that the appointment of counsel and not the appearance of counsel is the relevant time.”<sup>57</sup>

### C. Trial in Absentia

Sometimes a failure to appear at trial may constitute a waiver of the right to counsel and right to be present at trial, but *Hawkins v. State*<sup>58</sup> offers an usual set of facts that led the Indiana Supreme Court to reverse convictions entered against a North Carolina resident who failed to appear at his Elkhart County jury trial for

---

51. *Id.* at 451 (Dickson, C.J., concurring).

52. *Id.* at 442 (emphasis in original).

53. *Schepers v. State*, 980 N.E.2d 883, 886 (Ind. Ct. App. 2012).

54. *Id.*

55. *Id.* at 886.

56. *Id.* at 887.

57. *Fletcher v. State*, 959 N.E.2d 922, 929 (Ind. Ct. App.), *trans. denied*, 968 N.E.2d 768 (Ind. 2012).

58. 982 N.E.2d 997 (Ind. 2013).



non-support of a dependent.<sup>59</sup> Although not approving of the defendant's actions in any "way, shape, or form," the court emphasized the defendant (1) had appeared at every scheduled hearing until the final pretrial, (2) was never notified that his public defender's motion to withdraw had been granted, (3) contacted the trial court by letter after trial to explain the absence, and (4) had relayed a message to the deputy prosecutor, who in turn told the court that the defendant was attempting to get to court but would not arrive until early in the afternoon.<sup>60</sup>

Acknowledging the burden of delaying the jury trial and the impact on other matters on the trial court's docket, the supreme court concluded that a "trial court is the protector of more than just its own calendar. In criminal cases it must also vigorously protect the rights of those who are called before it as defendants."<sup>61</sup>

#### *D. Bifurcation of SVF Charge*

The court of appeals has long held the bifurcation of possession of a firearm by a serious violent felon (SVF) charges "serves the ends of justice" and "circumvent[s] legitimate concerns regarding fairness by avoiding reference to [a defendant] as a 'serious violent felon' until after the jury had decided whether he had knowingly or intentionally possessed" a firearm.<sup>62</sup> However, a second phase of the trial should occur "if, and only if, the jury first concluded beyond a reasonable doubt that [the defendant] had knowingly or intentionally possessed a firearm."<sup>63</sup>

In *Wood v. State*,<sup>64</sup> the court of appeals held the trial court "made an error of law when it instructed the State it could proceed to a second phase of trial even after the jury returned a verdict finding Wood had not knowingly or intentionally possessed the firearms."<sup>65</sup> Although the defendant then pleaded guilty to that charge, the court of appeals nevertheless reversed the conviction based on federal double jeopardy principles and the doctrine of collateral estoppel.<sup>66</sup>

#### *E. Insufficient Time to Prepare for Juvenile Waiver Hearing*

In *Gingerich v. State*<sup>67</sup> a twelve-year-old boy was charged with murder and waived to adult courts at a hearing for which his lawyer had only four business days to prepare.<sup>68</sup> Although the boy later pleaded guilty in adult court, the court of appeals addressed his challenge on direct appeal by reiterating "one may challenge a waiver into adult court at any time, as it involves a question of subject

---

59. *Id.* at 997-98.

60. *Id.* at 1001.

61. *Id.*

62. *Williams v. State*, 834 N.E.2d 225, 228 (Ind. Ct. App. 2005).

63. *Id.*

64. 988 N.E.2d 374 (Ind. Ct. App. 2013).

65. *Id.* at 378.

66. *Id.* at 377-78.

67. 979 N.E.2d 694 (Ind. Ct. App. 2012), *trans. denied*, 984 N.E.2d 221 (Ind. 2013).

68. *Id.*

matter jurisdiction.”<sup>69</sup> The court of appeals held the juvenile court abused its discretion in denying repeated requests for a continuance of the waiver hearing, pointing to prejudice from the inability to investigate competence or to prepare to refute the testimony of a probation officer who testified he was unaware of a juvenile facility that would accept Gingerich.<sup>70</sup>

#### F. *Crime or Not a Crime?*

As has become a Survey article tradition, this section explores cases in which the appellate courts decided whether there was sufficient evidence to support a charge, often with broad principles that could shape future charging and trial decisions.

1. *Bodily Injury*.—Many criminal statutes enhance offenses based on “bodily injury.” In *Bailey v. State*,<sup>71</sup> the supreme court considered whether a husband shoving his wife and repeatedly poking her in the forehead, causing pain, was sufficient to prove the bodily injury element of a domestic battery conviction.<sup>72</sup> After surveying Indiana precedent and the approaches of other states, the supreme court adopted a bright-line approach that any degree of physical pain may constitute bodily injury.<sup>73</sup> It rejected the requirement that “physical pain rise to a particular level of severity before it constitutes an impairment of physical condition” because that approach “could bring uncertainty to our relatively straightforward statutory structure,” “could unfairly discount the suffering of certain victims who may have a lower pain tolerance than others,” and would excuse “from punishment conduct that is covered under the language of the statute.”<sup>74</sup>

The supreme court acknowledged that its opinion “may raise the specter of witness coaching, whereby a victim is encouraged to say ‘it hurt’ when, in actuality, it did not,” which is especially dangerousness in emotionally charged domestic disputes that are often boil down to “he said/she said” testimony with no other witnesses.<sup>75</sup> Those issues, however, are not new and “are largely addressed through zealous advocacy and effective cross-examination.”<sup>76</sup>

2. *Resisting Law Enforcement: Force and Video*.—In *K.W. v. State*,<sup>77</sup> the supreme court reversed a true finding for resisting law enforcement based on the failure of the State to prove the resistance was forcible. The officer’s testimony that the juvenile “began to resist and pull away” and “turned” to take a step away did not meet the lofty requirement of “strength, power, or violence,” which has

---

69. *Id.* at 705 (quoting *Roberson v. State*, 903 N.E.2d 1009, 1009 (Ind. Ct. App. 2009)).

70. *Id.* at 713.

71. 979 N.E.2d 133 (Ind. 2012).

72. *Id.*

73. *Id.* at 141-42.

74. *Id.*

75. *Id.* at 142.

76. *Id.*

77. 984 N.E.2d 610 (Ind. 2013).

been found insufficient in similar cases of “leaning away” or “twisting and turning a little bit.”<sup>78</sup>

At the oral argument, at least two of the justices made clear they had watched the surveillance video of the incident.<sup>79</sup> In a footnote the court remarked the video confirmed the officer’s “cautious characterization” of the incident: “K.W. turning and taking a step away from Sergeant Smith while his arm was still in the officer’s grasp, immediately after which Sergeant Smith brought him to the floor by the straight arm-bar take-down his testimony described.”<sup>80</sup>

3. *No Accomplice Liability for Violation of a No-Contact Order.*—The violation of a no-contact order issued as a condition of pre-trial release is the Class A misdemeanor offense of invasion of privacy.<sup>81</sup> A separate statute makes clear that an invitation by the protected person “does not waive or nullify an order for protection.”<sup>82</sup> In *Patterson v. State*,<sup>83</sup> the court of appeals decided as an issue of first impression that a protected person could not be charged as an accomplice for invasion of privacy by inviting the respondent to make contact.<sup>84</sup> Relying heavily on an Ohio Supreme Court case, the court of appeals concluded, “Protection orders are about the behavior of the respondent and nothing else. How or why a respondent finds himself at the petitioner’s doorstep is irrelevant. To find appellant guilty of complicity would be to criminalize an irrelevancy.”<sup>85</sup>

4. *Unexplained Addresses Insufficient to Support HTV Conviction.*—A conviction for driving as a habitual traffic violator (HTV) requires defendants know their privileges are suspended, which is often established through a statutory presumption when notice is mailed “to the person at the last address shown for the person in the bureau’s records.”<sup>86</sup> In *Cruz v. State*,<sup>87</sup> the defendant had never applied for an Indiana license and therefore the Bureau of Motor

---

78. *Id.* at 613 (citations omitted).

79. The webcast of the Indiana Supreme Court’s oral argument are available at: <http://mycourts.in.gov/arguments/>, archived at <http://perma.cc/GH2Y-3VCX>.

80. *K.W.*, 984 N.E.2d at 613 n.1. A court of appeals’ opinion also touched upon issues related to video, although in the context of whether a jury instruction should have been given. In *Burton v. State*, 978 N.E.2d 520, 525 (Ind. Ct. App. 2012), a dash camera captured a disturbing episode where a sleeping driver was awakened and “could have been confused and/or scared for his life when Officer Gray threatened to shoot him, Officer Witt broken into the car, and both officers pulled him out of the car and threw him to the ground.” *Id.* at 526. Although the officers “testified to different versions of what occurred,” the court of appeals found a strong evidentiary basis for jury instructions on self-defense and excessive force by police. *Id.* The case was reversed and remanded for a new trial because the failure to give the instructions was not harmless error.

81. IND. CODE § 35-46-1-15.1(5).

82. *Id.* § 34-26-5-1.

83. 979 N.E.2d 1066 (Ind. Ct. App. 2012).

84. *Id.* at 1069.

85. *Id.* (quoting *State v. Lucas*, 795 N.E.2d 642, 648 (Ohio 2003)).

86. IND. CODE § 9-30-10-16(b).

87. 980 N.E.2d 915 (Ind. Ct. App. 2012).

Vehicles (BMV) could not rely on the address self-reported by the driver.<sup>88</sup> Although the court found the BMV's "practice of using court records is generally acceptable," all the records submitted at trial showed addresses different from the one where the BMV had sent the HTV notice.<sup>89</sup> A BMV employee speculated the address used came from a traffic violation several years earlier, but the records admitted were replete with more recent addresses.<sup>90</sup> Finding a "total lack of evidence" to explain how the notice address was determined, the court of appeals reversed Cruz's conviction because the State failed to prove notice was mailed to the "last address shown."<sup>91</sup>

5. *Refusing to Exit Home Is Not Fleeing.*—In *Vanzyll v. State*,<sup>92</sup> police officers were stationed at the front and back door of a residence and wanted a suspect to exit. The State conceded the suspect was not required to open the door when police knocked but argued he was committed resisting law enforcement (fleeing) when he ran back inside the house. Distinguishing *Wellman v. State*,<sup>93</sup> where a suspect fled by disobeying an officer's command to remain outside, the court of appeals reversed Vanzyll's conviction for fleeing because officers never ordered him to stop before or after he opened the back door and then ran inside the residence.<sup>94</sup>

6. *Temporarily Empty Home is an "Inhabited" Dwelling Under Criminal Recklessness Statute.*—Criminal recklessness is a Class C felony when a person shoots "a firearm into an inhabited dwelling or other building or place where people are likely to gather."<sup>95</sup> In *Tipton v. State*,<sup>96</sup> the court of appeals held as a matter of first impression that a "residence may be 'inhabited' for criminal recklessness purposes if someone is likely to be inside."<sup>97</sup> The court reasoned that the temporary absence of occupants "does not lessen the risk of danger to others or the recklessness of [the defendant's] behavior and that shooting at a structure currently used as a dwelling poses a great risk or 'high probability' of death."<sup>98</sup>

### G. Sentencing Issues Under Appellate Rule 7(B)

For many years, substantive appellate sentence review under Appellate Rule 7(B) was a one-way street, with the supreme court reducing a few sentences on

---

88. *Id.* at 919 (citing IND. CODE § 9-24-13-4).

89. *Id.*

90. *Id.*

91. *Id.*

92. 978 N.E.2d 511 (Ind. Ct. App. 2012).

93. 703 N.E.2d 1061 (Ind. Ct. App. 1998).

94. *Id.* at 516.

95. IND. CODE § 35-42-2-2(c)(3).

96. 981 N.E.2d 103 (Ind. Ct. App. 2012).

97. *Id.* at 110.

98. *Id.*

transfer each year.<sup>99</sup> That rule, which implements the Indiana Constitution's power to review and revise sentences, allows appellate courts to revise a statutorily authorized sentence "if, after due consideration of the trial court's decision, the Court find that the sentence is inappropriate in light of the nature of the offense and the character of the offender."<sup>100</sup> These reductions were on top of the several ordered by the court of appeals, which were seldom contested through a petition to transfer filed by the State.

Near the end of the last survey period, the supreme court broke new ground by granting a petition to transfer filed by the State and reinstating a sentence ordered by the trial court.<sup>101</sup> But that article continued with summaries of a few sentence reductions from the same year.<sup>102</sup>

The traffic on that one-way street has now been reversed. During the survey period, the Indiana Supreme Court issued opinions in four cases that vacated court of appeals' opinions ordering reductions—and reinstated the trial court's sentence.<sup>103</sup>

In *Kimbrough v. State*,<sup>104</sup> the Indiana Supreme Court applied basic and well-settled legal principles in reinstating a trial court's sentence. The defendant did not raise a claim that his sentence was inappropriate under Appellate Rule 7(B) but instead argued the trial court abused its discretion in finding two aggravating factors and requested a lesser sentence because "his mitigating circumstances outweighed aggravating ones."<sup>105</sup> By agreeing and reducing the sentence from forty to twenty years, the court of appeals contravened the basic principles of

---

99. See generally Schumm, *2013 Recent Development*, *supra* note 30, at 1057; Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 45 IND. L. REV. 1067, 1093 (2012) [hereinafter Schumm, *2012 Recent Developments*].

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

101. Schumm, *2013 Recent Developments*, *supra* note 30, at 1058 (discussing *Bushhorn v. State*, 971 N.E.2d 80 (Ind. 2012)).

102. *Id.* at 1059-61.

103. A fifth case, decided early in the survey period, is more difficult to categorize, as the supreme court largely affirmed the trial court while granting a small measure of sentencing relief far short of what the court of appeals had ordered. See *Kucholick v. State*, 977 N.E.2d 351 (Ind. 2012) (revising sentence to four years imprisonment after trial court imposed a seven year sentence with four of the years executed, which the court of appeals had reduced to two years in a community corrections program and two years of probation).

104. 979 N.E.2d 625 (Ind. 2012).

105. *Id.* at 628 (quoting Br. of Appellant at 14). Appellate counsel probably took this approach to avoid the possibility of an increased sentence. Although appeals are often seen as a no-risk venture for criminal defendants, a request for appellate review of a sentence under article 7, sections 4 or 6 of the Indiana Constitution and Appellate Rule 7(B) allows the court to "affirm, reduce, or increase the sentence." *McCullough v. State*, 900 N.E.2d 745, 750 (Ind. 2009). In the years since *McCullough*, the court of appeals has increased only one sentence, and that increase was quickly vacated by the Indiana Supreme Court. See *Akard v. State*, 937 N.E.2d 811 (Ind. 2010). Nevertheless, the possibility remains—and likely deters some defendants from raising 7(B) claims.

*Anglemyer v. State*,<sup>106</sup> which requires that trial courts give reasons for felony sentences but makes clear that “a trial court can not now be said to have abused its discretion in failing to ‘properly weigh’ such factors.”<sup>107</sup> More importantly, by failing to cite or rely on Appellate Rule 7(B) and saying nothing of the nature of the offense or character of the offender, the defendant cannot secure a sentence reduction under that rule.<sup>108</sup>

The other three cases represent a departure from traditional practice and suggest a new normal for appellate sentence review. In each case, the supreme court granted transfer and issued a short *per curiam* opinion that recited the relevant facts and court of appeals’ holding, summarized the boilerplate legal standard for a reduction, and then concluded: “Having reviewed the matter, our collective judgment is that the sentence imposed by the trial court is not inappropriate under Appellate Rule 7(B), and does not warrant appellate revision. Accordingly, we affirm the sentence imposed by the trial court.”<sup>109</sup>

Without any further reasoning or specific application of precedent, the reasons for a reversing a reduction—and the prospect of that continuing in future cases—remain a bit of a mystery. Some clues may be gleaned from the March 2013 oral argument in the only case set for oral argument. In *Lynch v. State*,<sup>110</sup> the court of appeals had reduced a forty-year sentence for attempted child molesting to the minimum term of twenty years.<sup>111</sup> The justices’ questions suggested the Court was trying to refine its approach to addressing 7(B) claims rather than completely abandoning 7(B) review. Even the Deputy Attorney General did not argue for abandoning the rule but did suggest the court of appeals should set forth a “compelling analysis” when reducing a sentence.<sup>112</sup> The justices’ specific questions focused on the failure of the court of appeals to provide a detailed analysis or application of precedent as well as its failure to include the “after due consideration of the trial court’s decision” language of Rule 7(B).<sup>113</sup>

As the following chart highlights, the change in the supreme court’s approach to sentence revisions appear to have had a significant effect on the court of appeals’ willingness to grant reductions.

---

106. 868 N.E.2d 482 (Ind. 2007).

107. *Id.* at 491.

108. *Kimbrough*, 979 N.E.2d at 628.

109. *Chambers v. State*, 989 N.E.2d 1257, 1259 (Ind. 2013); *Lynch v. State*, 987 N.E.2d 1092, 1093 (Ind. 2013); *Merida v. State*, 987 N.E.2d 1091, 1092 (Ind. 2013).

110. 987 N.E.2d 1092 (Ind. 2013).

111. *Id.* at 1093 (citing *Lynch v. State*, No. 40A05–1201–CR–26, 2012 WL 5381372 (Ind. Ct. App. Nov. 2, 2012) (mem. dec), *vacated*).

112. *See supra* note 79. The *Lynch* oral argument was held on April 11, 2013.

113. *See supra* note 79.

Sentence Reductions at the Indiana Court of Appeals				
Year <sup>114</sup>	7(B) Claim Raised	Reduced by Court of Appeals	Transfer to Supreme Court	Net Reductions
10/1/10-9/30/11	391	26	0	26 (6.6%)
10/1/11-9/30/12	337	16	3	13 (3.9%)
10/1/12-9/30/13	302	4	3	1 (0.3%)

In the twelve-months of the survey period, the court of appeals reduced sentences just four times—compared to as many as four times the year before and more than six times as many two years earlier.<sup>115</sup> Just one of those four reduced sentences actually stuck,<sup>116</sup> as transfer was sought and granted in the other three.<sup>117</sup>

Moreover, beyond rejecting the vast majority of 7(B) claims, the court of appeals decided a case in July as an incredibly rare *per curiam* opinion and largely parroted the language of recent supreme court cases.<sup>118</sup> Although the issuance of *per curiam* court of appeals' opinions denying sentencing relief seems unlikely, the trend of few, if any reductions, seems likely.

Cases mostly likely to secure a revision are those in which the court of appeals sets forth a compelling analysis and perhaps applies earlier supreme court precedent that had ordered a reduction. None of those earlier cases have been overruled or disapproved and remain available for advocates and appellate judges to use in making a compelling case for a reduction.

#### H. Other Sentencing Claims

Beyond the long odds for substantive sentencing relief under Appellate Rule

114. The first two years of data in the table comes from the last two years' Survey articles. Schumm, *2013 Recent Developments*, *supra* note 30, at 1057; Schumm, *2012 Recent Developments*, *supra* note 99, at 1093. The most recent year's data came from a Westlaw search of Indiana Court of Appeals' cases and is on file with the author. The author thanks Scott Milkey, IU-McKinney Class of 2014, for his invaluable research assistance.

115. Schumm, *2013 Recent Developments*, *supra* note 30, at 1057; Schumm, *2012 Recent Developments*, *supra* note 99, at 1093.

116. *See Kovats v. State*, 982 N.E.2d 409 (Ind. Ct. App. 2013) (reducing a twenty year sentence to fifteen years).

117. *See supra* note 109.

118. *King v. State*, 992 N.E.2d 743 (Ind. Ct. App. 2013).

7(B), defendants have several procedural-type routes for sentencing relief. A few of these are discussed below.

1. *Community Outrage Not a Proper Sentencing Consideration.*—In an especially short and pointed opinion that blurs the line between a substantive and procedural challenge, the supreme court made clear that it is keeping a careful eye on the reasoning of the court of appeals in sentencing cases.<sup>119</sup> The court of appeals had used the following sentence in affirming a maximum sentence: “In other words, the maximum sentence here can be justified as a deontological response giving voice to a community’s outrage, based on the facts and circumstances of the crime.”<sup>120</sup> The supreme court “disagree[d] and disapprove[d] of consideration of a community’s outrage in the determination or review of a criminal sentence.”<sup>121</sup> Presumably a trial court’s similar comments in ordering a lengthy sentence would be greeted by a similar rebuke. Ultimately, though, the court “agree[d] with the ultimate conclusion of the Court of Appeals that the sentence imposed by the trial court is appropriate and should be affirmed.”<sup>122</sup>

2. *Late Pre-Sentence Investigation (PSI) Report.*—Pre-sentence investigation (PSI) reports contain important information for judges to consider at sentences, and by statute must be given to a defendant “sufficiently in advance of sentencing” to allow “a fair opportunity to controvert the material included.”<sup>123</sup> In *Gilbert v. State*,<sup>124</sup> the court of appeals held due process requires a new sentencing hearing when the defendant was in Indiana only forty-eight hours before sentencing, had less than twenty-four hours notice of his sentencing, received the PSI the day of the sentencing hearing, and was given “only a few minutes during the hearing to review the report.”<sup>125</sup>

3. *Consecutive Sentences Require Reasons.*—*Bowen v. State*<sup>126</sup> highlights the important statutory limitation on consecutive sentences for different counts in the same case. There, the supreme court reiterated that “[p]recedent requires that a trial court ‘include a reasonably detailed recitation of the trial court’s reasons for imposing a particular sentence,’ including the reasons for imposing consecutive sentences.”<sup>127</sup> The court opted “to remand to the trial court for clarification of its sentencing decision and preparation of a new sentencing order.”<sup>128</sup>

---

119. *Escobedo v. State*, 989 N.E.2d 1248, 1248 (Ind. 2013).

120. *Id.*

121. *Id.*

122. *Id.*

123. IND. CODE § 35-38-1-12(b).

124. 982 N.E.2d 1087 (Ind. Ct. App. 2013).

125. *Id.* at 1092.

126. 988 N.E.2d 1134 (Ind. 2013).

127. *Id.* at 1134 (quoting *Anglemyer v. State*, 868 N.E.2d 482, 490-91 (Ind. 2007)).

128. *Id.* at 1135. Months later, after the survey period, the court granted rehearing to respond to the defendant’s contention that a new judge was now presiding in the trial where the case had been remanded. 1 N.E.3d 131 (Ind. 2013). Under these circumstances, the supreme court provided three options:



4. *Unbargained-For Illegal Sentences.*—The Indiana Supreme Court held in 2008 that a defendant can forfeit his or her right to appellate review of a sentence as part of a written plea agreement,<sup>129</sup> and has repeatedly explained that a defendant “may not enter a plea agreement calling for an illegal sentence, benefit from that sentence, and then later complain that it is an illegal sentence.”<sup>130</sup> But how do those principles apply when the sentence imposed is contrary to law (impermissible consecutive habitual offender enhancements) and not addressed in the plea agreement? Distinguishing the earlier cases where illegal sentences were “explicitly provided for in the plea agreement, and the defendant benefited from the plea,”<sup>131</sup> in *Crider v. State*<sup>132</sup> the supreme court remanded for resentencing because the defendant had not agreed to consecutive habitual enhancements and thus his appeal waiver was invalid and the sentences had to be served concurrently.<sup>133</sup>

5. *Trial Courts Can Aggravate Remaining Counts Based on Facts From Counts Dismissed as Part of a Plea Agreement.*—A 1986 supreme court opinion made clear that trial courts could not aggravate a sentence to compensate for disagreement with a jury’s verdict, i.e., acquittal on some counts.<sup>134</sup> In *Bethea v. State*,<sup>135</sup> the supreme court applied that precedent to the plea agreement context. There, a defendant charged with nine counts, including Class A felony burglary resulting in bodily injury, pleaded guilty to two counts, including Class B felony burglary, which does not include the bodily injury element.<sup>136</sup> The supreme court concluded that the plea agreement “did not limit what the State could offer as aggravating factors . . . . In other words, it did not limit the sentencing evidence, only the maximum sentence.”<sup>137</sup> Thus, the trial court was free to give significant weight to evidence of bodily injury in sentencing the defendant for Class B felony burglary.<sup>138</sup> In future cases, however, the parties could include in a plea agreement language restricting the ability of the trial court to use evidence related

---

On remand for a new sentencing order that responds to concerns raised by the Supreme Court, the trial court may discharge this responsibility by (1) issuing a new sentencing order without taking any further action, (2) ordering additional briefing on the sentencing issue and then issuing a new order without holding a new sentencing hearing, or (3) ordering a new sentencing hearing at which additional factual submissions are either allowed or disallowed and then issuing a new order based on the presentations of the parties.

*Id.*

129. *Creech v. State*, 887 N.E.2d 73, 75 (Ind. 2008).

130. *Lee v. State*, 816 N.E.2d 35, 40 (Ind. 2004).

131. *Id.*

132. 984 N.E.2d 618 (Ind. 2013).

133. *Id.* at 625.

134. *Hammons v. State*, 493 N.E.2d 1250 (Ind. 1986).

135. 983 N.E.2d 1134 (Ind. 2013).

136. *Id.* at 1137-38.

137. *Id.* at 1144.

138. *Id.* at 1145.

to dismissed charges.<sup>139</sup> In the absence of that language, however, “it is not necessary for a trial court to turn a blind eye to the facts of the incident that brought the defendant before them.”<sup>140</sup>

The conclusion to the opinion notes “[u]nless the *evidence* is forbidden by terms of the plea agreement, the trial court judge may consider all *evidence* properly before him.”<sup>141</sup> The fact section mentions that the trial court heard “testimony of one of the victims,”<sup>142</sup> which surely qualifies of evidence. Presumably the State will be required to call witnesses to prove facts related to dismissed charges—and may not simply rely on the probable cause affidavit filed with the original charges (and usually attached to the presentence investigation report).<sup>143</sup>

6. *Continuing Crime Doctrine.*—Indiana’s double jeopardy clause provides broad protection against multiple convictions based on the same evidence,<sup>144</sup> and a less commonly cited but powerful variety of double jeopardy protection is the “continuing crime doctrine.” That doctrine prohibits the State from securing multiple convictions for same continuous offense if was “so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.”<sup>145</sup>

Applying the doctrine’s “fact-sensitive analysis” in *Chavez v. State* the court of appeals reduced five convictions for child molesting by fondling to two convictions for actions occurring at two separate points in the same day.<sup>146</sup> During the first encounter, the defendant kissed the child on the mouth, inserted his tongue into her mouth, rubbed her nipple, and held his hand on her buttocks—acts that were “so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.”<sup>147</sup> Similarly, later in the day his insertion of his tongue in the victim’s mouth while placing his hand over her clothes on her vagina was a single transaction for which only one conviction could stand.<sup>148</sup> Thus, three of the five convictions were vacated based on the continuing crime doctrine.

---

139. *Id.*

140. *Id.*

141. *Id.* at 1146 (emphasis added).

142. *Id.* at 1138.

143. The approach of *Bethea* seems somewhat at odds with the restitution context, where trial courts may not order restitution for damages related to a charge that is dismissed as part of a plea agreement. See *infra* notes 157-58 and accompanying text.

144. See generally *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999) (creating and applying the “actual evidence test” for assessing double jeopardy violations under the Indiana Constitution).

145. *Chavez v. State*, 988 N.E.2d 1226, 1228 (Ind. Ct. App. 2013) (quoting *Riehle v. State*, 823 N.E.2d 287, 296 (Ind. Ct. App. 2005)).

146. *Id.* at 1229-30.

147. *Id.* at 1229 (quoting *Riehle*, 823 N.E.2d at 296).

148. *Id.* at 1230.

### I. Restitution

1. *Restitution in Non-Support of Dependent Cases.*—In *Sickels v. State*,<sup>149</sup> Indiana Supreme Court granted transfer to address the narrow question of whether a custodial parent qualifies as the “victim” for purposes of restitution in a child-support arrearage cases involving emancipated children.<sup>150</sup> The court of appeals had *sua sponte* found the defendant’s children—and not his former wife, the custodial parent of their children—was the victim.<sup>151</sup> Relying on civil cases, the supreme court expanded to the criminal restitution realm the presumption that a custodial parent whose children are now emancipated has expended his or her own funds to offset any deficit caused by missing child-support payments.<sup>152</sup> Although the custodial parent of *emancipated* children may not be the only possible victim entitled to restitution, criminal restitution will be payable only to the custodial parent in cases involving *dependent* (non-emancipated) children.<sup>153</sup>

2. *Letter from Victim Sufficient.*—Restitution orders must provide a “reasonable basis for estimating loss” and cannot “subject the trier of fact to mere speculation or conjecture.”<sup>154</sup> In *Guzman*, the court of appeals affirmed a restitution order based on a letter from the victim’s attorney that set out “medical expenses incurred as a result of the accident, breaking down the total by amount and to whom the amount was due.”<sup>155</sup> The court emphasized the letter established an “exact amount of law” and provided a reasonable basis for determining that loss, which did not require speculation or conjecture by the trial court.<sup>156</sup>

3. *Limited to Crimes in Plea Agreement.*—Restitution orders must be based on the amount of damage to the victim “incurred as a result of the crime”—which in the plea agreement context means only the crime(s) to which the defendant has pleaded guilty.<sup>157</sup> Thus, in *Gil v. State* the court of appeals remanded a \$20,000 restitution order because the defendant pleaded guilty to only one or two burglary counts and even the State conceded that it was not clear how the trial court arrived at its restitution amount.<sup>158</sup>

4. *Joint and Several Liability?*—Although merely dicta because the court was otherwise remanding for a new restitution hearing, *Gil* includes an important discussion of whether joint and several liability for the full amount of restitution

---

149. 982 N.E.2d 1010 (Ind. 2013).

150. *Id.* at 1012.

151. *Id.*

152. *Id.* at 1014.

153. *Id.*

154. *Guzman v. State*, 985 N.E.2d 1125, 1130 (Ind. Ct. App. 2013) (citations omitted).

155. *Id.* at 1131.

156. *Id.*

157. *Gil v. State*, 988 N.E.2d 1231, 1236 n.5 (Ind. Ct. App. 2013).

158. *Id.* at 1236. Similarly, as the court of appeals reiterated in another case decided during the survey period, “when a plea agreement is silent on the issue of restitution, a trial court may not order the defendant to pay restitution as part of his or her sentence; such an order exceeds the scope of the plea agreement.” *Morris v. State*, 985 N.E.2d 364, 369 (Ind. Ct. App. 2013).

“is constitutionally proportionate to the nature of the offense committed by a defendant who has caused only a portion of the damages.”<sup>159</sup> Citing federal district court opinions, the court of appeals suggested it “may be particularly advisable to apportion liability among defendants under some factual circumstances, such as when there are varying lengths and levels of involvement by the criminal participants.”<sup>160</sup>

5. *Proper Remedy Is New Hearing.*—Finally, in *Iltzch v. State*<sup>161</sup> the supreme court considered the proper remedy when the State fails to present sufficient evidence to support a restitution order. Reversing a divided court of appeals’ opinion that required the order be vacated,<sup>162</sup> the supreme court held the appropriate remedy is instead to remand to the trial court “to conduct a new restitution hearing, at which the State will be permitted to present, and [the defendant] will be allowed to confront, any additional evidence supporting the victim’s property loss.”<sup>163</sup> Chief Justice Dickson dissented from that view, concluding that “permitting the State a second opportunity to overcome its deficiency in proof is inconsistent with principles prohibiting double jeopardy.”<sup>164</sup>

### *J. Probation Conditions*

1. *Standard of Proof for Violation.*—In *Heaton v. State*<sup>165</sup> the supreme court made clear the State must prove a violation of probation by a preponderance of the evidence—overruling an earlier case that suggested the standard was merely probable cause.<sup>166</sup> Because it was unclear which standard the trial court applied, the supreme court remanded the case “for reconsideration of whether the defendant violated her probation and if so, what sanction, if any, is appropriate.”<sup>167</sup>

2. *Probation for Misdemeanor Sentences.*—In *Jennings v. State*,<sup>168</sup> the Indiana Supreme Court clarified the confusion surrounding limitations on suspended sentences and probation in misdemeanor cases. The court of appeals had held “term of imprisonment” includes both executed and suspended time, which meant after a thirty-day jail sentence and 150 day suspended sentence, the period of probation could not exceed 185 days (30+150+185=365).<sup>169</sup> Based on the plain language of the statute, legislative intent, and the rehabilitative purpose of probation, the supreme court concluded that imprisonment means executed or

---

159. *Gil*, 988 N.E.2d at 1236.

160. *Id.*

161. 981 N.E.2d 55 (Ind. 2013).

162. *Id.* at 57 (citing *Iltzsch v. State*, 972 N.E.2d 409 (Ind. Ct. App. 2012)).

163. *Id.* at 57.

164. *Id.* (Dickson, C.J., dissenting).

165. 984 N.E.2d 614 (Ind. 2013).

166. *Id.* at 616-17 (overruling *Cooper v. State*, 917 N.E.2d 667 (Ind. 2009)).

167. *Id.* at 618.

168. 982 N.E.2d 1003 (Ind. 2013).

169. *Id.* at 1004.

incarcerated time and does not include the suspended portion of the sentence.<sup>170</sup> Because the trial court imposed a thirty-day jail sentence, it could impose a probationary period as long as 335 days.<sup>171</sup>

3. *Probation Conditions Upheld*.—The court of appeals also considered the propriety of probation conditions in two separate cases. First, in *Whitener v. State*,<sup>172</sup> the court of appeals held it was within the trial court’s discretion to require a defendant convicted of burglary to register as a sex offender as a condition of probation.<sup>173</sup> Trial courts have broad discretion in setting probation conditions “reasonably related to the person’s rehabilitation,” and a jury had found the defendant guilty of rape as the underlying felony, which was vacated on double jeopardy grounds.<sup>174</sup>

Second, in *Patton v. State*,<sup>175</sup> a defendant convicted of child seduction challenged a probation condition prohibiting access of “certain websites, chat rooms, or instant messaging programs frequented by children” as both overly broad and unconstitutionally vague.<sup>176</sup> The court distinguished a Seventh Circuit case,<sup>177</sup> which had struck down a similarly worded restriction on certain non-probationary sex offenders in Indiana Code section 35-42-4-12. Emphasizing that the Seventh Circuit case recognized the ability of trial courts to limit internet access as a condition of supervised release, the court of appeals distinguished the limited rights of probationers in concluding the condition was “reasonably and directly related to deterring Patton from having contact with children and to protecting the public.”<sup>178</sup> As to the vagueness challenge, the court of appeals noted “a number of ways that Patton can learn which internet activities are permissible,” including websites that require age verification, the names of chat rooms, and the terms and conditions of social media sites.<sup>179</sup>

### K. Sex Offender Registry

Finally, the Indiana Supreme Court decided two sex offender registry cases, building on its landmark opinion in *Wallace v. State*,<sup>180</sup> which applied a seven-factor “intents-effects” test in assessing potential violations of Indiana’s ex post

---

170. *Id.* at 1009.

171. *Id.* at 1004, 1009. The same days that *Jennings* was issued, the court applied the case in affirming a suspended sentence of one year with a one-year probationary term in *Peterink v. State*, 982 N.E.2d 1009, 1010 (Ind. 2013).

172. 982 N.E.2d 447 (Ind. 2013).

173. *Id.* at 447-48.

174. *Id.* at 448.

175. 990 N.E.2d 511 (Ind. Ct. App. 2013).

176. *Id.* at 514.

177. *Doe v. Marion Cnty. Prosecutor*, 705 F.3d 694, 703 (7th Cir. 2013).

178. *Patton*, 990 N.E.2d at 515-16.

179. *Id.* at 516-17.

180. 905 N.E.2d 371 (Ind. 2009).

facto clause.<sup>181</sup> In *Gonzalez v. State*,<sup>182</sup> the supreme court addressed whether a defendant who pleaded guilty to class D felony child solicitation in 1997 could be required to register for life as a sex offender under a 2006 statutory amendment. Considering the crime was the lowest level felony in Indiana's criminal code and carried only a ten-year registration requirement at the time of the offense, the court concluded that the statute's effect of lifetime registration was so punitive as to constitute a criminal penalty in violation of the ex post facto clause.<sup>183</sup> As in earlier cases, the seventh factor—whether the statute appears excessive in relation to the alternative purpose assigned—was especially important.<sup>184</sup> Distinguishing earlier cases that had upheld lifetime registration requirements, the supreme court emphasized that the defendant had “no available channel through which he may petition the trial court for review of his future dangerousness or complete rehabilitation” and noted the trial court had refused to grant a hearing despite repeated requests.<sup>185</sup>

Next, in a case with likely significance outside the sex offender registry realm, the supreme court considered the effect of a prosecutor's failure to appeal a registry ruling on the Department of Correction's ability to later raise the issue.<sup>186</sup> As the unanimous opinion in *Becker v. State*<sup>187</sup> succinctly put it, “the State is the State, whether it acts through a deputy prosecutor or through the Department of Correction. Both entities share the same substantial interest—to maximize an offender's registration obligations—and are therefore in privity with each other in cases involving that interest.”<sup>188</sup> By failing to appeal the 2008 order, the State (through the local prosecutor) bound the State (via the DOC) under principles of res judicata.<sup>189</sup>

---

181. *Id.* at 378.

182. 980 N.E.2d 312 (Ind. 2013).

183. *Id.* at 321.

184. *Id.* at 319.

185. *Id.* at 320-21.

186. *See* *Becker v. State*, 992 N.E. 2d 697 (Ind. 2013).

187. 992 N.E.2d 697 (Ind. 2013).

188. *Id.* at 698-99.

189. *Id.* at 699.