

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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The legislature and Indiana's appellate courts confronted several significant issues during the survey period October 1, 2013 to September 30, 2014. The General Assembly enacted an overhaul of sentencing within the criminal code, while the Indiana Supreme Court and the Indiana Court of Appeals addressed a variety of issues that arise in all stages from the beginning of criminal cases to their end.

I. LEGISLATIVE DEVELOPMENTS

Although passed in 2013, the 2014 session included some revisions to the overhaul of the criminal statutes, which became effective July 1, 2014.¹ An entire article could be written about these sweeping changes, but this Article highlights five especially important changes.

A. Offense Levels and Credit Time

Felonies committed before July 1, 2014, must be charged as a Class A through D felony with the following sentencing ranges,² while felonies committed on July 1, 2014 or after, must be charged as a Level 1 to 6 with the following sentencing ranges:³

Old Sentencing Ranges			New Sentences Effective July 1, 2014		
Class	Range (yrs.)	Actual Time	Level	Range (yrs.)	Actual Time
Murder	45-65	22.5-32.5		45-65	33.75-48.75
A	20-50	10-25	1	20-40	15-30
A	20-50	10-25	2	10-30	7.5-22.5
B	6-20	3-10	3	3-16	2.25-12
B	6-20	3-10	4	2-12	1.5-9
C	2-8	1-4	5	1-6	.75-4.5
D	.5-3	.25-1.5	6	.5-2.5	.25-1.25

As alluded to in the table above, before July 1, 2014, defendants sentenced to felony sentences generally earned one day of credit for each day served—provided they maintained good behavior while incarcerated.⁴ Effective

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1. H. 1006, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013). This section includes citations to the specific code provisions rather than sections of the bills that span more than 500 pages.

2. IND. CODE § 35-50-2-3 to -6 (2013).

3. *Id.*

4. IND. CODE § 35-50-5-3 (2014).

July 1, 2014, most defendants sentenced for felonies will be required to serve three days to earn one day credit.⁵ The exceptions are Level 6 felons, who will continue to earn one day credit for each day served.⁶ The differences are significant—instead of serving fifty percent of a sentence most defendants will now serve seventy-five percent. Because many of the sentence ranges and advisory sentences were lowered, however, the net effect is a mixed bag.

Although some crimes were reclassified as more or less serious in the overhaul, most crimes that were Class D felonies are now Level 6 felonies; Class C felonies are generally Level 5 felonies; Class B felonies are primarily either Level 3 or Level 4 felonies; and Class A felonies are generally either Level 1 or Level 2 felonies. The changes to drug penalties and theft, however, are notable.

B. Drug Offenses

Both the possession and dealing statutes were rewritten with a goal of proportionality, replacing a blanket three-gram threshold with lower base offenses that increase based on the amount of drugs involved. For example, the base possession of methamphetamine offense is a Level 6 felony, which may be increased based on quantity or “enhancing circumstances”:

- (b) The offense is a Level 5 felony if:
 - (1) the amount of the drug involved is at least five (5) but less than ten (10) grams; or
 - (2) the amount of the drug involved is less than five (5) grams and an enhancing circumstance applies.
- (c) The offense is a Level 4 felony if:
 - (1) the amount of the drug involved is at least ten (10) but less than twenty-eight (28) grams; or
 - (2) the amount of the drug involved is at least five (5) but less than ten (10) grams and an enhancing circumstance applies.
- (d) The offense is a Level 3 felony if:
 - (1) the amount of the drug involved is more than twenty-eight (28) grams; or
 - (2) the amount of the drug involved is at least ten (10) but less than twenty-eight (28) grams and an enhancing circumstance applies.⁷

The six enhancing circumstances, which apply to both possession and dealing offenses are as follows:

- (1) The person has a prior conviction in any jurisdiction, for dealing in a controlled substance that is not marijuana, hashish, hash oil, salvia divinorum, or a synthetic drug, including an attempt or conspiracy to commit the offense.

5. *Id.* § 35-50-6-3.1.

6. IND. CODE § 35-50-6-4(a) (2014).

7. IND. CODE § 35-48-4-6.1 (2014) (addressing “Possession of methamphetamine”).

- (2) The person committed the offense while in possession of a firearm.
- (3) The person committed the offense:
 - (A) on a school bus; or
 - (B) in, on, or within five hundred (500) feet of:
 - (i) school property while a person under eighteen (18) years of age was reasonably expected to be present; or
 - (ii) a public park while a person under eighteen (18) years of age was reasonably expected to be present.
- (4) The person delivered or financed the delivery of the drug to a person under eighteen (18) years of age at least three (3) years junior to the person.
- (5) The person manufactured or financed the manufacture of the drug.
- (6) The person committed the offense in the physical presence of a child less than eighteen (18) years of age, knowing that the child was present and might be able to see or hear the offense.⁸

The base dealing offense is a Level 5 felony, from which greater penalties may be imposed based on quantity or “enhancing circumstances.”⁹

- (b) The offense is a Level 4 felony if:
 - (1) the amount of the drug involved is at least one (1) but less than five (5) grams; or
 - (2) the amount of the drug involved is less than one (1) grams and an enhancing circumstance applies.
- (c) The offense is a Level 3 felony if:
 - (1) the amount of the drug involved is at least five (5) but less than ten (10) grams; or
 - (2) the amount of the drug involved is at least one (1) but less than five (5) grams and an enhancing circumstance applies.
- (d) The offense is a Level 2 felony if:
 - (1) the amount of the drug involved is at least ten (10) grams;
 - (2) the amount of the drug involved is at least five (5) but less than ten (10) grams and an enhancing circumstance applies; or
 - (3) the person is manufacturing the drug and the manufacture results in an explosion causing serious bodily injury to a person other than the manufacturer.¹⁰

C. Theft

For decades, Indiana’s theft statute did not include a threshold for the value of the property taken. Therefore, stealing a pack of gum could be punished as a felony. The new theft statute lowers the base crime to a misdemeanor but

8. IND. CODE § 35-48-1-16.5 (2014).

9. *Id.*

10. IND. CODE § 35-48-4-1.1 (2014) (addressing “Dealing in methamphetamine”).

ensures proportionality by considering the property's value:

(a) A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class A misdemeanor. However, the offense is:

(1) a Level 6 felony if:

(A) the value of the property is at least seven hundred fifty dollars (\$750) and less than fifty thousand dollars (\$50,000); or

(B) the property is a firearm; or

(C) the person has a prior unrelated conviction for:

(i) theft under this section; or

(ii) criminal conversion under section 3 of this chapter; and

(2) a Level 5 felony if:

(A) the value of the property is at least fifty thousand dollars (\$50,000); or

or

(B) the property that is the subject of the theft is a valuable metal (as defined in IC 25-37.5-1-1) and:

(i) relates to transportation safety;

(ii) relates to public safety; or

(iii) is taken from a hospital or other health care facility, telecommunications provider, public utility (as defined in IC 32-24-1-5.9(a)), or key facility; and the absence of the property creates a substantial risk of

bodily injury to a person.

(b) In determining the value of property under this section, acts of theft committed in a single episode of criminal conduct (as defined in IC 35-50-1-2(b)) may be charged in a single count.

(c) For purposes of this section, "the value of property" means:

(1) the fair market value of the property at the time and place the offense was committed; or

(2) if the fair market value of the property cannot be satisfactorily determined, the cost to replace the property within a reasonable time after the offense was committed.

A price tag or price marking on property displayed or offered for sale constitutes prima facie evidence of the value of the property.¹¹

D. Rape Broadened to Include Criminal Deviate Conduct

The separate offense of criminal deviate conduct has been 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.¹² This offense could involve defendants

11. IND. CODE § 35-43-4-2 (2014).

12. IND. CODE §§ 35-42-4-2 (2013) (elements of the offense of deviate conduct) & 35-41-1-9

whose victims were of the opposite or same sex.¹³ Under the amended statute, the crime of rape—which was previously limited to those had “sexual intercourse with a member of the opposite sex”¹⁴—has been broadened to include those who knowingly or intentionally cause “another person to perform or submit to other sexual conduct”¹⁵

E. Modification of Sentences

For many years defendants unhappy with their sentences have been free to file a request for a modification of sentence but faced a substantial obstacle one year after the sentence. Previously, Indiana Code section 35-38-1-17 forbade trial courts from modifying a sentence after 365 days unless the prosecutor consented, which in the author’s experience seemed limited in many counties to defendants who later offered testimony for the State or otherwise had a special connection to a prosecutor. That changed, effective July 1, 2014. The amendment removed the one-year restriction and now provides “the court may reduce or suspend the sentence and impose a sentence that the court was authorized to impose at the time of sentencing. The court must incorporate its reasons in the record.”¹⁶ The new statute restricts defendants to one request each year and two for each offense.¹⁷ It also makes clear that the right to seek a sentence modification may *not* be waived as part of a plea agreement; “[a]ny purported waiver of the right to sentence modification under this section is invalid and unenforceable as against public policy.”¹⁸ Such waiver provisions included in plea agreements signed before July 1, 2014, will likely be held unenforceable. The anti-waiver language will likely be viewed as remedial and “intended to cure a defect or mischief” that existed before July 1, 2014.¹⁹

But will defendants who were sentenced before July 1, 2014, be able to avail themselves of the amended statute if more than a year has passed and the prosecutor does not consent? At least some judges and prosecutors through not in trial-level litigation in the months after the amended statute took effect, although defendants have a plausible argument based on the plain language of the statute. No provision in the revised Indiana Code section 35-38-1-17 limits the statute’s application to persons convicted after July 1, 2014. Moreover, the amendment may be found procedural, i.e., it governs the method and time of asserting a right, and therefore will apply to all petitions filed after July 1, 2014.²⁰

(2013) (defining “deviate conduct”).

13. *Id.*

14. IND. CODE § 35-42-4-1 (2014).

15. *Id.* § 35-42-4-1(a).

16. IND. CODE § 35-38-1-17 (2014).

17. *Id.*

18. *Id.*

19. *See generally* Martin v. State, 774, N.E.2d 43 (Ind. 2002).

20. *See generally* Willis v. State, 567 N.E.2d 1170 (Ind. Ct. App. 1991) (holding that “Willis merely sought to petition for modification of his sentence under provisions of a later enacted statute

II. DECISIONAL LAW DEVELOPMENTS

As summarized below, the Indiana Supreme Court and Indiana Court of Appeals addressed cases involving all stages and aspects of criminal cases from searches, confessions, competence to stand trial, and jury issues at the beginning or before a trial to sentencing, probation conditions, and post-conviction issues at the end of a case. The focus in this section is Indiana Supreme Court opinions, although several significant Indiana Court of Appeals' opinions are also discussed.

A. Search and Seizure

1. *Deference to Trial Courts in Suppression Cases.*—In a pair of cases decided on the same day, the Indiana Supreme Court affirmed a trial court decision finding reasonable suspicion to support a stop and another finding a lack of reasonable suspicion, emphasizing “sometimes standards of review decide cases” and declining the appellants’ “invitation to invade the fact-finder’s province.”²¹

In *State v. Keck*,²² the trial court granted a motion to suppress a vehicle stop in a drunk driving case in which the driver went left of center on a two-way county road with no center line. Its order included the following:

Because of the poor road conditions, the Court finds it wholly unreasonable to expect motorists in Putnam County to take a perfectly straight course, on the far right side of a roadway riddled with potholes in the absence of oncoming traffic, as in the case at Bar. Evasive action, including possibly driving left-of-center has become a necessity with the current conditions of our County Roads.²³

In affirming that ruling, the Indiana Supreme Court agreed that the deputy lacked reasonable suspicion to stop the vehicle “[b]ased on the facts as the trial court found them—that Keck’s conduct was either authorized under [Indiana Code section 9-21-8-2(b)] or excused by road conditions”²⁴ The supreme court made clear that driving left of center may be a basis for a proper stop in a future case, but the trial court did not clearly err in its ruling on the facts of the specific case.²⁵

In the other case decided the same day, however, the trial court had denied a motion to suppress based on a vehicle stop for crossing the fog line on the right

which enlarged the time in which he could so petition. In our view, the statute under which he sought relief was procedural, not substantive, was ameliorative, and he was not foreclosed from using that statute.”).

21. *Robinson v. State*, 5 N.E.3d 362, 363-64 (Ind. 2014).

22. 4 N.E.3d 1180 (Ind. 2014).

23. *Id.* at 1183.

24. *Id.* at 1186.

25. *Id.*

side of the roadway.²⁶ The supreme court affirmed that ruling, noting that only reasonable suspicion—not “absolute certainty”—of illegal activity is required.²⁷

The opinions focused on the “fact-finding” role or province of the trial court in determining reasonable suspicion.²⁸ Certainly an express statement or ruling that infers the trial court believed one witness over another is not a matter for appellate judges to second guess. As the Supreme Court explained:

[O]ur trial judges are able to see and hear the witnesses and other evidence first-hand. But the appellate bench, in a far corner of the upper deck, doesn’t provide such a clear view. Remote from the hearing in time and frequently in distance, we review a cold paper record. Thus, unless that record leads us to conclude the trial judge made a clear error in his findings of fact, we will apply the law de novo to the facts as the trial court found them.²⁹

2. *The (Limited?) Power of Video.*—The *Robinson* opinion discussed above also includes an important discussion of the relative importance of video evidence in appellate review.³⁰ After considering the approach of other jurisdictions, the Indiana Supreme Court concluded that it “consider[s] video evidence admitted in the trial court to be a necessary part of the record on appeal, just like any other type of evidence.”³¹ “And just like any other type of evidence, video is subject to conflicting interpretations.”³² Although the deputy’s testimony conflicted to some extent with the police vehicle video, the supreme court emphasized the importance of the police officer’s “experience and expertise,” which “led the trial judge to weigh [the officer’s] testimony more heavily than the video evidence, and we decline Robinson’s invitation to substitute our own judgment for that of the trial court and rebalance the scales in her favor.”³³

The Indiana Supreme Court took a somewhat different approach a year earlier, though, in a case where a school liaison officer believed a student had forcibly resisted arrest.³⁴ In reversing the juvenile court’s true finding, the supreme court mentioned both the officer’s testimony and video of the incident, seemingly placing more weight on the video.³⁵ “The surveillance video further confirms Sergeant Smith’s restrained and cautious characterization of K.W.’s conduct. It shows K.W. turning and taking a step away from Sergeant Smith

26. *Robinson*, 5 N.E.3d at 367.

27. *Id.* at 368.

28. *Id.*

29. *Keck*, 4 N.E.3d at 1185-86.

30. *Robinson*, 5 N.E.3d at 366.

31. *Id.*

32. *Id.*

33. *Id.* at 367.

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

35. *Id.*

while his arm was still in the officer's grasp"³⁶

B. Statements to Police

1. *Detective's Comments About Race Render Confession Involuntary.*—In *Bond v. State*,³⁷ the Indiana Supreme Court reaffirmed that police may employ a number of “interrogation techniques,” including lying, to secure a confession but may not “imp[ly] that the suspect's race precluded him from receiving a fair trial and an impartial jury.”³⁸ Specifically, the detective told an African American suspect:

[d]on't let twelve people who are from Schererville, Crown Point—white people, Hispanic people, other people that aren't from Gary, from your part of the hood—judge you. Because they're not gonna put people on there who are from your neck of the woods. You know that. They're not gonna be the ones to decide what happens to you. You know that. I know that. Everybody knows that.³⁹

The Indiana Supreme Court reversed the denial of the defendant's motion to suppress his statement to police, concluding the detective's statement

was an intentional misrepresentation of rights ensconced in the very fabric of our nation's justice system—the rights to a fair trial and an impartial jury, and the right not to be judged by or for the color of your skin—carried out as leverage to convince a suspect in a criminal case that his only recourse was to forego his claim of innocence and confess.⁴⁰

In the days after the *Bond* opinion was issued, many lawyers engaged in thoughtful soul-searching about the ways in which race manifests itself in jury selection and beyond. As one deputy prosecutor wrote on the Indiana Law Blog: “the court doesn't even address the elephant in the room, which in my mind is: What if the detective was accurate about the jury situation? Does the court merely bypass the whole issue by stating that the detective can't talk about the elephant or use the presence of the elephant as leverage?”⁴¹

2. *Inadequate Miranda Advisement.*—In *Kelly v. State*,⁴² the State conceded the statements defendant made before police officer read her the *Miranda* warning should be suppressed, but argued that her post-*Miranda* statements are

36. *Id.* at 613 n.1.

37. 9 N.E.3d 134 (Ind. 2014).

38. *Id.* at 136.

39. *Id.*

40. *Id.* at 138.

41. *A Potential Dialogue on the Supreme Court's Opinion this Week in Bond v. State*, IND. LAW BLOG (May 15, 2014, 2:31 PM), http://indianalawblog.com/archives/2014/05/ind_decisions_a_213.html, archived at <http://perma.cc/B8KR-8G69>.

42. 997 N.E.2d 1045 (Ind. 2013).

admissible under *Oregon v. Elstad*.⁴³ The Indiana Supreme Court disagreed, noting that the defendant's pre-warning statement regarding knowledge of cocaine in her vehicle was more specific than her post-warning statement, both statements concerned the same subject, were made in the same location, and mere minutes apart, in response to the same officer.⁴⁴ Most significantly, officers referred to defendant's pre-warning admission three times during the post-warning interrogation.⁴⁵ Under these circumstances, the supreme court concluded, as in *Missouri v. Seibert*,⁴⁶ "that a reasonable person in the suspect's shoes would not have understood [the Miranda warning] to convey a message that she retained a choice about continuing to talk."⁴⁷

C. Competency to Stand Trial

In *State v. Coats*,⁴⁸ the trial court dismissed charges after doctors opined competency could never be restored for a defendant suffering from Alzheimer's disease.⁴⁹ The Indiana Supreme Court reversed, explaining:

the legislature entrusts only the superintendent of the state institution where the defendant has been committed with the power to determine that the defendant does not have a substantial probability of attaining competency to stand trial within the foreseeable future. The legislature's choice is deliberate, as it is the DMHA's experts who observe and work with the committed defendant for up to ninety days.⁵⁰

The unanimous opinion concluded: "Only by following the strict statutory framework set forth by the legislature in Ind. Code chapter 35-36-3 can both the interests of the State and Coats be protected."⁵¹

D. Jury Issues

Although there are relatively few jury trials in Indiana each year,⁵² each presents numerous opportunities for reversible error, from selecting the jury, to a variety of rulings or counsel's remarks during the trial, to jury instructions and conduct of the deliberating jurors. Three opinions are discussed below, including

43. 470 U.S. 298 (1985).

44. *Kelly*, 997 N.E.2d at 1054.

45. *Id.* at 1055.

46. 542 U.S. 600 (2004).

47. *Kelly*, 997 N.E.2d at 1055.

48. 3 N.E.3d 528 (Ind. 2014).

49. *Id.* at 530-31.

50. *Id.* at 534.

51. *Id.* at 538.

52. See, e.g., Joel Schumm, *The Disappearing Jury Trial in Indiana: Some Thoughts (and Stats) on the Past Five Years*, THE INDIANA LAW BLOG (Dec. 18, 2012, 9:17 AM), http://indianalawblog.com/archives/2012/12/ind_courts_the_36.html, archived at <http://perma.cc/H6VV-TUDQ>.

one involving challenges to jurors during voir dire and the other two involving deliberation issues of unauthorized communication and replacing a juror.

1. *Batson Reversal for Striking the Only African American Subject to Voir Dire*.—The Indiana Supreme Court has previously held that removal of “the only . . . African American juror that could have served on the petit jury does raise an inference that the juror was excluded on the basis of race”⁵³ in violation of *Batson v. Kentucky*.⁵⁴ In *Robertson v. State*,⁵⁵ the State used a peremptory challenge to remove the only African American venire person, and the trial court did not require the State to offer a race-neutral reason for the strike.⁵⁶ Neither the defendant or State had an opportunity to conduct voir dire of the other African American member of the venire.⁵⁷ The court of appeals reversed a conviction and remanded for a new trial, concluding “for all intents and purposes the State used its peremptory challenges to strike the only African-American member of the venire.”⁵⁸

2. *Unauthorized Communication*.—Acknowledging its precedent had “given trial courts inconsistent guidance” about how to address claims of unauthorized contacts and communication with jurors, the Indiana Supreme Court clarified that precedent in *Ramirez v. State*.⁵⁹ The court explained:

Defendants seeking a mistrial for suspected jury taint are entitled to the presumption of prejudice only after making two showings, by a preponderance of the evidence: (1) extra-judicial contact or communications between jurors and unauthorized persons occurred, and (2) the contact or communications pertained to the matter before the jury. The burden then shifts to the State to rebut this presumption of prejudice by showing that any contact or communications were harmless.

If the State does not rebut the presumption, the trial court must grant a new trial. On the other hand, if a defendant fails to make the initial two-part showing, the presumption does not apply. Instead, the trial court must apply the probable harm standard for juror misconduct, granting a new trial only if the misconduct is “gross and probably harmed” the defendant. But in egregious cases where juror conduct fundamentally compromises the appearance of juror neutrality, trial courts should skip *Currin*’s two-part inquiry, find irrebuttable prejudice, and immediately declare a mistrial. At all times, trial courts have discretion to decide whether a defendant has satisfied the initial two-part showing necessary to obtain the presumption of prejudice or a finding of irrebuttable

53. *McCormick v. State*, 803 N.E.2d 1108, 1111 (Ind. 2004) (internal quotation marks and citations omitted).

54. 476 U.S. 79 (1986).

55. 9 N.E.3d 765 (Ind. Ct. App. 2014), *trans. denied*, 15 N.E.3d 588 (Ind. 2014).

56. *Id.*

57. *Id.*

58. *Id.* at 769.

59. 7 N.E.3d 933 (Ind. 2014).

prejudice.⁶⁰

The justices emphasized that trial courts “must immediately investigate suspected jury taint by thoroughly interviewing jurors collectively and individually if necessary.”⁶¹

If any of the jurors have been exposed, he must be individually interrogated by the court outside the presence of the other jurors, to determine the degree of exposure and the likely effect thereof. After each juror is so interrogated, he should be individually admonished. After all exposed jurors have been interrogated and admonished, the jury should be assembled and collectively admonished, as in the case of a finding of “no exposure.” If the imperiled party deems such action insufficient to remove the peril, he should move for a mistrial.⁶²

The supreme court rejected the claim by the defendant in *Ramirez* because the trial court was within its discretion to conclude that a juror relaying an incident of gunshots heard near a juror’s apartment to other members of the jury in a trial for murder and criminal gang activity “was nothing more than a concerned individual sharing a frightening, but unrelated, personal experience with her peers.”⁶³

Ramirez could be read to suggest the trial court should interview all the jurors when an issue is brought to its attention. A trial court is certainly free, and arguably expected, to take this action on its own. If not, however, the party claiming error should request such interviews. *Lyons v. State*,⁶⁴ suggests counsel should use Rule 606(b) to put evidence into record of outside influence.⁶⁵ In *Lyons*, the trial court failed to instruct the alternates not to participate.⁶⁶ But without any evidence they did participate, the court of appeals found no fundamental error.⁶⁷

3. *Replacing a Deliberating Juror.*—*Wright v. State*⁶⁸ is the most recent case where a trial court failed to heed the Indiana Supreme Court’s requirements in removing a deliberating juror of creating a “carefully developed record as to the grounds for removal,” as well as providing an instruction “that removal in no way reflected approval or disapproval of the views expressed by the [dismissed] juror.”⁶⁹

Discharging a juror after deliberations have begun may only occur:

60. *Id.* at 939 (citations omitted).

61. *Id.* at 940.

62. *Id.* (quoting *Lindsey v. State*, 295 N.E.2d 819, 824 (Ind. 1973)).

63. *Id.*

64. 993 N.E.2d 1192 (Ind. Ct. App. 2013).

65. *Id.* at 1196.

66. *Id.*

67. *Id.* at 1196-97.

68. 12 N.E.3d 314 (Ind. Ct. App. 2014).

69. *Id.* at 316, 320.

in the most extreme situations where it can be shown that the removal of the juror (1) is necessary for the integrity of the process, (2) does not prejudice the deliberations of the rest of the panel, and (3) does not impair the party's right to a trial by jury.⁷⁰

In *Wright*, the discharged juror simply “voted for acquittal based on his determination the victim was not credible, and he would not change his mind”—behavior that does not fall within any of the three categories.⁷¹

E. Amending Charges: A Rare Reversal

Indictments and informations may be amended by the State in a number of circumstances outlined in Indiana Code section 35-34-1-5.⁷² Amendments are always permissible for immaterial defect, and several examples are listed, including the catch-all category of “any other defect which does not prejudice the substantial rights of the defendant.”⁷³ According to Indiana case law:

A defendant's substantial rights include a right to sufficient notice and an opportunity to be heard regarding the charge; and, if the amendment does not affect any particular defense or change the positions of either of the parties, it does not violate these rights. Ultimately, the question is whether the defendant had a reasonable opportunity to prepare for and defend against the charges.⁷⁴

In *Nunley v. State*,⁷⁵ the State originally listed prior convictions for theft and possession of cocaine as the predicate offenses.⁷⁶ On the day after the jury was empaneled, the State moved to amend the information to remove the possession conviction because it did not qualify under the habitual statute.⁷⁷ Defense counsel objected, but the trial court allowed the state to replace the possession charge with additional theft charges and continued the trial for six days to allow the defendant to prepare his defense.⁷⁸

The court of appeals reversed, finding a violation of Nunley's substantial rights under subsections (a), (b), and (c) of the statute: “[T]he amendment drastically changed Nunley's available defense that the State had not alleged convictions that would support an habitual offender finding,” which was no

70. *Id.* at 316.

71. *Id.* at 320.

72. IND. CODE § 35-34-1-5 (2014).

73. *Id.* § 35-34-1-5(a).

74. *Nunley v. State*, 995 N.E.2d 718, 723 (Ind. Ct. App. 2013), *trans. denied*, 4 N.E.3d 1187 (Ind. 2014) (quoting *Gomez v. State*, 907 N.E.2d 607, 611 (Ind. Ct. App. 2009)).

75. *Id.* at 718.

76. *Id.* at 721.

77. *Id.* at 722.

78. *Id.*

longer available to him under the amended information.⁷⁹ As to subsection (e), the court of appeals noted that the State had admitted at the time of the amendment that it was not supported by “good cause.”⁸⁰ Finally, applying subsection (e), the court concluded the defendant did not waive the issue for appeal by failing to request a continuance, noting the trial court did not give him a chance to request a continuance after the trial court granted the motion to amend and before granting a continuance on its own motion.⁸¹

F. Prosecutorial Misconduct

Although claims of prosecutorial misconduct are frequently raised, they are seldom successful in leading to a new trial for a criminal defendant. For example, in cases appealed from Marion County over two and a half years, Indiana appellate courts agreed or assumed without deciding that misconduct had occurred in twenty-two cases.⁸² But only one of those cases resulted in a new trial.⁸³

Because defense counsel failed to object or otherwise preserve the issue of prosecutorial misconduct for appeal in all twenty-two cases,⁸⁴ the affirmance of convictions, even in the face of sometimes multiple instances of misconduct, is explained in part by the fundamental error doctrine. As the Indiana Supreme Court reiterated in *Ryan v. State*,⁸⁵ defendants are “‘highly unlikely’ to prevail on a claim of fundamental error relating to prosecutorial misconduct.”⁸⁶ The fundamental error doctrine requires “‘an undeniable and substantial effect on the jury’s decision [such] that a fair trial was impossible.’”⁸⁷

In *Ryan* the supreme court noted the impropriety of inviting the jury to convict for reasons other than the defendant’s own guilt when the prosecutor alluded to the “bigger picture,” to “hearing about this happening” without a chance “to stop it,” and to other perpetrators such as “a teacher, or a coach, or a pastor”; and then imploring the jury to “send the message that we’re not going to allow people to do this.”⁸⁸ It also expressed disapproval of the prosecutor’s “characterization of defense counsel’s line of argumentation as ‘how guilty people walk’ and a ‘trick,’” which violates the requirement that lawyers “demonstrate respect for the legal system and for those who serve it, including

79. *Id.* at 723.

80. *Id.* at 725.

81. *Id.*

82. Joel M. Schumm, *Isn’t It Time to Get Serious About Prosecutorial Misconduct?* Ind. Law Blog (July 7, 2014, 8:10 AM), http://indianalawblog.com/archives/2014/07/ind_courts_isnt.html, archived at <http://perma.cc/8FRY-EUNX>.

83. *Id.*

84. *Id.*

85. 9 N.E.3d 663 (Ind. 2014).

86. *Id.* at 667.

87. *Id.* (emphasis in original).

88. *Id.* at 672.

. . . other lawyers.”⁸⁹

Nevertheless, although “[t]he prosecutor improperly urged the jury to convict the defendant for reasons other than his guilt,” the supreme court affirmed the convictions because “the defendant's failure to contemporaneously object and enable the trial court to take corrective action results in procedural default of the defendant's appellate claim.”⁹⁰ Simply put, the effect of the misconduct “did not make a fair trial for the defendant impossible.”⁹¹

The misconduct was also not objected to but even more egregious in *Brummett v. State*,⁹² decided one day before *Ryan*. During the jury trial for child molesting and sexual misconduct with a minor, the deputy prosecutor made comments implying defense counsel’s arguments helped guilty men go free.⁹³ She stated defense counsel employed “tricks” while questioning the child victims by sitting at counsel table.⁹⁴

The prosecutor stated, “I trust that if it was a child that any of you loved having to come into this courtroom you would appreciate um, that same conviction or anger, call it whatever you want, coming out of the State if it was your kid coming on the stand,” asking them to focus on irrelevant and improper considerations.⁹⁵ The prosecutor also accused defense counsel of collaborating with the defendant to falsify information: “And in those months he couldn't come up with anything. But once he hired an attorney and they were able to kind of talk things through all of a sudden it's this money issue.”⁹⁶

The court of appeals found that the prosecutor's statement that “these kids do not . . . they do not lie about the Defendant,” was not based on any evidence outside of the girls' testimony and concluded that the statement constituted improper vouching.⁹⁷ Moreover, although the prosecutor’s comment that a witness, “had nothing to gain,” was permissible, the prosecutor went too far when she stated that the witness “just had to do the right thing,” as it suggested that the prosecutor knew the witness was telling the truth.⁹⁸

The court of appeals found fundamental error and reversed the convictions.⁹⁹ In short, it concluded the prosecutor's comments impugned the integrity of defense counsel and demeaned the role of defense counsel; personally vouched for the State’s witnesses; and asked questions that were argumentative and

89. *Id.* (citing Preamble [5], Ind. Professional Conduct Rules).

90. *Id.* at 673.

91. *Id.*

92. 10 N.E.3d 78 (Ind. Ct. App. 2014). A short opinion reaffirming the original decision was issued, initially as an unpublished opinion on August 20, 2014, but later ordered published in December. 21 N.E.3d 840 (Ind. 2014).

93. *Brummett*, 10 N.E.3d at 85.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 87.

98. *Id.*

99. *Id.* at 91.

inflammatory.¹⁰⁰

Finally, in another case, the court of appeals found misconduct but nevertheless upheld a conviction. Prosecutors may not comment on a defendant's decision not to testify at trial under *Griffin v. California*.¹⁰¹ Yet nearly fifty years after *Griffin*, the practice continues. In *Thomas v. State*,¹⁰² the prosecutor said the following during closing argument:

there's not another story that's going on here. You've not heard the testimony of another story. You heard what [Thomas] told Officer Hinton, but he wasn't raising his right hand swearing to tell the truth. He's not a witness in this case.¹⁰³

Defense counsel objected, and the trial court offered a "strongly worded rebuke to the State," admonished the jury with a "fairly detailed caution," but denied a mistrial.¹⁰⁴ The court of appeals concluded "it is self-evident that the deputy prosecutor was suggesting that the jury draw an inference of guilt from Thomas' decision not to raise his right hand, be sworn in, and tell the jury his story."¹⁰⁵ Nevertheless, absent "an argument that the admonishment was ineffective," it found the error harmless because "the trial court's curative instruction defused the impact of the State's improper remark."¹⁰⁶

G. Deployed Soldiers and Continuances

Lawyers should be considerate of opposing counsel, witnesses, and the trial court in filing timely motions for continuance. The defense lawyer in *Calvert v. State*¹⁰⁷ failed on that score, filing three separate motions for continuance just one or three days before a trial or hearing, which created "an undue hardship" for the State's police officer witness.¹⁰⁸ The client was deployed in Afghanistan and "had a constitutional right to be present at his trial, but he was bound by his U.S. Army Orders for deployment overseas, which compelled him to be absent from the trial."¹⁰⁹ Therefore, the trial court should have granted his motion for

100. *Id.*

101. 380 U.S. 609 (1965).

102. 9 N.E.3d 737 (Ind. Ct. App. 2014).

103. *Id.* at 742.

104. Although decisional law generally requires an objection, request for admonishment, and request for a mistrial, the Indiana Court of Appeals concluded: "In light of the trial court's firm warning, Thomas made the reasonable decision to forego the request for an admonishment, as he could infer that it would be insufficient to cure the error, and instead to immediately request a mistrial." *Id.* at 743.

105. *Id.* at 744.

106. *Id.*

107. 14 N.E.3d 818 (Ind. Ct. App. 2014).

108. *Id.* at 820.

109. *Id.* at 822.

continuance and erred by trying him in absentia.¹¹⁰

H. *Crime or Not a Crime?*

As has become a tradition in the Survey Article, this section again surveys cases in which the appellate courts addressed whether there was sufficient evidence to support the crime.¹¹¹

1. *How Much Evidence is Required? Did the Supreme Court Lower the Bar?*—In 2013, a panel of the court of appeals reversed a conviction for burglary, finding insufficient the evidence of a glove with the defendant's DNA found inside the point of entry of the burglarized business.¹¹² The court reasoned: "Were we to affirm [Meehan's conviction], we would be creating a precedent that would make it relatively easy for criminals to frame other individuals; all they would need to do is obtain an object with someone else's DNA and leave it at the crime scene."¹¹³ That sentence seems to have drawn the attention of the Indiana Supreme Court, which granted transfer and ultimately upheld the conviction.¹¹⁴

The supreme court relied not only on "the presence of Meehan's DNA on the glove," but also recited a police officer's "uncontroverted testimony that the glove was discovered only steps from the point of entry of a secured building, Meehan's lack of authorization to enter to the [burglarized] building, and Meehan's possession of potential burglary tools," even though those tools were found on Meehan several months after the burglary.¹¹⁵ Taking aim at that sentence from the court of appeals' opinion, the court reasoned:

The existence of the possibility of being "framed" does not amount to a lack of substantial evidence of probative value from which the jury could reasonably infer that Meehan committed the burglary. In reviewing sufficiency claims, we look at what evidence was presented to the jury,

110. *Id.*

111. The cases discussed in this section are challenges to the sufficiency of the evidence after trial. Other cases in prior years, however, have found their way to the appellate courts through pretrial motions to dismiss—some ending successfully. *See, e.g.,* *Smith v. State*, 867 N.E.2d 1268 (Ind. 2007) (reversing denial of motion to dismiss child seduction charges). The continued viability of pre-trial dismissals, however, may be somewhat in question after *Corbin v. State*, a 2014 opinion from the Indiana Supreme Court. *Corbin v. State*, 17 N.E.3d 270 (Ind. 2014). There, a teacher and coach who had communicated with a sixteen-year-old student on Facebook was charged with attempted child solicitation. *Id.* at 271. In upholding the denial of the motion to dismiss, the supreme court reasoned that the charging information mostly tracked the language of the seduction statute and the case was "in the charging stage, when other evidence, if there [was] any, [was] not yet known." *Id.* at 272. Because "there [were] enough unanswered questions," the court held the charges were "sufficient to survive a motion to dismiss at [that] time." *Id.*

112. *Meehan v. State*, 986 N.E.2d 371, 372 (Ind. Ct. App. 2013), *vacated*, 7 N.E.3d 255 (Ind. 2014).

113. *Id.* at 376.

114. *Meehan v. State*, 7 N.E.3d 255 (Ind. 2014).

115. *Id.*

not at what evidence was not presented.¹¹⁶

Just months after the supreme court's opinion in *Meehan*, Judge Crone, the author of the now-vacated court of appeals' opinion in that case, opined in another sufficiency case that the supreme court had fundamentally changed the sufficiency equation. Reflecting back on *Meehan*, Judge Crone wrote in a two-to-one opinion in *Willis v. State*:¹¹⁷

Given that approximately seven billion other persons also lacked authorization to enter the building and that the "potential burglary tools" were found in Meehan's possession while he was standing on a street corner over seven months after the burglary, we must conclude that under *Meehan*, the quantum of circumstantial evidence needed to affirm a criminal conviction in Indiana is extremely small indeed.¹¹⁸

In an opinion joined by Judge Baker, a conviction for criminal trespass was upheld in *Willis* because the defendant

was observed running near the scene of the alleged crime shortly after a security alarm was activated and voices and noises were heard inside the Center. Another man was seen running in the opposite direction. Evidence of flight may be considered as circumstantial evidence of consciousness of guilt. Police also found a vandalized vending machine inside the Center and a vehicle with its doors and trunk open outside the Center. Officers apprehended [the defendant] based on the description of Officer Clouse, who confirmed his identity.¹¹⁹

Judge Barnes, however, dissented.

The entirety of the evidence upon which Willis was convicted was the fact that he was seen running at a distance of approximately 100 yards. I am not convinced that this evidence can be construed as Willis's fleeing from the scene of the crime. Even though we are bound to give the State a reasonable inference here, it is well-settled Indiana law that flight from a crime scene, in and of itself, is not sufficient to sustain a conviction. We are not in the business of horseshoes and hand grenades, where "close" is good enough. I am convinced the State has failed in its burden of proof and vote to reverse.¹²⁰

Transfer was granted in *Willis*, and next year's survey will discuss whether the Indiana Supreme Court's view of the sufficiency standard changed in *Meehan*.

2. *Conspiracy to Commit Robbery Does Not Require Actual Serious Bodily Injury for A Felony Enhancement*.—The base offense of robbery is a Class C

116. *Id.*

117. 13 N.E.3d 460 (Ind. Ct. App. 2014), *trans. granted*, 17 N.E.3d 933 (Ind. 2014).

118. *Id.* at 462.

119. *Id.* at 462-63 (internal citation omitted).

120. *Id.* at 462 (Barnes, J., dissenting).

felony but becomes a Class A felony “if it results in serious bodily injury to any person other than a defendant.”¹²¹ As a matter of first impression in *Erkins v. State*,¹²² the Indiana Supreme Court held the State was not required to prove “the actual existence of serious bodily injury in order to convict a defendant of class A felony *conspiracy* to commit robbery”¹²³ The majority observed, “it is well established that defendants can conspire to commit a specific result—here robbery resulting in serious bodily injury.”¹²⁴ Justice David explained the A felony conspiracy offense was in effect “two ‘mini-conspiracies’ within one crime: a conspiracy to commit robbery and a conspiracy to commit serious bodily injury in the course of the robbery. Each ‘mini-conspiracy’ requires the State to establish intent, agreement, and the commission of an overt act in furtherance of the agreement.”¹²⁵

With a wealth of evidence from recorded phone conversations and surveillance cameras, the court found sufficient evidence the defendants not only conspired to rob the victim but also to seriously injure him in the course of the robbery.¹²⁶

Justice Rucker, joined by Chief Justice Dickson, dissented.¹²⁷ They emphasized that serious bodily injury is not an element of robbery but simply a penalty enhancement, and the conspiracy statute provides: “A person conspires to commit a felony when, with intent to commit *the felony*, he agrees with another person to commit *the felony*.”¹²⁸ Moreover, the dissent noted the anomalous result that co-defendants committing an actual robbery face the A felony offense only when serious bodily injury results while those who merely conspire to rob a victim may face the A felony offense “even if bodily injury never occurs. With such a lethal weapon at its disposal why would the State ever charge a simple robbery offense?”¹²⁹

3. *Resisting Law Enforcement*.—Defendants convicted of resisting law enforcement saw favorable precedent on three different fronts from the appellate courts. The first, and most common, claims involved the requirement that one “forcibly” resist law enforcement officer. Second, a case found the State had failed to prove an officer was lawfully engaged in his duties, another element of the offense. Third, the Indiana Supreme Court placed a significant limitation on the breadth of the part of the statute that allows convictions for fleeing from

121. IND. CODE § 35-42-5-1 (2014).

122. 13 N.E.3d 400 (Ind. 2014).

123. *Id.* at 407 (emphasis added).

124. *Id.* at 408.

125. *Id.*

126. *Id.* at 410.

127. Although the vast majority of recent criminal opinions from the Indiana Supreme Court have been unanimous, *Erkins*, like *Smith v. State*, discussed in *infra* notes 172-76, divided the three newest justices and the two more senior justices who again dissented in favor of a criminal defendant.

128. *Id.* at 412-13 (quoting IND. CODE § 35-41-5-2(a) (2014)) (emphasis in original).

129. *Id.* at 413.

officers.

a. Forcible resistance.—The Indiana resisting statute has for decades required proof that a defendant “forcibly resists, obstructs, or interferes with a law enforcement officer”¹³⁰ Numerous convictions have been reversed, however, because the State failed to prove forcible resistance.¹³¹

In *Walker v. State*,¹³² the Indiana Supreme Court considered the sufficiency of evidence to support a conviction for resisting law enforcement against a defendant who refused repeated orders to lay down and “advanced aggressively, with his fists clenched, to within a few feet of the police officer.”¹³³ The court has long required proof of “strong, powerful, violent means” to uphold conviction, reversing cases in recent years that failed to meet that standard.¹³⁴

In *Walker*, the supreme court summarized several recent Indiana cases before rejecting “any strict bright-line test for whether a defendant acts ‘forcibly’—at least, not one with any more definitiveness than the language already in use by our case law.”¹³⁵ Although refusing the officer’s orders and walking toward him were not evidence of forcible resistance, displaying his fists—which the court characterized as a “weapon”—within three or four feet of the officer was “sufficient to show an active threat of strength, violence, or power.”¹³⁶ Noting that its “body of case law provides ample guideposts for appellate review,” the court upheld the conviction.¹³⁷

Unlike *Walker*, *Macy v. State*¹³⁸ found insufficient evidence. There, the Indiana Court of Appeals concluded that the defendant’s opening the door of a police car after being handcuffed and placed inside “did not involve any interaction with [the officer] nor was it directed toward him or did it present a threat to him.”¹³⁹ Previous cases affirming convictions had involved “at a minimum, some physical interaction with the law enforcement officer.”¹⁴⁰ Moreover, the defendant’s refusal to place her feet inside the vehicle was passive resistance “akin to a refusal to stand or some other passive action” held insufficient in previous cases.¹⁴¹

b. Lawfully engaged.—Failure of proof on the forcibly element is the most frequently raised and successful appellate claim under the statute, but sometimes the evidence may fall short on other elements. As a general rule, “a private

130. IND. CODE § 35-44.1-3-1(a)(1) (2014).

131. See, e.g., *K.W. v. State*, 984 N.E.2d 610 (Ind. 2013); *Berberena v. State*, 917 N.E.2d 780 (Ind. Ct. App. 2009); *Graham v. State*, 903 N.E.2d 963 (Ind. 2009).

132. 998 N.E.2d 724 (Ind. 2013).

133. *Id.* at 725.

134. *Id.* at 727 (citing *K.W.*, 984 N.E.2d at 610; *Graham*, 903 N.E.2d at 963).

135. *Id.* at 728.

136. *Id.* at 729.

137. *Id.* at 728.

138. 9 N.E.3d 249 (Ind. Ct. App. 2014).

139. *Id.* at 253.

140. *Id.*

141. *Id.* (citing *A.C. v. State*, 929 N.E.2d 907 (Ind. Ct. App. 2010)).

citizen may not use force in resisting a peaceful arrest by an individual who he knows, or has reason to know, is a police officer performing his duties regardless of whether the arrest in question is lawful or unlawful.”¹⁴² In *Harper v. State*, officers unlawfully entered Harper’s residence, but because they were not engaged in the lawful execution of their duties at the time they arrested Harper and then attempted to remove her wedding ring in preparation for booking, the conviction was reversed.¹⁴³

c. Fleeting and reasonable suspicion.—In a pair of cases decided on the same day, the Indiana Supreme Court considered whether a defendant could be convicted of resisting by fleeing when a police officer lacked reasonable suspicion to stop him. In *Gaddie v. State*,¹⁴⁴ a defendant was told to stop by an officer who responded to the report of a disturbance. Because Gaddie continued walking away when ordered to stop, he was charged with and later convicted of resisting law enforcement by flight.¹⁴⁵ The Indiana Supreme Court reversed, concluding: “To avoid conflict with the Fourth Amendment, Indiana Code section 35-44.1-3-1(a)(3), the statute defining the offense of Resisting Law Enforcement by fleeing after being ordered to stop must be construed to require that a law enforcement officer’s order to stop be based on reasonable suspicion or probable cause.”¹⁴⁶

On the same day *Gaddie* was decided, the supreme court decided another case upholding the revocation of probation based on the commission of a new offense of resisting.¹⁴⁷ In *Murdock*, however, “the defendant ran when the officer appeared, engaged in furtive and evasive activity in a high-crime area, was uncooperative, and matched the description of the suspect.”¹⁴⁸

4. Free Speech Limitations on the Intimidation Statute.—*Brewington v. State*¹⁴⁹ provides a comprehensive and thoughtful review of federal and Indiana free speech principles as they relate to Indiana’s intimidation statute.¹⁵⁰ Although making clear that protection extends to even “intemperate or caustic” speech involving public officials or issues of public or general concern, including comments about a judge and doctor involved in the custody dispute over which the defendant wrote on his blog, the Indiana Supreme Court ultimately upheld the intimidation convictions because they were “true threats . . . intended to put the victims in fear for their safety.”¹⁵¹ “To the extent Defendant attempted to veil his threats behind self-serving disclaimers and supposed ‘hypotheticals,’ the victims

142. *Harper v. State*, 3 N.E.3d 1080 (Ind. Ct. App. 2014).

143. *Id.*

144. 10 N.E.3d 1249 (Ind. 2014).

145. *Id.* at 1251.

146. *Id.* at 1256.

147. *Murdock v. State*, 10 N.E.3d 1265 (Ind. 2014).

148. *Id.* at 1268.

149. 7 N.E.3d 946 (Ind. 2014).

150. See IND. CODE § 35-42-2-1(c) (2014).

151. *Brewington*, 7 N.E.3d at 953.

saw through that pretext—as did the jury, and as do we.”¹⁵²

Nevertheless, the unanimous opinion makes clear that two subparts of the statute—“(6) expose the person threatened to hatred, contempt, disgrace, or ridicule [and] (7) falsely harm the credit or business reputation of the person threatened”—may be applied as written “[o]nly where a purely-private figure is involved, *and* the alleged ‘threat’ involves no colorable issue of public concern.”¹⁵³ “[O]therwise, the actual malice standard will preclude most prosecutions,” and “the State will be well-advised to avoid bringing charges under those subparts”¹⁵⁴

5. *Public Intoxication*.—In response to the supreme court’s 2011 opinion in *Moore v. State*,¹⁵⁵ the public intoxication statute was amended in 2012 to require beyond intoxication in a public place that the defendant:

- (1) endangers the person’s life;
 - (2) endangers the life of another person;
 - (3) breaches the peace or is in imminent danger of breaching the peace;
- or
- (4) harasses, annoys, or alarms another person.¹⁵⁶

*Holbert v. State*¹⁵⁷ provides a summary of the early published decisional law applying the amended statute. In *Holbert*, a woman called 9-1-1 after seeing a man twice cross her backyard and then enter her neighbor’s garage.¹⁵⁸ In reversing the public intoxication conviction, the court of appeals noted that the woman had been alarmed by the defendant’s behavior on private—not public—property, and there was no suggestion that he placed himself in danger by his public conduct of walking down a sidewalk.¹⁵⁹ Beyond *Holbert*, another case finding insufficient evidence was *Sesay v. State*¹⁶⁰ where the court concluded that an intoxicated defendant standing by the side of the road after the car he rode in crashed did not cause endangerment.¹⁶¹

Cases finding sufficient evidence include *Thang v. State*,¹⁶² where the supreme court concluded “it is a reasonable inference that the defendant had arrived at the gas station by driving [] on the public streets while intoxicated, thereby endangering his or another person’s life.”¹⁶³ In *Williams v. State*,¹⁶⁴ the

152. *Id.* at 979.

153. *Id.* at 962.

154. *Id.*

155. 949 N.E.2d 343 (Ind. 2011).

156. IND. CODE § 7.1-5-1-3(a) (2012).

157. 996 N.E.2d 396 (Ind. Ct. App. 2013), *trans. denied*, 1 N.E.3d 149 (Ind. 2014).

158. *Id.*

159. *Id.* at 402.

160. 5 N.E.3d 478 (Ind. Ct. App.), *trans. denied*, 10 N.E.3d 516 (Ind. 2014).

161. *Id.*

162. 10 N.E.3d 1256 (Ind. 2014).

163. *Id.* at 1259.

164. 989 N.E.2d 366 (Ind. Ct. App. 2013).

court found sufficient evidence that the defendant endangered his life or the life of another, breached the peace, or harassed, annoyed or alarmed another person when he refused to leave the scene of an accident and became belligerent after a police officer ordered him to leave the street.¹⁶⁵ The court of appeals in *Naas v. State*¹⁶⁶ found sufficient evidence that the defendant breached the peace or alarmed a driver involved in a collision whom he confronted at gas station.¹⁶⁷

Finally, even when it is not clear which subsection of the statute is at issue, defendants can nevertheless prevail on appeal, as in *Milam v. State*,¹⁶⁸ where the court found no violation of any of the four sections of the statute. In that case, an officer noticed an arm and object “hanging out the passenger’s side window of a car, followed by the sound of shattering glass.”¹⁶⁹ An argument ensued during which a police officer described Milam, who smelled of alcohol and was slurring his speech, as loud, boisterous, and uncooperative.¹⁷⁰ The trial court declined to determine who threw the bottle, and the court of appeals found no evidence that another passenger in the vehicle was annoyed by Milam’s comments or that the officer “felt threatened in any way” by them.¹⁷¹

6. *Other Offenses.*—*a. Failure to immediately report child abuse.*—In *Smith v. State*,¹⁷² a high school principal waited four hours to notify the police or Department of Child Services of a student’s report that she had been raped by another student.¹⁷³ A three-to-two majority of the Indiana Supreme Court upheld the misdemeanor conviction for failing to report child abuse or neglect, finding that (1) the reporting requirement was not unconstitutionally vague, and (2) the evidence was sufficient to show the principal (a) had reason to believe the student was raped and was also a child in need of services, and (b) failed to make an immediate report as required by the statute.¹⁷⁴

In considering whether a report was “immediately” filed, the court emphasized “the length of the delay is not the only thing that matters. What also matters is the urgency with which the person files the report, the primacy of the action, and the absence of an unrelated and intervening cause for delay.”¹⁷⁵

Justice Rucker, joined by Chief Justice Dickson, dissented, believing the principal did not know or should have known that the rape of a minor student by another minor student was “child abuse” under the failure to report statute.¹⁷⁶

165. *Id.*

166. 993 N.E.2d 1151 (Ind. Ct. App. 2013).

167. *Id.*

168. 14 N.E.3d 879 (Ind. Ct. App. 2014).

169. *Id.* at 880.

170. *Id.*

171. *Id.* at 882.

172. 8 N.E.3d 668 (Ind. 2014).

173. *Id.* at 692.

174. *Id.*

175. *Id.* at 691.

176. *Id.* at 694.

b. Upskirt photographs are attempted child exploitation.—In *Delagrang v. State*,¹⁷⁷ the Indiana Supreme Court upheld convictions for attempted child exploitation against a man who took “upskirt” photographs of women and girls by means of a concealed shoe camera. Although the defendant claimed he merely intended to get “fetish photography, which is high heels, boots, pantyhose, panty shots, nylons,” the Indiana Supreme Court found sufficient circumstantial evidence that a jury could have inferred he “intended to capture not just images of undergarments but also—or instead—images of uncovered genitals.”¹⁷⁸

c. Domestic battery for extramarital relationships.—In *Bowling v. State*,¹⁷⁹ the court of appeals rejected the argument that a defendant married to one person could not be convicted of domestic battery involving another person under the “living as if a spouse” provision of Indiana Code section 35-42-2-1.3.¹⁸⁰ The individuals involved had been involved in a romantic relationship for two years and “had lived together off and on, once for as long as four to five months.”¹⁸¹ The court reasoned that other subsections of the statute allow domestic battery charges against many people, including former spouses and individuals with a child in common.¹⁸² Moreover, the court concluded that applying the statute to extramarital relationships does not broaden its intended scope, as long as the relationship falls within the living-as-if-a-spouse requirement.¹⁸³

d. A run-of-the-mill burglary is not corrupt business influence.—The Class C felony offense of corrupt business influence occurs when a person “employed by or associated with an enterprise . . . knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity.”¹⁸⁴ In *Miller v. State*,¹⁸⁵ what appeared to be a run-of-the-mill burglary and theft of property, followed by unsuccessful attempts to use stolen credit cards, was charged under the statute patterned after the federal RICO act.¹⁸⁶ In reversing the conviction, the court of appeals found insufficient evidence of the element of “enterprise.”¹⁸⁷ Specifically, the defendant and his cohort:

got together on the night in question and committed the offenses described. There was no evidence of a prior history of such conduct, nor was there evidence that they planned to repeat their escapade. The

177. 5 N.E.3d 354 (Ind. 2014).

178. *Id.* at 357-58.

179. 995 N.E.2d 715 (Ind. Ct App. 2013).

180. *Id.* at 716.

181. *Id.*

182. *Id.* at 718.

183. *Id.*

184. IND. CODE § 35-45-6-2(3) (2014).

185. 992 N.E.2d 791 (Ind. Ct. App. 2013), *trans. denied*, 7 N.E.3d 993 (Ind. 2014).

186. *Id.* at 793.

187. *Id.* at 794-95.

events all occurred in a very brief period. Indeed there was scant evidence of a *pattern* of racketeering activity. As the court pointed out in [*United States v. Rogers*, 89 F.3d 1326 (7th Cir. 1996)], the hallmark of an enterprise is structure. It is an ongoing group of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision making.¹⁸⁸

e. Insufficient evidence of raccoon chasing.—Finally, an unusual case involved a seldom charged offense of chasing (or hunting, trapping, or fishing) animals without the consent of the owner or tenant of land.¹⁸⁹ In *Schath v. State*,¹⁹⁰ a man was raccoon hunting with his dog one evening when his dog crossed the road onto private property on which he was not allowed.¹⁹¹ Schath twice retrieved his dog, which had cornered a raccoon in a drainage pipe, and immediately left the property.¹⁹²

Although appellate courts frequently emphasize their inability to “reweigh the credibility of witnesses or the evidence on appeal,” the conviction was reversed because “all the evidence in the record” showed Schath was retrieving his dog and not chasing a raccoon.¹⁹³

I. 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 transfer each year.¹⁹⁴ 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 finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.”¹⁹⁵ As summarized in last year’s survey, the traffic on sentence revision street ran one way in the State’s favor last year.¹⁹⁶ The Indiana Supreme Court issued opinions in four cases reinstating the trial court’s sentence after vacating the court of appeals-ordered reductions—and did not grant transfer in any cases for purposes of granting a sentence revision.¹⁹⁷

This was a less eventful 7(B) year. With only one reduction during the past

188. *Id.* at 795.

189. IND. CODE § 14-22-10-1 (2015).

190. 2 N.E.3d 136 (Ind. Ct. App. 2014).

191. *Id.*

192. *Id.*

193. *Id.* at 138.

194. See generally Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 46 IND. L. REV. 1033, 1057 (2013); Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 45 IND. L. REV. 1067, 1093 (2012).

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

196. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 47 IND. L. REV. 1043, 1055-57 (2014).

197. *Id.*

survey period—reduction of a twenty year sentence to fifteen for burglary in *Kovats v. State*,¹⁹⁸ the supreme court had little opportunity to vacate a sentence reduction. During this survey, in March of 2014, the court of appeals reduced a sentence of 270 years for multiple sex crimes to 165 years—still surely a life sentence—after including several pages of thoughtful analysis and precedent in *Corbally v. State*.¹⁹⁹ Transfer was not sought in the case, which easily satisfied the State’s expectation of a “compelling analysis” mentioned during the Indiana Supreme Court oral argument discussed in last year’s survey.²⁰⁰

More significantly, in June of 2014 the Indiana Supreme Court made clear that reductions are still possible. In two cases decided on the same day, a unanimous court reduced 150 year-sentences for two juvenile defendants convicted of two counts of murder and one count of robbery. In *Brown v. State*,²⁰¹ the sixteen-year-old defendant had a lengthy history of juvenile adjudications (although only one was a violent offense, a battery), had been using alcohol and marijuana for many years, and gave a detailed confession upon arrest.²⁰² The Indiana Supreme Court emphasized the defendant’s young age, noting United States Supreme Court precedent of “how children are different” and its own precedent that “has not been hesitant to reduce maximum sentences for juveniles convicted of murder.”²⁰³ Reiterating that appellate review and revision of sentences turns on the court’s “collective sense of what is appropriate, not a product of a deductive reasoning process,” the justices reduced the sentence to eighty years (sixty years for murder served consecutive to twenty years for robbery).²⁰⁴

In *Fuller v. State*,²⁰⁵ the justices reduced the sentences to eighty-five years for the fifteen-year-old defendant. “Although only a year older than Fuller, Brown unlike Fuller was an accomplice—a factor that we found particularly important. Instead Fuller was one of the actual shooters.”²⁰⁶

Citing *Brown*, in September of 2014, the Indiana Court of Appeals reduced sentences for two juveniles convicted of felony murder.²⁰⁷ The court noted the offenses “were not particularly serious” and this was the first adult offense for the defendants who had been on informal probation previously.²⁰⁸ Perhaps most notably, the court found the defendants’ culpability were similar to a co-defendant who had received a lower sentence after pleading guilty and that “it is constitutionally impermissible for a trial court to impose a more severe sentence

198. 982 N.E.2d 409 (Ind. Ct. App. 2013).

199. 5 N.E.3d 463 (Ind. Ct. App. 2014).

200. Schumm, *supra* note 196, at 1056.

201. 10 N.E.3d 1 (Ind. 2014).

202. *Id.* at 6.

203. *Id.* at 7.

204. *Id.* at 8 (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008)).

205. 9 N.E.3d 653 (Ind. 2014).

206. *Id.* at 659.

207. *Layman v. State*, 17 N.E.3d 957 (Ind. Ct. App. 2014).

208. *Id.*

because the defendant chose to stand trial rather than plead guilty.”²⁰⁹

There was no evidence that the victim was tortured or beaten or lingered in pain.²¹⁰ Further, this was the first offense for which Layman and Sharp were charged as adults.²¹¹ “Both young men [had] previously been under informal supervision in juvenile court. Although this [did] not reflect favorably upon their character, their offenses were not particularly serious and were not related to the murder in this case.”²¹² The trial court sentenced Layman to fifty-five years and Sparks to fifty years.²¹³ The court found there was difference in the relative culpability of the three defendants and their respective roles in this crime.²¹⁴ The only difference the court found was that Quiroz pled guilty and Layman and Sparks exercised their constitutional right to a jury trial.²¹⁵ Based on the foregoing, the court concluded that Layman's and Sparks' sentences were inappropriate.²¹⁶ As with Quiroz, the court suspended ten years of Layman's sentence to probation and five years of Sparks' sentence was suspended to probation.²¹⁷

Although the few reductions discussed in this section could suggest continued vitality for Appellate Rule 7(B), they also signal a trend quite different from the first ten or twelve years of this century. With one exception, the cases involve juvenile or young defendants. Moreover, the reductions were mostly quite modest—just five or ten years in some of the cases and a small percentage of a lengthy sentence in other cases. Finally, as noted in Part I, the sentencing statutes have been significantly amended for crimes committed after June 30, 2014, and many defendants will now be required to serve seventy-five percent—instead of fifty percent—of their sentences. Unless very young, defendants convicted of murder (forty-five to sixty-five years) or a Level 1 offense (maximum of fifty years) may now be facing a de facto life sentence even if convicted on only one count.

J. Other Sentencing Claims

Outside of the 7(B) realm, the appellate courts decided several cases involving enhanced sentences, partially consecutive sentences, and credit time for electronic monitoring.

209. *Id.* at 963 (quoting *Walker v. State*, 454 N.E.2d 425 (Ind. Ct. App. 1983)).

210. *See id.*

211. *Id.*

212. *Id.*

213. *Id.* at 962.

214. *Id.* at 963.

215. *Id.*

216. *Id.*

217. On the same day the court of appeals issued the *Layman* opinion, another panel employed similar language and reasoning in revising a fifty-five-year sentence for a co-defendant who had just turned eighteen to fifty years with ten suspended. *See Sharp v. State*, 16 N.E.3d 470 (Ind. Ct. App. 2014).

1. Material Elements of Offenses Cannot Enhance Sentences.—For decades Indiana precedent has prohibited use of a material element of an offense as “an aggravating circumstance to support an enhanced sentence.”²¹⁸ The rationale behind the rule is an assumption that the Indiana General Assembly “took into consideration the serious nature of every act it defines as criminal, and that in all cases it assigned an appropriate level of punishment.”²¹⁹

The issue was complicated by the sweeping 2005 amendments to Indiana’s sentencing scheme that eliminated the fixed presumptive term while retaining the lower and upper limits for each felony classification.²²⁰ In light of those amendments and *Pedraza v. State*,²²¹ several recent Indiana Court of Appeals’ opinions had held that “trial courts are no longer prohibited from considering material elements of an offense when considering aggravating circumstances at sentencing.”²²²

The Indiana Supreme Court found this reading “too broad” in *Gomillia v. State*.²²³ Rather, the court concluded, “[w]here a trial court’s reason for imposing a sentence greater than the advisory sentence includes material elements of the offense, absent something unique about the circumstances that would justify deviating from the advisory sentence, that reason is ‘improper as a matter of law.’”²²⁴

Nevertheless, the justices upheld *Gomillia*’s sentence.²²⁵ The trial court had relied on the “circumstances of the crime,” and the supreme court found both the “leadership role *Gomillia* played in the commission of these offense” and “the terror the victim suffered” appropriate reasons to enhance his sentence above the advisory term.²²⁶

2. No Partially Consecutive Sentences.—In *Wilson v. State*,²²⁷ the Indiana Supreme Court held that trial courts may not impose partially consecutive sentences “absent specific authorization by the General Assembly not found in the current statutory scheme.”²²⁸ Trial courts nevertheless retain considerable flexibility to “impose some sentences as consecutive and some as concurrent in a single sentencing order.”²²⁹

3. No Credit Time for Electronic Monitoring While in Drug Treatment Court.—In *Meadows v. State*,²³⁰ the court of appeals rejected a defendant’s

218. *Townsend v. State*, 498 N.E.2d 1198, 1201 (Ind. 1986).

219. *Pavey v. State*, 477 N.E.2d 957, 963 (Ind. Ct. App. 1985).

220. *Gomillia v. State*, 13 N.E.3d 846, 848-49 (Ind. 2014).

221. 887 N.E.2d 77 (Ind. 2008).

222. *Gomillia*, 13 N.E.3d at 852.

223. *Id.* at 846.

224. *Id.* at 853 (quoting *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007)).

225. *Id.*

226. *Id.*

227. 5 N.E.3d 759 (Ind. 2014).

228. *Id.*

229. *Id.*

230. 2 N.E.3d 788 (Ind. Ct. App. 2014).

request for credit for the time spent on electronic monitoring while in a drug court program. The court found inapplicable the statutes that allow credit time for defendants (1) confined on home detention as a condition of probation, (2) placed in a community corrections program, or (3) serving time on electronic monitoring while awaiting trial or sentencing.²³¹

Because there is no statutory mandate for credit time for electronic monitoring while in drug court, trial courts are free to exercise their discretion.²³² In affirming the denial of credit time, the court of appeals concluded that allowing “credit time to a person who fails to comply with deferral conditions diminishes the value of such programs in that the incentive to comply is undermined by the reward for failure.”²³³

K. Probation Conditions

Again this year, the court of appeals was asked to consider the propriety of probation conditions, invalidating one and upholding another. First, in *Hurd v. State*,²³⁴ the court of appeals struck a condition of probation that forbade a defendant convicted of misdemeanor battery of a woman at a bus stop from traveling within hundreds of city blocks of Indianapolis near the stop.²³⁵ The court made clear the trial court could reasonably prohibit contact with the victim or order the defendant to comply with mental health treatment but “prohibiting Hurd from entering a significant area of the central part of Indianapolis is not tailored to his rehabilitation or public safety.”²³⁶

However, in *Bratcher v. State*,²³⁷ the court of appeals upheld probation conditions prohibiting all internet use for a convicted sex offender without approval of his probation officer and prohibiting accessing of certain web sites, chat rooms and instant messaging programs frequented by children.²³⁸ The court reasoned that probationers do not enjoy the same freedoms as individual citizens and the defendant may request access from his probation officer.²³⁹

L. Notice of Appeal Deadline—Or Is It Now Flexible?

A notice of appeal is due within thirty days of “final judgment” in a case.²⁴⁰ Sentencing is usually the final judgment of a criminal case.²⁴¹ Although trial

231. *Id.* at 792-93.

232. *Id.*

233. *Id.* at 793.

234. 9 N.E.3d 720, 726 (Ind. Ct. App. 2014).

235. *Id.*

236. *Id.*

237. 999 N.E.2d 864 (Ind. Ct. App. 2013), *trans. denied*, 3 N.E.3d 539 (Ind. 2014).

238. *Id.* at 877-78.

239. *Id.* at 878.

240. IND. R. APP. P. 9(A)(1).

241. Under Appellate Rule 9, a final judgment “disposes of all claims as to all parties.” If counsel files a Motion to Correct Error under Trial Rule 59, however, the deadline for filing a

courts generally enter any restitution order at sentencing, what is the deadline for a notice of appeal when restitution is not resolved at sentencing and must be addressed at a later hearing?

In 2012 in *Haste v. State*,²⁴² the court of appeals had dismissed an appeal as premature when a notice of appeal was filed before an order on restitution, which was taken under advisement at sentencing. In allowing an appeal to go forward in *Alexander v. State*,²⁴³ in 2014, the Indiana Supreme Court distinguished *Haste* without declaring any categorical rules for the future:

However, unlike the reported facts in *Haste*, here the trial court advised [the defendant] that any Notice of Appeal had to be filed within thirty days of the June 20 hearing and the trial court appointed appellate counsel a few days later. That advisement sufficiently put matters in a state of confusion about [the defendant's] appeal deadline, we think, such that he is entitled to have his appeal decided on the merits now.²⁴⁴

Trial courts can help avoid this problem in future cases by either entering restitution orders at sentencing or making clear that a notice of appeal needs to be filed within thirty days of the sentencing hearing, even if restitution is unresolved. Holding restitution under advisement for weeks or months should not be an option because it undermines a defendant's right to appeal and interjects needless uncertainty and confusion in the appellate process.

A case decided near the end of the survey period could further complicate the timing issue. Although a failure to meet the notice of appeal deadline was previously fatal to post-conviction or probation revocation cases,²⁴⁵ the Indiana Supreme Court held in *In re Adoption of O.R.*²⁴⁶ that the failure to file a timely Notice of Appeal is not jurisdictional.²⁴⁷ Nevertheless, a late Notice of Appeal will not always lead to an appellate decision because "the right to appeal having been forfeited," the supreme court will require a showing of "extraordinarily compelling reasons why this forfeited right should be restored."²⁴⁸ Future cases will need to sort through which circumstances qualify.

M. State's Acquiescence to Modification

As discussed in Part I of this Article, effective July 1, 2014, trial courts may modify a defendant's sentence at any time without a prosecutor's consent.²⁴⁹

Notice of Appeal is tolled until the Motion to Correct is ruled upon or deemed denied pursuant to Trial Rule 53.3.

242. 967 N.E.2d 576 (Ind. Ct. App. 2012).

243. 4 N.E.3d 1169, 1171 (Ind. 2014).

244. *Id.*

245. *In re Adoption of O.R.*, 16 N.E.3d 965 (Ind. 2014).

246. *Id.*

247. *Id.*

248. *Id.* at 971.

249. IND. CODE § 35-38-1-17(c) (2015).

Before July 1, however, if 365 days had elapsed after sentencing, any modification was “subject to the approval of the prosecuting attorney.”²⁵⁰ In *State v. Harper*,²⁵¹ a trial court told a deputy prosecutor it would modify the sentence over the prosecutor’s objection. The prosecutor asked for time to think about it “and talk about it with somebody else.”²⁵² At the end of the hearing the trial court asked for “more input . . . in the next week or so,” and the prosecutor agreed.²⁵³ Hearing no response, the trial court modified the sentence five weeks later; the State then appealed.²⁵⁴

In affirming the trial court’s modification, the Indiana Supreme Court concluded “in the context of the interactions and communications between the trial court and the prosecutor in this case, the prosecutor’s conduct satisfied the ‘approval’ requirement of the statute.”²⁵⁵ It remains to be seen whether the supreme court’s actions-speak-louder-than-literal-words approach in *Harper* may be applied more broadly beyond a single modification of sentence case.

N. Post-Conviction Issues

A post-conviction petitioner prevailed on appeal involving a badly botched translation of the advisement of rights for a guilty plea while another petitioner lost in trying to secure a new trial based on newly discovered evidence.

In *Ponce v. State*,²⁵⁶ the Indiana Supreme Court agreed with a defendant who sought to vacate a guilty plea because “the Spanish translation of the right he was waiving by entering the plea was so inaccurate his plea of guilty was not entered knowingly, intelligently, and voluntarily.”²⁵⁷ As demonstrated below, the mistranslation was severe:

Court’s Advisement in English

Mr. Ponce, I now advise you that you have the right to a public and speedy trial by jury.

You also have the right to face all witnesses against you and to see, hear, question, and cross-examine these witnesses.

* * *

English Equivalent of Spanish Interpretation Given to Ponce

He’s—he’s advising you that you have the right to another—another judging [2 syllables unintelligible] speedier. Okay?

And you also have the right to see those who have the witnesses and . . . to ask if it’s all right [1 syllable unintelligible].

* * *

250. *Id.* § 35-38-1-17(b).

251. 8 N.E.3d 694 (Ind. 2014).

252. *Id.* at 697.

253. *Id.*

254. *Id.*

255. *Id.*

256. 9 N.E.3d 1265 (Ind. 2014).

257. *Id.* at 1267.

Further, you cannot be compelled to make any statement or testify against yourself at any hearing or trial . . . but you may remain silent.²⁵⁸

And until that date you cannot make other oaths against yourself . . . but you can remain silent.²⁵⁹

Because the defendant met the initial burden of showing he was not properly advised, the burden shifted to the State, which was unable to show “that the record as a whole nonetheless demonstrated that Ponce understood his constitutional rights and waived them.”²⁶⁰ The Indiana Supreme Court concluded:

To declare that a defendant with limited English proficiency who received an incorrect interpretation of the trial court’s Boykin advisements should be equally culpable for his guilty plea as a defendant who is fluent in the English language and received an accurate and uninterrupted advisement directly from the trial court would work a great injustice not only on the LEP defendant, but on the integrity of our system as a whole.²⁶¹

Turning to the second case, Indiana courts have long required defendants seeking a new trial based on newly discovered evidence to prove the following nine elements:

(1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at retrial.²⁶²

In *Dickens v. State*,²⁶³ the petitioner in a post-conviction proceeding challenged his murder conviction from a 1997 crime based on the 2004 National Research Council (“NRC”) report that established comparative bullet lead analysis (“CBLA”) conducted by the FBI was not reliable.²⁶⁴ The trial court agreed that the NRC report satisfied the first eight requirements for a new trial.²⁶⁵ Although it concluded the testimony about CBLA would not likely have been admissible at trial in light of the NRC report, Dickens did not establish the ninth requirement that the exclusion of the CBLA evidence made it probable that a

258. *Id.* at 1271.

259. *Id.*

260. *Id.* at 1274.

261. *Id.*

262. *Taylor v. State*, 840 N.E.2d 324, 329-30 (Ind. 2006).

263. 997 N.E.2d 56 (Ind. Ct. App. 2013), *trans. denied*, 2 N.E.3d 686 (Ind. 2014).

264. *Id.* at 61.

265. *Id.*

different result would be produced at retrial.²⁶⁶ The court of appeals affirmed that ruling, concluding the State had produced “overwhelming evidence of Dickens’ guilt,” including eyewitness testimony from the shooting, evidence of Dickens’ actions immediately after the shooting, and unchallenged forensic evidence that the bullets were shot from the same firearm.²⁶⁷

266. *Id.* at 62.

267. *Id.* at 62-63.