RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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The survey period—October 1, 2021 to September 30, 2022—marked at least a partial return to relative normalcy as the COVID-19 pandemic entered its second and third year. Justice David retired on August 31, 2022, after nearly twelve years on the Indiana Supreme Court, and was replaced by forty-year-old Court of Appeals' Judge Derek Molter. That transition could mean changes in direction or focus. The five justices, all appointed by Republican governors, have nevertheless sometimes divided, often 3-2.

As in the past, the bulk of this survey focuses on Indiana Supreme Court opinions while also addressing opinions of the Indiana Court of Appeals that provide significant direction in criminal cases from beginning (such as bail and discovery) to end (sentencing, post-conviction relief). It includes a brief tribute and reflection on the work of Justice David before concluding with some thoughts on the past year and what it might signal about future direction.

I. BAIL

After a pilot project in several counties in 2016, Criminal Rule 26 became effective in all courts on January 1, 2020.[1] Instead of keeping low-risk offenders in jail because they could not afford bail, Criminal Rule 26 was designed to "encourag[e] trial judges to engage in evidence-based decision-making at the pretrial stage" while continuing "to maximize the likelihood of the arrestee's appearance at trial and the protection of public safety."[2] Prosecutors were opposed to the change.[3] Many legislators also expressed concern about bail for those charged with violent crimes in particular, leading to proposals such as requiring that 100% of the minimum bail amount be paid by cash deposit.[4]

Early opinions under Criminal Rule 26 suggested robust appellate review of cases with high bail. For example, the court of appeals referred to Criminal Rule

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1. Amanda Bridgman, *Criminal Rule 26 - New Rules for Bonding Out - Now in Effect*, TIMES UNION ONLINE (Jan. 1, 2020), https://timesuniononline.com/Content/Default/News/Article/Criminal-Rule-26-New-Rules-For-Bonding-Out-Now-In-Effect/-3/224/123968 [https://perma.cc/564B-YXFS].

2. *Id.*; *FAQ: Criminal Rule 26*, IND. CT. TIMES (Feb. 28, 2017), http://indianacourts.us/times/2017/02/faq-criminal-rule-26/ [https://perma.cc/5ANT-HVP8].

3. Marilyn Odendahl, *Prosecutors Push Back Against New Bail Rule*, IND. LAW. (Oct. 24, 2016), https://www.theindianalawyer.com/articles/41814-prosecutors-push-back-against-new-bail-rule [https://perma.cc/3U3U-9RFY].

4. Jordan Morey, *Crime Bill Package Passes Senate*, IND. LAW. (Jan. 26, 2022) https://www.theindianalawyer.com/articles/crime-bill-package-passes-senate [https://perma.cc/7YGG-7V7X].

26 in 2020 in *Yeager v. State*.[5] There, the trial court set bail at $250,000 cash for a defendant charged with four Level 3 felony offenses.[6] The defendant

> had no criminal history besides underage drinking, lived in the area his whole life, lived in the same house (which he was buying) for twelve years, had a job to which he could return, and had a good relationship with his family (who also lived in the area and was supportive of him).[7]

The pretrial director recommended that the defendant be released to pretrial supervision.[8]

In light of "substantial mitigating factors showing that he recognize[d] the court's authority to bring him to trial" and without evidence he "pose[d] a risk to the physical safety of the victim or the community," the court of appeals held that the trial court abused its discretion in denying his request to reduce bail.[9] The case was remanded with instructions that he "be released to pretrial supervision with the added condition of electronic monitoring."[10] After quoting Criminal Rule 26, the court added its conclusion was "consistent with the new evidence-based risk-assessment system that Indiana has adopted."[11]

The Indiana Supreme Court heard oral argument in November of 2020 and then granted transfer and dismissed the case as moot on May 26, 2021, wiping out the court of appeals' opinion as precedent.[12] That decision may have foreshadowed a far more deferential approach to trial court determinations of bail, and any doubt was removed during the survey period.

In *DeWees v. State*,[13] the Indiana Supreme Court explained that Criminal Rule 26 and the statutory codification of its principles to "**enhance**, rather than restrict, the broad discretion entrusted to our trial courts when executing bail. What's more, a trial court can and **should** exercise that discretion to protect against the risk of flight or potential danger to the community."[14]

In *DeWees*, a high school senior with no criminal history was charged with aiding, inducing, or causing burglary with a deadly weapon, a Level 2 felony.[15] The trial court set bond at $50,000 cash only and denied a subsequent motion to reduce bond after a hearing at which the defendant and victim testified.[16] The

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5. Yeager v. State, 148 N.E.3d 1025 (Ind. Ct. App. 2020), *vacated and dismissed as moot*, 168 N.E.3d 277 (Ind. 2021).

6. *Id.* at 1026.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 1029.

12. Joel M. Schumm & Riley L. Parr, *Recent Developments in Indiana Criminal Law and Procedure*, 54 IND. L. REV. 851, 854 (2022).

13. 180 N.E.3d 261 (Ind. 2022).

14. *Id.* at 263.

15. *Id.*

16. *Id.*

court of appeals reversed, citing "'evidence of substantial mitigating factors' to suggest that 'DeWees recognized the trial court's authority to bring her to trial' . . . coupled with the 'trial court's inordinate reliance'" on the victim's testimony that he lives in constant fear and sleeps with two guns by his side.[17]

Emphasizing "judicial flexibility in the execution of bail" and the statutory mandate that trial courts consider all "relevant factors" when setting or modifying bail, the Indiana Supreme Court affirmed the trial court's denial of a bond reduction.[18] Although "a victim's statement of fear, standing alone, falls short of the clear-and-convincing standard necessary for the evidence to support a finding that she posed a risk of physical danger to others," the supreme court found the trial court had instead relied on proper considerations such as the "extremely serious" nature of the offense and the thirty-mile proximity between the defendant and victim's home.[19] The supreme court acknowledged that:

> several factors—DeWees's strong family ties, her lack of criminal record, and no evidence of past bad character—certainly militate **against** denying DeWees's motion. But when, like here, the trial court followed the appropriate procedural safeguards and the evidence provides sufficient support for its ruling, we refrain from interfering with the trial court's discretion—even when, like here, we consider it a close call.[20]

Although much of the opinion is specifically tailored to the unique facts of the case, the court also offered broader guidance:

> Criminal Rule 26 strongly **encourages** pretrial release for many accused individuals awaiting trial. This is especially true for persons charged with only non-violent and low-level offenses. And if a defendant presents no "substantial risk of flight or danger" to others, the court **must** consider releasing the defendant "without money bail or surety," subject to any reasonable conditions deemed appropriate by the court. Releasing this category of defendants under suitable nonfinancial conditions—such as electronic monitoring, community supervision, no-contact orders, and restrictions on activities or place of residence—will often prove sufficient to ensure the defendant's appearance at trial and to ensure community safety. But when a person poses a risk of flight or a risk to public safety, Criminal Rule 26 in no way hinders a trial court's ability to set bond in an amount sufficient to curtail such risks.[21]

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17. *Id.* at 264 (quoting DeWees v. State, 163 N.E.3d 357, 365-67 (Ind. Ct. App. 2021)).

18. *Id.* at 268.

19. *Id.* at 269.

20. *Id.* at 271.

21. *Id.* at 268 (citation omitted). The opinion ended by expressing serious concern about the court of appeals issuing "a precedential opinion effective immediately and the need for appellate courts to exercise prudence and restraint when deviating from Appellate Rule 65(E)," which allows time for the parties to seek rehearing or transfer before an opinion is certified or may be acted upon by the trial court. *Id.* at 271.

Any remaining air in the balloon of robust appellate review of excessive bail was removed within weeks when the court of appeals began applying *DeWees* to pending cases. First, in *Medina v. State*, the panel concluded that "*DeWees* makes clear the broad discretion trial courts possess in bail decisions; so long as the trial court followed the proper procedure and its decision is supported by the record, we must affirm."[22] There, the trial court refused to reduce $150,000 bail for two Level 4 offenses involving driving under the influence causing death.[23] Although the defendant had no criminal history, had lived in the county for her entire life, and was employed full-time at the time of the offenses, the panel noted the "potentially lengthy sentence" and her continued use of marijuana, which showed a "certain 'disdain for the law' that increases the likelihood that she might fail to appear for trial if a high bail were not set."[24] Both the trial and appellate courts acknowledged the amount of bail was high, especially for "a high-school age teenager who still lives with her parents and cannot work while incarcerated," but noted she "would have to raise only approximately ten percent of that amount to post a bail bond."[25]

A week later, a different panel, in *Jones v. State*, affirmed the denial of a request to reduce $200,000 surety or 10% cash bail in a case involving approximately forty felony counts of vehicle theft.[26] Although the defendant did not have "a lengthy criminal history, he is accused of committing forty-one felonies against at least twenty different victims over a three-year period, and some of those felonies allegedly occurred while he was out on bail."[27] Accruing new charges during pretrial release supports a finding of "disdain for authority," and the gravity of offenses increased the risk he "will fail to appear at trial."[28]

II. DISCOVERY AND CONTINUANCES

The survey period included three remarkable opinions addressing discovery-related issues. The first upheld a statutory change that fundamentally alters decades of criminal defense practice regarding depositions of child witnesses. The second reiterates the primacy of the Indiana Trial Rules on discovery over local rules while reversing the denial of a request for continuance—often thought to be among the least assailable rulings on appeal. Finally, the third opinion holds that police reports are not categorically off-limits as work product.

A. Depositions of Child Witnesses

A 2020 statute imposed significant restrictions on a defendant charged with

22. Medina v. State, 188 N.E.3d 897, 907 (Ind. Ct. App. 2022).
23. *Id.* at 900.
24. *Id.* at 905-06.
25. *Id.* at 907.
26. Jones v. State, 189 N.E.3d 227, 230 (Ind. Ct. App. 2022).
27. *Id.*
28. *Id.*

certain crimes from deposing "a child less than sixteen (16) years of age who is the victim or alleged victim of a sex offense."[29] Before this statute, defendants faced few limitations on their ability to depose child witnesses, who were treated the same as other witnesses under Indiana Trial Rules 26 and 30.[30] Under the new legislation, a defendant must first contact the prosecutor and (1) secure the prosecutor's agreement to "the manner in which the deposition shall be conducted"; (2) obtain court authorization after a hearing with a finding "that there is a reasonable likelihood that the child victim will be unavailable for trial and the deposition is necessary to preserve the child victim's testimony"; or (3) obtain court authorization after a hearing with a finding, following a hearing, "that the deposition is necessary: (A) due to the existence of extraordinary circumstances; and (B) in the interest of justice."[31]

As predicted in that year's survey article, the statute was challenged on a number of grounds.[32] Numerous panels of the court of appeals invalidated the statute, largely on the basis that the procedural provisions in the statute conflict with those of the Indiana Trial Rules; therefore, the provisions of the Indiana Trial Rules must govern.[33]

The Indiana Supreme Court disagreed in *Church v. State*,[34] holding that although "the statute has procedural elements," it was "substantive, as it predominantly furthers public policy objectives of the General Assembly, as opposed to judicial administration objectives characteristic of a procedural statute."[35] After examining precedent from Indiana and other states, the majority adopted a "more thoughtful test that looks at the statute's predominant objective. If the statute predominantly furthers judicial administration objectives, the statute is procedural. But if the statute predominantly furthers public policy objectives 'involving matters other than the orderly dispatch of judicial business,' it is substantive."[36]

Justice Goff concurred in the result, taking a different view of the procedural/substantive issue but ultimately concluding that the statute "warrants an exception because it harmonizes with our concern for child welfare and

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29. IND. CODE § 35-40-5-11.5(a) (2023).

30. *See generally* Jones v. State, 445 N.E.2d 98 (Ind. 1983) (upholding exclusion of defendant charged with child molesting from taking a deposition of the child).

31. IND. CODE § 35-40-5-11.5(d).

32. Schumm & Parr, *supra* note 12, at 852-53.

33. *See, e.g.*, Sawyer v. State, 171 N.E.3d 1010, 1016-18 (Ind. Ct. App. 2021), *vacated*, 190 N.E.3d 920 (Ind. 2022); Church v. State, 173 N.E.3d 302, 305-07 (Ind. Ct. App. 2021), *vacated*, 189 N.E.3d 580 (Ind. 2022); State v. Riggs, 175 N.E.3d 300, 304-06 (Ind. Ct. App. 2021), *vacated*, 190 N.E.3d 920 (Ind. 2022)*; see also* State v. Wells, No. 21A-CR-89, 2021 WL 3478637, at *3-5 (Ind. Ct. App. Aug. 9, 2021), *vacated*, No. 22S-CR-206, 2022 WL 2301266 (Ind. June 23, 2022); Pate v. State, 176 N.E.3d 228, 232-34 (Ind. Ct. App. 2021), *vacated*, No. 22S-CR-206, 2022 WL 2301179 (Ind. June 23, 2022).

34. 189 N.E.3d 580 (Ind. 2022).

35. *Id.* at 584.

36. *Id.* at 590 (citation omitted).

because it ultimately retains the trial court's discretion."[37] As to the primary question, however, the chart included in his opinion effectively summarizes the "clear and unambiguous differences" between the deposition practice under the trial rules and the 2020 statute:[38]

	Trial Rules	**I.C. § 35-40-5-11.5**
Application	**No limit** to the frequency a defendant may use these methods unless protective order applies. T.R. 26(A).	Defendant may depose "**only** in accordance with this section," signaling exclusion of trial rules.
Initiation Process	Defendant files notice **with no need for prosecutor's consent**. T.R. 30, 45(D).	Defendant asks for **consent of prosecutor**, who can refuse or agree to with conditions.
Leave of Court	**Only** when plaintiff seeks to depose before certain time. T.R. 30(A).	**Always** necessary when prosecutor denies request.
Motions and Burden of Proof	The "**person from whom discovery is sought**" must file and show "good cause" for protection. T.R. 26(C).	**Defendant** must file and show by "preponderance of the evidence" the likelihood of a witness's absence at trial or "extraordinary circumstances" and "the interest of justice."
Order of Court	Trial court "**may**" issue protective order with terms and conditions. T.R. 26(C).	Trial court "**shall**" issue written order when granting or denying petition.

As the competing opinions make clear, the reach of the case is significant. The majority notes that depositions have long been widely used in Indiana criminal cases, unlike in most states.[39] Moreover, even the seven states that "allow[] regular depositions in criminal cases 'often carve out special categories of witnesses who are not subject to that procedure,' including child sex-crime victims and children in general."[40] Although still widely available for many witnesses, deposition use will be seriously curtailed with child witnesses, some of whom will now have to meet a defense lawyer and face challenging questions for the first time not in a small conference room with a couple of lawyers but in a large courtroom before twelve jurors, court personnel, and the public.

B. Reversal for Denial of Continuance

Trial courts generally have broad discretion in ruling on discovery disputes

37. *Id.* at 604 (Goff, J., concurring).
38. *Id.* at 602.
39. *Id.* at 586 (majority opinion).
40. *Id.* (quoting WAYNE R. LAFAVE ET AL., 5 CRIMINAL PROCEDURE § 20.2(e) (4th ed. 2015)).

and ruling on motions for continuance. In *Ramirez v. State*, the Indiana Supreme Court reversed a trial court's denial of a continuance.[41] Review of the denial of a continuance involves a "potentially a two-step inquiry."[42] First, "whether the trial court 'properly evaluated and compared' the parties' 'diverse interests' that would be impacted by 'altering the schedule[,]'" and, "[i]f not, . . . whether the court's denial resulted in prejudice."[43]

In *Ramirez*, the prosecutor in a child molesting case spoke to the child and her mother the day before trial.[44] "That conversation unearthed new allegations against Ramirez, including that he had touched A.P. under the clothes with both hands, he had bribed [the mother] to get A.P. to lie at trial, and he and [the mother] had both disclosed the inappropriate conduct to their pastor."[45] Within hours, defense counsel filed a request for a continuance.[46] Although counsel explained how the new allegations materially changed his defense, requiring further investigation and depositions of witnesses, the trial court addressed none of the reasons and simply found the motion was not timely.[47] The supreme court found the trial court's "rigidity" in refusing to consider even a one-day continuance "can only be characterized as arbitrary."[48]

As to prejudice, the Justices found it "unrealistic to expect the defense, within a few hours, to investigate the new allegations, evaluate the evidence, adapt trial strategy, and complete final preparations."[49] The case cited as support suggests trial courts must offer at least a few days for such significant adjustments: "to expect the defense, within four days, to meaningfully investigate new evidence 'misunderstands both the reality of trial and defense attorneys' resources.'"[50]

Although the reversal was based on the denial of a continuance, the opinion found two other errors. First, a county's local discovery rule cannot "attach conditions not required by our trial rules on a defendant's ability to obtain a copy of otherwise discoverable evidence."[51] Specifically, the Allen County rule required defense counsel to submit an application to the trial court stating the specific need for a copy of relevant, nonprivileged video evidence in the prosecutor's possession, which is at odds with (a) liberal discovery under the Trial Rules, (b) minimal trial court involvement in discovery, and (c) Rule 34(B)'s requirement of simply describing an item with particularity (and not a specific need for it).[52]

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41. Ramirez v. State, 186 N.E.3d 89 (Ind. 2022).
42. *Id.* at 96.
43. *Id.*
44. *Id.* at 97.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* (quoting Carlson v. Jess, 526 F.3d 1018, 1026 (7th Cir. 2008)).
49. *Id.* at 99.
50. *Id.* (quoting United States v. Williams, 576 F.3d 385, 389 (7th Cir. 2009)).
51. *Id.* at 95.
52. *Id.* at 94-95.

Second, the trial court erred in granting the State's request for a protective order "prohibiting the Defendant or counsel from obtaining a copy" of A.P.'s forensic interview.[53] The Justices were not persuaded by the State's arguments that "the interview involved a child discussing sexual acts by an adult; the identity of child victims of sex crimes should be kept confidential; and the prosecutor's office had 'a copy of at least one interview' posted to social media in a different case."[54]

C. Police Reports Are Not Categorically Work Product

Overruling precedent is unusual, but the Indiana Supreme Court's opinion in *Minges v. State*[55] is of limited reach because the practice at issue was limited to two counties.[56]

Nearly three decades ago, the supreme court decided *State ex rel. Keaton v. Circuit Court of Rush County*, which held trial courts did not have inherent authority to require the State to produce complete copies of police reports if the prosecutor made a timely work-product objection.[57] Grounded in concern for "an undue burden on prosecuting attorneys and the potential for abuse by defense counsel" at "a time when lawyers redacted documents using Marks-a-Lot markers, the *Keaton* court was unlikely to fathom electronic filing or software programs readily accessible to legal professionals today."[58]

Based on modernized technology, rules of criminal procedure, and "custom," the supreme court overruled *Keaton* because that decision (1) "conflicts with Indiana's liberal discovery rules, including Trial Rule 26(B)(3)"[59] and (2) the justifications offered in *Keaton* "are improper considerations in a work product analysis and unsupported in our modern age."[60] Instead, trial courts must now decide on a cases-by-case basis whether a police report is protectible work product.[61] As the unanimous opinion explains:

> Trial Rule 26(B)(3) sets forth a two-pronged definition of "work product," requiring that the document was prepared in anticipation of litigation by counsel or its agent at the direction of counsel. Any concerns of an "undue burden" on the producing party may be resolved by Trial Rule 26(B)(1), which permits trial courts to limit discovery if "the burden or expense of the proposed discovery outweighs its likely benefit[.]" And . . . under Evidence Rule 403, trial courts may exclude

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53. *Id.* at 95.

54. *Id.*

55. 192 N.E.3d 893 (Ind. 2022).

56. *Id.* at 901 (noting that every county "apart from two . . . has an open file policy allowing the defense to examine" police reports).

57. State *ex rel.* Keaton v. Cir. Ct. of Rush Cnty., 475 N.E.2d 1146 (Ind. 1985).

58. *Minges*, 192 N.E.3d at 895.

59. *Id.* at 897.

60. *Id.* at 900.

61. *Id.* at 901.

relevant evidence if its probative value is substantially outweighed by the danger of "misleading the jury."[62]

III. LIMITATIONS ON EVIDENCE OR TRIAL PRACTICES

Although somewhat difficult to categorize, the court of appeals decided several cases involving limitations on evidence or trial practices. In the four opinions summarized below, the court (a) allowed expert testimony on PTSD of a defendant charged with killing her husband, (b) held that a trial court abused its discretion in finding that evidence of defendant's parole status was relevant to his self-defense claim, (c) found no prejudice in allowing a support dog to sit near a child as she testified in a child molesting trial, and (d) affirmed the broad discretion of trial courts in regulating questioning during jury selection.

A. Effects-of-Battery Defense Statute

In *Higginson v. State*,[63] the court of appeals reversed a trial court's exclusion of a defense expert on the effects-of-battery defense when arguing self-defense in a murder prosecution against a woman diagnosed with PTSD who was charged with the murder of her husband.[64] The court took "special care in outlining the appropriate use" of the evidence, noting that the expert "may testify as to evidence which relates to the general reasonableness of one's apprehension of fear, given the psychological trauma which comes from battery" but may "not reach an ultimate factual determination exclusive to the jury."[65] Put another way, the expert "may testify as to the objective component of a person's reasonable belief that they were under threat of imminent harm, given their PTSD, but not [the defendant's] specific subjective belief."[66]

B. Self-Defense While on Parole

Self-defense claims arise on appeal in a variety of ways. Claims of insufficient evidence after a factfinder rejects a self-defense claim are nearly impossible to win. But errors in instructing the jury may require a new trial when instructions misstate the law and materially dilute legal requirements.[67] Somewhere along that continuum are claims that a trial court abused its discretion in allowing or excluding evidence on self-defense.

Indiana courts have long required that a person asserting self-defense show

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62. *Id.* at 900-01 (citation omitted).

63. Higginson v. State, 183 N.E.3d 340 (Ind. Ct. App. 2022).

64. *Id.* at 345-46.

65. *Id.*

66. *Id.*

67. *See, e.g.*, Gammons v. State, 148 N.E.3d 301, 302 (Ind. 2020) ("Because the jury instruction used here—that a crime and confrontation need only be 'related' to defeat self-defense—diluted this causal standard, and because we can't conclude that this instructional error was harmless, we reverse and remand for a new trial.").

that he or she "was in a place where he [or she] had a right to be, 'acted without fault,' and reasonably feared or apprehended death or great bodily harm."[68] In *Turner v. State*,[69] the court of appeals held that a trial court abused its discretion in finding that evidence of defendant's parole status was relevant to his self-defense claim.[70] Specifically, although he was outside the county where he was supposed to be, he was spending time with his girlfriend; there was no evidence that he was attempting to or intended to see the person he was charged with murdering.[71] Therefore, that his "presence in Muncie was a violation of his parole does not have an immediate causal connection to his confrontation with [the victim.][72]

Nevertheless, the appellate court found the error harmless considering the "overwhelming evidence" disproving his self-defense claim.[73]

C. Comfort Animals at Trial

A 2019 statute allows a child under sixteen testifying in a criminal matter "a comfort item or comfort animal . . . in the courtroom with the child during the child's testimony unless the court finds that the defendant's constitutional right to a fair trial will be unduly prejudiced."[74]

In *Izaguirre v. State*,[75] the court of appeals addressed whether the defendant was prejudiced by a support dog sitting near a child as she testified in a child molesting trial.[76] The trial court told the jury that "Indiana law permits a child under the age of sixteen to have an animal accompany the child during the child's testimony here in court. [Child] has chosen to take advantage of that provision of the law and will have a comfort animal present during her testimony."[77] Moreover, the trial court instructed the jury not only about the presumption of innocence and the State's burden of proof, but also sympathy for the child: "Neither sympathy nor prejudice for or against either the victim or the Defendant in this case should be allowed to influence you in whatever verdict you may find."[78] Based on these instructions and the "very damning" evidence presented by the State, the court of appeals affirmed the convictions because the defendant could not demonstrate prejudice by the trial court's decision to allow the support animal.[79]

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68. Larkin v. State, 173 N.E.3d 662, 670 (Ind. 2021).
69. Turner v. State, 183 N.E.3d 346 (Ind. Ct. App.), *trans. denied*, 188 N.E.3d 853 (Ind. 2022).
70. *Id.* at 356-58.
71. *Id.* at 357.
72. *Id.*
73. *Id.* at 357, 362.
74. IND. CODE § 35-40-5-13 (2023).
75. 194 N.E.3d 1224 (Ind. Ct. App. 2022).
76. *Id.* at 1226.
77. *Id.*
78. *Id.*
79. *Id.* at 1227.

D. Alleged Conditioning of Jurors

Glover v. State[80] reiterates the broad discretion of trial courts in regulating jury selection. In a domestic violence case, the court of appeals rejected the defense argument that "the State's mini opening and questions during jury selection sought only to shape a favorable jury by deliberate exposure to the substantive issues in the case."[81] First, "Indiana Jury Rule 14(b) expressly permitted the State to give a mini opening that was a 'brief statement[ ] of the facts and issues . . . to be determined by the jury,' which is how the State used its opening."[82] Second, "the State's questions inquired with the prospective jurors about their own experiences with and exposure to domestic violence," which "bore similarities to the actual case and explored the jurors' understanding of domestic violence, which was relevant to uncovering the jurors' attitudes toward the charges and any preconceived ideas they may have had about the charges and any defenses."[83] The court distinguished cases of improper questioning because "nothing in the State's questioning of the prospective jurors suggested the existence of prejudicial evidence that was not introduced at trial."[84]

IV. CRIME OR NOT A CRIME

Indiana's appellate courts decided several cases regarding challenges to the validity of a specific charge. This section starts with an Indiana Supreme Court opinion that tests the limits of textualism. It then turns to appellate claims of insufficient evidence, the sufficiency of a charge, or constitutional vagueness.

A. Limits on Textualism?

Most cases from the survey period had a favorable outcome for the State, which is not surprising considering the standard of review for appellate claims of insufficient evidence, evidentiary rulings, or ineffective assistance of counsel—not to mention the doctrine of harmless error.

A notable exception in recent years has been claims grounded in statutory interpretation, especially when the State's principal argument is to look beyond statutory text to legislative intent or the avoidance of absurd results.[85] The standard of review for issues of statutory interpretation (and related jurisdictional issues) is de novo.[86]

The Justices have recently considered whether individuals alleged to have

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80. 179 N.E.3d 526, 532-33 (Ind. Ct. App. 2021), *trans. denied*, 181 N.E.3d 982 (Ind. 2022).

81. *Id*. at 534.

82. *Id.*

83. *Id.*

84. *Id.*

85. *See, e.g.*, K.C.G. v. State, 156 N.E.3d 1281, 1284 (Ind. 2020); R.R. v. State, 106 N.E.3d 1037, 1042 (Ind. 2018).

86. State v. Neukam, 189 N.E.3d 152, 153 (Ind. 2022).

committed child molesting before they were eighteen years old could be prosecuted if the allegations were not pursued until after they were twenty-one (when the juvenile court no longer has jurisdiction). *D.P. v. State*[87] held in 2020 that juvenile courts lose jurisdiction once the alleged offender reaches twenty-one years of age but left open the question whether the State can file charges in a criminal court against a person no longer a child but who committed the charged conduct while still a child.[88]

During the survey period, in *State v. Neukam*,[89] a divided court answered that question in the negative with sharply different views of the reach and limits of textualism. Writing for the three-justice majority that included Chief Justice Rush and Justice David, Justice Slaughter focused on the plain text of the relevant statutes. Specifically,

> circuit courts have jurisdiction over criminal cases, and juvenile courts have jurisdiction over delinquency cases. Under Indiana Code section 33-28-1-2(a)(1), circuit courts have "original and concurrent jurisdiction . . . in all criminal cases." But the legislature carved out a portion of this general jurisdiction to grant juvenile courts exclusive original jurisdiction over "[p]roceedings in which a child . . . is alleged to be a delinquent child under IC 31-37."[90]

Although the criminal code does not define "criminal," "crime" is defined as "a felony or a misdemeanor."[91] A delinquent act, in contrast, occurs when a child, before turning eighteen, "commits an act . . . that would be an offense if committed by an adult."[92] The legislature used two different terms: "criminal" act and "delinquent act," and the majority assumes every statutory word "was used intentionally" and inferred the legislature intended "criminal" acts to be distinct from "delinquent acts."[93] Even if the terms were ambiguous, courts should "harmonize related statutes by reading them together and giving effect to both."[94]

Taking aim at the dissent, the majority emphasized its "modest judicial role" in which concerns about a perceived "unjust" or "absurd" result are improper "value judgments."[95] Moreover, the underlying policy of the juvenile justice system is to rehabilitate young people—not punish and stigmatize them.[96] Focusing on practical or policy considerations would run afoul "not only of separation of powers, but of our entire constitutional scheme."[97]

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87. D.P. v. State, 151 N.E.3d 1210 (Ind. 2020).
88. *Id.* at 1214, 1217 n.2.
89. *Neukam*, 189 N.E.3d 152.
90. *Id.* at 153.
91. IND. CODE § 33-23-1-4 (2023).
92. *Neukam*, 189 N.E.3d at 154 (quoting IND. CODE § 31-37-1-2(1)).
93. *Id.* at 154 (quoting Clippinger v. State, 54 N.E.3d 986, 989 (Ind. 2016)).
94. *Id.*
95. *Id.* at 155.
96. *Id.*
97. *Id.*

Justice Massa and Justice Goff filed separate dissenting opinions. In Justice Massa's view, cases involving offenders charged after age twenty-one for offenses committed as juveniles "must go somewhere. The General Assembly never contemplated safe harbor for alleged sex offenders who turn twenty-one before their victims reveal."[98] Justice Goff focused in part on "statutory evidence of legislative intent," opining that the statutes vest "jurisdiction in the juvenile court **only** when the offender **is currently a child**. It logically follows, then, that when the offender is an adult, the juvenile-court carve-out exception to the legislative grant of general jurisdiction to the circuit courts simply doesn't apply."[99] His dissent also pointed to canons of interpretation, including the "unjust" result of negating the legislature's expansion of the statute of limitations for child molesting and the "absurd" result of allowing "certain delinquent acts to go unpunished."[100] Perhaps most remarkable was his strongly worded conclusion, expressing concern about "the extremes to which the Court chooses to apply textualism to the exclusion of other evidence of legislative intent."[101]

B. Burglary Is Ongoing Crime

In *Fix v. State*,[102] the Indiana Supreme Court unanimously held that "burglary is an ongoing crime that encompasses a defendant's conduct inside the premises, terminating only when the unlawful invasion ends."[103] Therefore, although the defendant armed himself after the breaking and entering, the court affirmed his conviction for Level 2 felony burglary because he was "armed with a deadly weapon" during the offense.[104]

C. Pretrial Dismissal Based on Insufficient Evidence Reversed

In *State v. Smith*,[105] the court of appeals reiterated that "[a] pretrial motion to dismiss directed to the insufficiency of the evidence is improper, and a trial court errs when it grants such a motion."[106] Although trial courts have "a certain level of discretion to determine factual issues when considering motions to dismiss," that "discretion does not extend to usurping the function of the jury."[107] The appellate court summarized that some "evidence of criminality" (despite a recantation) is sufficient for a case to proceed, quoting an earlier case for the proposition that "an alleged 'total absence of evidence' following victim

98. *Id.* at 158 (Massa, J., dissenting) (footnotes omitted).
99. *Id.* at 159-60 (Goff, J., dissenting).
100. *Id.* at 160.
101. *Id.* at 163.
102. 186 N.E.3d 1134 (Ind. 2022).
103. *Id.* at 1136.
104. *Id.*
105. 179 N.E.3d 516 (Ind. Ct. App. 2021), *trans. denied*, 186 N.E.3d 582 (Ind. 2022).
106. *Id.* at 519 (quoting State v. Helton, 837 N.E.2d 1040, 1041 (Ind. Ct. App. 2005)).
107. *Id.* at 519-20.

recantation . . . is not a basis for dismissal of an Information."[108]

D. Insufficient Evidence of Impairment

Driving while "intoxicated" requires proof that a person was under the influence of an illegal substance "so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties."[109] Impairment, in turn, "can be established by evidence of the following: '(1) the consumption of a significant amount of [an intoxicant]; (2) impaired attention and reflexes; (3) watery or bloodshot eyes; (4) the odor of [an intoxicant] on the breath; (5) unsteady balance; and (6) slurred speech.'"[110]

In *Awbrey v. State*,[111] the State relied solely on the first factor, but "the sheer amount of the intoxicant consumed, standing alone, is insufficient to support a finding of impairment."[112] The general testimony of the toxicologist—that she would expect impairment, given the levels of methamphetamine in the Defendant's blood—could not salvage the conviction: "testimony that someone *would theoretically* be impaired is not the same as testimony that somebody *is* impaired."[113]

E. Video Evidence

In *Love v. State*,[114] the Indiana Supreme Court addressed the seeming (un)importance of video evidence when reviewing claims of insufficient evidence.[115] Specifically, appellate courts will find that "[a] video indisputably contradicts the trial court's findings when no reasonable person can view the video and come to a different conclusion."[116]

In *Carmouche v. State*,[117] the court of appeals found insufficient evidence despite the high bar set in cases involving video evidence.[118] There, the State alleged battery by kicking a door that struck a woman's knee, causing her pain.[119] But the video showed the door hit her foot, and the State offered no evidence explaining how contact with her foot would cause pain to her knee.[120] Moreover, other facts supported the "conclusion that the video indisputably contradicts the

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108. *Id.* at 520.

109. IND. CODE § 9-13-2-86 (2023).

110. Awbrey v. State, 191 N.E.3d 925, 929 (Ind. Ct. App. 2022) (quoting Wilkinson v. State, 70 N.E.3d 392, 400 (Ind. Ct. App. 2017)) (citation omitted).

111. *Id.* at 925.

112. *Id.* at 930.

113. *Id.*

114. 73 N.E.3d 693 (Ind. 2017).

115. *Id.* at 700.

116. *Id.* at 695, 700.

117. 188 N.E.3d 482 (Ind. Ct. App. 2022).

118. *Id.* at 485-86.

119. *Id.* at 486.

120. *Id.*

trial court's findings: the video may be grainy, but it is well-lit, the angle affords a good view of the altercation, and the entire incident is recorded."[121]

F. Another Resisting Reversal

Reiterating the necessity of forcible action—"strength, power, or violence"—the court of appeals reversed a conviction for resisting law enforcement in *Runnells v. State*.[122] Simply pulling away from an officer is not enough, as in another recent reversal where the defendant "kept tensing up and pulling away" when an officer tried to handcuff her.[123]

G. Unconstitutionally Vague

Finally, although not a sufficiency claim, a challenge to the vagueness of a statute can lead to dismissal and the inability to prosecute. In *Armes v. State*,[124] the court of appeals reversed the denial of a motion to dismiss charges involving a Schedule I controlled substance identified as MDMB-4en-PINACA (MDMB).[125] "A criminal statute may be invalidated for vagueness for either of two independent reasons: (1) for failing to provide notice enabling ordinary people to understand the conduct that it prohibits, and (2) for the possibility that it authorizes or encourages arbitrary or discriminatory enforcement."[126] The Emergency Rule adopted by the Indiana Board of Pharmacy to add MDMB to Schedule I failed to provide the notice required by federal due process.[127] Specifically, the Emergency Rule did not "explicitly identify the listed substances as synthetic drugs" and, even more troubling, did "not provide the chemical composition of MDMB. Thus, there is no official designation of what constitutes MDMB."[128]

V. DOUBLE JEOPARDY

For two decades, challenges involving "multiple punishment" were recognized as a distinct brand of double jeopardy claim under the Indiana Constitution.[129] In August 2020 in *Wadle v. State*,[130] the Indiana Supreme Court overruled two decades of "constitutional tests in resolving claims of substantive double jeopardy," replacing it with "an analytical framework that applies the

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121. *Id.* at 486.

122. 186 N.E.3d 1181, 1184 (Ind. Ct. App. 2022).

123. *Id.* at 1185 (quoting Brooks v. State, 113 N.E.3d 782, 785 (Ind. Ct. App. 2018)).

124. 191 N.E.3d 942 (Ind. Ct. App.), *aff'd on reh'g*, 194 N.E.3d 1220 (Ind. Ct. App. 2022)

125. *Id.* at 945.

126. *Id.*at 950 (quoting Brown v. State, 868 N.E.2d 464, 467 (Ind. 2007)).

127. *Id.* at 951.

128. *Id.*

129. *See* Richardson v. State, 717 N.E.2d 32 (Ind. 1999); Schumm & Parr, *supra* note 12, at 867-69

130. 151 N.E.3d 227 (Ind. 2020).

statutory rules of double jeopardy."[131]

A. Pleading Guilty to Double Jeopardy Violation

Although the Indiana Supreme Court has not revisited *Wadle* itself, it has addressed what happens when a defendant pleads guilty to offenses that violate double jeopardy principles. Years before *Wadle*, the Indiana Supreme Court made clear that "defendants who plead guilty to achieve favorable outcomes give up a plethora of substantive claims and procedural rights, such as challenges to convictions that would otherwise constitute double jeopardy."[132] But what about defendants who plead guilty to all pending charges without securing a "favorable" benefit through a plea agreement? Some court of appeals' precedent permitted a direct appeal challenge to the double jeopardy violation.[133]

The Indiana Supreme Court heard oral argument in September of 2021 from a memorandum decision of the court of appeals that found a double jeopardy claim "forfeited" by pleading guilty, even without a plea agreement.[134] The Justices took the unusual action of appointing a special judge and ordering "the parties to participate in a confidential settlement conference" to resolve the case.[135] The agreement was to permit the defendant to file a petition for post-conviction relief, which the trial court granted and vacated the offending count and sentence.[136]

The Justices heard oral argument in a different case in January of 2022, and quickly resolved the issue in a per curiam opinion that "summarily affirm[ed]" a court of appeals' opinion holding that "[i]t is well-established that a defendant who has pleaded guilty may not challenge the validity of his conviction on direct appeal."[137]

Therefore, the issue appears settled to the extent that double jeopardy claims arising from an open (or any) plea agreement may not be raised on direct appeal. Although such claims may instead by raised in a petition for post-conviction relief, one would hope that prosecutors would instead offer plea agreements that avoid double jeopardy violations or that trial courts would refuse to accept illegal

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131. *Id.* at 235.

132. Lee v. State, 816 N.E.2d 35, 40 (Ind. 2004) (quoting Davis v. State, 771 N.E.2d 647, 649 n.4 (Ind. 2002)).

133. *See, e.g.*, Snyder v. State, 176 N.E.3d 995, 1000 (Ind. Ct. App. 2021); Thompson v. State, 82 N.E.3d 376, 379 (Ind. Ct. App. 2017), *trans. denied*, 95 N.E.3d 1294 (Ind. 2018); Kunberger v. State, 46 N.E.3d 966, 970 (Ind. Ct. App. 2015).

134. Gravit v. State, 20A-CR-1578, 2021 WL 732897, at 5, 7 (Ind. Ct. App. Feb. 25, 2021). The Indiana Supreme Court's oral argument calendar and videos are available at https://www.in.gov/courts/supreme/arguments/.

135. Order, Ind. Sup. Ct., 20A-CR-1578 (Dec. 2, 2021). All orders are available on the appellate clerk's docket at https://publicaccess.courts.in.gov/docket.

136. Appellant's Motion to Dismiss Petition to Transfer, 20A-CR-1578 (Jan. 26, 2022).

137. McDonald v. State, 179 N.E.3d 463, 464 (Ind. 2022) (quoting the court of appeals' opinion that in turn cites Tumulty v. State, 666 N.E.2d 394, 395 (Ind. 1996)).

agreements. If not, defense counsel might file a motion to have a count that violates double jeopardy principles dismissed before accepting a plea. *Wadle* reaffirms that a "prosecutor's broad discretionary power to pursue multiple charges for the same offense,"[138] but after reciting its analytical test notes that prosecutors "may *charge* the offenses as alternative sanctions only."[139]

B. Non-Unanimous Application

Wadle has been applied more than sixty times on appeal during its first two years, and nearly every opinion has been unanimous. *A.W. v. State*[140] is an exception. The court of appeals issued a divided opinion, and the State sought transfer, which the Indiana Supreme Court granted on February 13, 2023, after the conclusion of the survey period.[141] Although now vacated, the court of appeals opinion is still informative. The Indiana Supreme Court's decision will be discussed in next year's survey.

The Respondent was adjudicated delinquent for possession of a machine gun and dangerous possession of a firearm.[142] Offenses are "'factually included' when 'the charging instrument alleges that *the means used* to commit the crime charged include all of the elements of the alleged lesser included offense.'"[143] The majority found that test was met because "[a]s charged and as proven at A.W.'s hearing, unlawful possession of the same firearm was the means used to commit both offenses."[144] Moreover, based on "one thirty-second episode of possession, the two offenses were obviously 'so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.'"[145]

Chief Judge Bradford dissented on that issue, opining that dangerous possession required proof that A.W. was a minor and did not satisfy any of the statutory exceptions, which "was not relevant to the machine-gun charge. Given that each charge requires proof of facts that the other does not," he concluded that neither is factually included in the other.[146]

VI. SENTENCING

Although most survey periods include notable opinions addressing sentence revision under Appellate Rule 7(B), few published opinions from the court of appeals during the survey addressed such claims, and the Indiana Supreme Court

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138. Wadle v. State, 151 N.E.3d 227, 250 (Ind. 2020).
139. *Id.* at 253 (emphasis added).
140. 192 N.E.3d 227 (Ind. Ct. App. 2022).
141. *Id.*; Order, No. 22A-JV-00150 (Ind. Feb. 13, 2023) (granting transfer).
142. *A.W.*, 192 N.E.3d at 229.
143. *Id.* at 232 (quoting *Wadle*, 151 N.E.3d at 251 n.30).
144. *Id.*
145. *Id.* (quoting *Wadle*, 151 N.E.3d at 253).
146. *Id.* at 233 (Bradford, C.J., concurring in part).

did not grant discretionary review in any 7(B) cases.[147] The survey period instead included a brief per curiam opinion on allocution and a notable court of appeals opinion on remote sentencing hearings.

A. Allocution

In *Strack v. State*,[148] the Indiana Supreme Court reminds trial courts "to be clear and accurate in their sentencing hearing colloquies."[149] Specifically, defendants who plead guilty have a right to allocution that "is separate and distinct from the right to present sentencing testimony."[150] Allocution allows a defendant to "explain his or her views of the facts and circumstances without being 'put to the rigors of cross-examination.'"[151]

B. Remote Sentencing Hearing Reversed

Administrative Rule 14(2)(a) allows trial courts to "use audiovisual telecommunication to conduct . . . [s]entencing hearings . . . when the defendant has given a written waiver of his or her right to be present in person and the prosecution has consented[.]"[152] Although the ability to hold remote hearings during the COVID-19 pandemic was broadened by Indiana Supreme Court order in some ways, similar limitations remained in felony cases, including "sentencings where the defendant waives the right to be present in court."[153]

In *Warren v. State*, a defendant convicted of dealing methamphetamine filed a written motion asking to be physically present in the courtroom for his sentencing hearing.[154] The trial court denied the motion by stamping "DENIED" on the motion without an "order or findings."[155] The court of appeals reversed and remanded for a new sentencing hearing at which the defendant could be physically present.[156]

The court of appeals did not engage in a harmless error analysis. A violation of court rules are harmless if "its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties."[157] As the Indiana Supreme Court has remarked in applying harmless

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147. *Cf.* Schumm & Parr, *supra* note 12, at 870-71 (addressing 7(B) cases from a recent survey period). Rule 7(B) was addressed in the two life without parole cases discussed in Part VII and is tangential to the ineffective assistance of counsel case in Part VIII.

148. 186 N.E.3d 99 (Ind. 2022).

149. *Id.* at 104.

150. *Id.* at 103.

151. *Id.* at 102 (quoting Biddinger v. State, 868 N.E.2d 407, 413 (Ind. 2007)).

152. Warren v. State, 182 N.E.3d 925, 935 (Ind. Ct. App. 2022).

153. *Id.* at 936 (quoting *In re* Admin. Rule 17 Emergency Relief for Ind. Trial Cts. Relating to 2019 Novel Coronavirus, 144 N.E.3d 197, 197 (Ind. 2020)).

154. *Id.* at 928, 932.

155. *Id.* at 932.

156. *Id.* at 936.

157. IND. R. APP. P. 66(A).

error to a violation of statutory requirements for a proceeding, "harmlessness depends not on whether evidence supports [the judgment], but on the extent of record evidence supporting" the complained-of error.[158] In that case, an attorney improperly waived his client's right to be present in a civil commitment proceeding.[159] In finding the error was not harmless, the Justices noted that, if present, the respondent "could have voiced concerns on issues like adverse side effects of forced medications; assisted his counsel in cross-examining witnesses, such as family members; and offered mitigating evidence."[160] Appearing in court with an attorney by one's side is quite different from appearing remotely with one's attorney, judge, and witnesses as a box on a screen.

A virtual hearing is quite different for judges as well. As Justice Kafker of the Supreme Judicial Court of Massachusetts aptly explains, virtual hearings are "not the same as an in-person evidentiary proceeding. The evolving empirical evidence indicates a virtual hearing may alter our evaluation of demeanor evidence, diminish the solemnity of the legal process, and affect our ability to use emotional intelligence, thereby subtly influencing our assessment of other participants."[161]

VII. LIFE WITHOUT PAROLE DIRECT APPEALS

Although the life without parole (LWOP) sanction is noteworthy, the issues raised on appeal often are not. The Indiana Constitution gives the Indiana Supreme Court exclusive jurisdiction over all death penalty cases,[162] and LWOP cases go directly to the Indiana Supreme Court by court rule.[163] The fairly routine nature of the two LWOP direct appeals from the survey period may lead some to wonder if the cases are better suited for resolution in the court of appeals, a change that would simply require an amendment to the Appellate Rules—not the Indiana Constitution.

In *Hall v. State*,[164] the defendant "challenge[d] the sufficiency of the evidence for her convictions; the sufficiency of the evidence for her murder-for-hire aggravating circumstance; the admission and exclusion of certain testimony at trial; and ask[ed] this Court to revise her concurrent conspiracy sentence."[165] The court rejected each challenge, perhaps the most novel of which was whether the defense could introduce a deposition's video footage for the first-time during

158. A.A. v. Eskenazi Health/Midtown CMHC, 97 N.E.3d 606, 617 (Ind. 2018).

159. *Id.* at 609, 615-16.

160. *Id.* at 618.

161. Vazquez Diaz v. Commonwealth, 167 N.E.3d 822, 843 (Mass. 2021) (Kafker, J., concurring).

162. IND. CONST. art. VII, § 4.

163. IND. R. APP. P. 4(A)(1). Life without parole is usually imposed through the same statutory procedure used in capital cases. *See* IND. CODE § 35-50-2-9 (2023). A seldom-used statute that was repealed in 2014 allowed imposition of LWOP for a third, especially serious felony. *See* IND. CODE § 35-50-2-8.5 (2013), *repealed by* P.L.158-2013, § 662, eff. July 1, 2014.

164. 177 N.E.3d 1183 (Ind. 2021).

165. *Id.* at 1188.

closing argument.[166] The trial court sustained the State's objection, explaining "that the time for viewing the deposition would have been in lieu of reading it during the guilt phase, not during closing argument."[167] Emphasizing the discretion given to trial courts during closing argument, the Indiana Supreme Court affirmed the trial court because "the State would not have the opportunity to rebut this new mode for the jury to experience [the] deposition."[168]

Most of the opinion in *Ramirez v. State*,[169] another LWOP case, is spent discussing and rejecting "multiple trial-court errors in admitting certain evidence, excluding other evidence, and giving a supplemental jury instruction"—the types of claims usually addressed by the court of appeals as an error-correcting court, often in memorandum (unpublished) decisions.[170] The *Ramirez* opinion also affirmed the sentence despite claims under Article 1, Section 16, and Appellate Rule 7(B)[171]—claims also addressed with relative ease routinely by the court of appeals.

Perhaps most notably, the *Ramirez* opinion also addresses a challenge to one of the aggravating circumstances necessary to impose LWOP, which are the same aggravating circumstances for a death sentence.[172] Such a sentence requires the jury to find at least one statutory aggravator.[173] Ramirez did not challenge "that P.H. was less than twelve (12) years of age" but instead focused on the aggravator that "Ramirez tortured P.H. while P.H. was alive."[174] Appellate courts apply the "same standard of review that governs other sufficiency claims,"[175] which is quite deferential as outlined in Part IV above.

Relying on a decisional law definition of "torture,"[176] the Justices noted that the evidence shows Ramirez "physically abused P.H. over time and beat her to death" and rejected his claim that no evidence demonstrates that he "abused P.H. for sadistic or coercive reasons."[177] Finally, even if the torture aggravator were improper, the supreme court would affirm the sentence because "the jury would have been just as likely to recommend an LWOP sentence based solely on the murder-of-a-child aggravator, which Ramirez does not challenge," and especially

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166. *Id.* at 1195.

167. *Id.*

168. *Id.*

169. 174 N.E.3d 181 (Ind. 2021).

170. *Id.* at 186.

171. *Id.* at 201-02.

172. *See* IND. CODE § 35-50-2-9 (2016).

173. *Id.*

174. *Ramirez*, 174 N.E.3d at 200 (Ind. 2021).

175. *Id.*

176. "'Torture' is not defined in the life without parole statute. I.C. § 35-50-2-9(b)(11)(A). But our decisions have defined it as 'either the intentional infliction of a prolonged period of pain or punishment for coercive or sadistic purposes; or the gratuitous infliction of an injury substantially greater than that required to commit the underlying crime.'" *Id.* (quoting Tate v. State, 161 N.E.3d 1225, 1232 (Ind. 2021)).

177. *Id.*

because "Ramirez presented little mitigating evidence and does not contend that the mitigation evidence he presented outweighed the murder-of-a-child aggravator."[178]

VIII. POST-CONVICTION RELIEF

Criminal defendants face a steep uphill climb in appealing the denial of post-conviction relief. Few issues are available, and the preeminent one that is—ineffective assistance of counsel—requires proof both that (1) counsel's performance was deficient and (2) the deficient performance was prejudicial.[179] Those requirements set a high bar:

> There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Counsel is afforded considerable discretion in choosing strategy and tactics and these decisions are entitled to deferential review. Furthermore, isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective.
>
> To demonstrate prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[180]

But there's more. Because the appeal is from a negative judgment, the defendant must show:

> "the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the postconviction court." . . . The post-conviction court's decision will be disturbed "only if the evidence is without conflict and leads only to a conclusion contrary to the result of the postconviction court." When a defendant fails to meet this "rigorous standard of review," [the appellate court] will affirm the post-conviction court's denial of relief.[181]

A. Evidence of Juvenile Brain Development

In *Conley v. State*,[182] a life without parole case involving a seventeen-year-old defendant, the Indiana Supreme Court vacated the court of appeals opinion and

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178. *Id.* at 201.

179. Conley v. State, 183 N.E.3d 276, 282-83 (Ind. 2022).

180. *Id.* (citations omitted).

181. *Id.* at 282 (quoting Timberlake v. State, 753 N.E.2d 591, 597 (Ind. 2001); Wilson v. State, 157 N.E.3d 1163, 1170 (Ind. 2020)) (citations omitted).

182. 183 N.E.3d at 276.

affirmed the denial of relief.[183] Giving considerable deference under the standards outlined above, the supreme court concluded that "trial counsel's failure to present evidence of Conley's age and juvenile brain development, to call or examine certain witnesses and expert witnesses, to challenge the State's mental health experts, and failure to conduct further investigation constituted ineffective assistance of counsel at sentencing."[184]

B. Stipulation and Failure to Seek Lesser-Included Offense

The supreme court vacated another appellate victory for the defendant on ineffectiveness grounds. In *Bradbury v. State*,[185] the Indiana Supreme Court affirmed the denial of post-conviction relief (PCR) on two claims from a defendant convicted as an accomplice to murder: "1) whether counsel was deficient for stipulating that [a co-defendant] was convicted of murder as the principal . . . ; and 2) whether counsel was ineffective for failing to request that the jury be instructed on lesser-included offenses."[186] As to the first, the court relied on trial counsel's PCR testimony about the reasons for stipulating, including that he wanted the jury to know that someone would be accountable if Bradbury was acquitted and that, because Bradbury initially confessed, the stipulation showed it was a false confession.[187]

As to the second claim, the majority found the refusal to tender a reckless homicide instruction was not deficient because the "all or nothing strategy employed by counsel was appropriate and reasonable based on the facts in this case," namely that "Bradbury was not an accomplice because he tried to stop the shooting as counsel argued throughout trial."[188]

Justice Goff, joined by Chief Justice Rush, dissented as to the second claim, believing the failure to consult with the defendant was deficient performance under *Strickland*, the Rules of Professional Conduct, and ABA Standards.[189] "And because conflicting evidence would likely have created a serious enough dispute over Bradbury's culpability as an accomplice for the court to have given the instruction, I would also hold that counsel's deficient performance resulted in prejudice."[190]

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183. *Id.* at 280, 289.

184. *Id.* at 280.

185. 180 N.E.3d 249 (Ind. 2022).

186. *Id.* at 251.

187. *Id.* at 253.

188. *Id.* at 254. Although the lead opinion did not address prejudice, a separate concurring opinion observed that the "jury convicted him of murder with a specific intent to kill, why would they have found him guilty of reckless homicide? Defense counsel's performance here was something to compliment, not second-guess." *Id.* at 257 (Massa, J., concurring).

189. *Id.* at 257, 261 (Goff, J., dissenting).

190. *Id.* at 261.

IX. JUSTICE DAVID'S LEGACY

Justice David retired on August 31, 2022, after nearly twelve years on the Indiana Supreme Court. A short section of an article cannot begin to capture Justice David's many contributions to Indiana criminal law—and the development of Indiana law more broadly. Instead, this article offers brief comments on a few notable opinions.

First, from the beginning of his term, Justice David was an independent voice—asking probing questions at oral argument and writing and voting in opinions in ways that considered many nuances of cases. For example, he joined Justices Sullivan and Rucker in a case reversing a bench verdict of guilty but mentally ill in the face of "nonconflicting expert and lay opinion testimony" of insanity in *Galloway v. State*.[191] A year later, he sided with Chief Justice Shepard and Justice Dickson in granting rehearing to flip the outcome of a three-to-two opinion decided before Justice Boehm's retirement.[192] The new majority undid the requirement that trial courts provide self-represented defendants an advisement that "an attorney is usually more experienced in plea negotiations and better able to identify and evaluate any potential defenses and evidentiary or procedural problems in the prosecution's case."[193]

Justice David's trial court experience surely informed his appellate decisions—but not in a reflexive way that affirmed trial court rulings and actions out of a blind sense of deference. A widely respected trial court judge for more than two decades, Justice David's experience and expectations came through in many of this opinions. Always respectful, he would criticize and reverse when trial courts fell short. For example, when "a defendant who lived in North Carolina arrived late for trial in Elkhart, Indiana, only to discover that he had already been convicted," a new trial was ordered "[b]ased on the particular facts and circumstances of this case" because "trying the defendant in absentia, without counsel, was not the proper course of action for the trial judge to take."[194] In

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191. 938 N.E.2d 699, 703 (Ind. 2010). The issue arose, with varying outcomes, in other cases during Justice David's tenure. *See* Schumm & Parr, *supra* note 12, at 863-64.

192. Hopper v. State, 957 N.E.2d 613, 624 (Ind. 2011) (opinion on rehearing).

193. *Id.* at 616, 621 (quoting Hopper v. State, 934 N.E.2d 1086, 1088 (Ind. 2010)).

194. Hawkins v. State, 982 N.E.2d 997, 997 (Ind. 2013). Although this section focuses on majority opinions authored by Justice David, his dissents and dissents from the denial of transfer are also notable and provide some window into the types of cases he was willing to take that some of his colleagues were not. For example, in *Partee v. State*, Justice David joined by Chief Justice Rush dissented from the denial of transfer to "provide needed guidance to our trial courts, which all too often must navigate proceedings involving disruptive, vexatious, and outright abusive litigants." 189 N.E.3d 163, 164 (Ind. 2022) (David, J., dissenting from the denial of transfer). Courts have interpreted the requirements of *Illinois v. Allen*, 397 U.S. 337 (1970), differently. Under the dissenting Justices view, although the trial court was justified in removing the disruptive defendant from the courtroom, "its failure to ensure that [he] was informed how he could reclaim the right to be present—or even **that** he could reclaim this right—renders the process constitutionally inadequate and constitutes fundamental error." *Partee*, 189 N.E.3d at 164-65.

another cases where a trial judge trial court made a comment that contradicted its decision regarding a community corrections' violation, he wrote for the three-Justice majority in reversing the trial court while acknowledging "a well-respected trial court judge . . . inadvertently negated part of the definition necessary to find a violation."[195]

Justice David's expectations extended to others in the criminal justice system. Reaffirming the many tools available to police in interrogating suspects, Justice David led a unanimous court in drawing a clear line that "intentionally misleading a suspect as to his constitutionally guaranteed rights to a fair trial and an impartial jury, because of his race" warranted suppression of the resulting statement.[196] Quoting Dr. Martin Luther King, Jr. and recent survey results, the opinion acknowledged the "nation's tortured history of race relations" in explaining that the "fear or mistrust of the justice system is why all courts must remain vigilant to eradicate any last vestiges of the days in which a person's skin color defined their access to justice."[197]

Finally, although the rule of law and precedent were certainly preeminent during his tenure, Justice David reconsidered 150 years of precedent in holding "that the burden must be placed upon the State to prove the defendant should be denied bail" in murder cases.[198] As he aptly put it, "'because that's the way we've always done it' is a poor excuse—the merits of stare decisis notwithstanding—for continuing to do something *wrong*."[199]

Justice David's final opinion for the court in *Minges*, summarized in Part II(C) above, embodies many of these principles that marked his tenure—respecting the rule of law while protecting the rights of Hoosiers.

X. CONCLUSION

The farthest reaching opinions of the survey period were favorable to the State: *DeWees* will likely be interpreted to make bail appeals (and more reasonable bails amounts) more challenging, and *Church* will severely restrict the decades-long ability of defense counsel to depose child witnesses in sex offense cases. Defendants scored modest victories in the discovery realm—from a reversal of a trial court's abuse of discretion in denying a continuance necessitated by discovery abuses in *Ramirez* to the seldom-used but troubling blanket restriction on police reports in two of Indiana's counties in *Minges*.

The change in membership of the Indiana Supreme Court could mean some

195. Bennett v. State, 119 N.E.3d 1057, 1059 (Ind. 2019).

196. Bond v. State, 9 N.E.3d 134, 141 (Ind. 2014).

197. *Id.* at 136, 139.

198. Fry v. State, 990 N.E.2d 429, 433 (Ind. 2013).

199. *Id.* at 442.

change in direction both in the cases the Justices decide to take and how those cases are resolved. Strict adherence to legislative text, even in the face of seemingly absurd results, may be reaching a limit after the divided opinion in *Neukam*, in which now-retired Justice David was one of the three votes in the majority. Challenges to the appropriateness of a sentence, which used to occur several times each year on transfer, likely will continue to face tougher odds.[200]

200. *See* Schumm & Parr, *supra* note 12, at 870-72; Faith v. State, 131 N.E.3d 158, 160-61 (Ind. 2019) (Slaughter, J., dissenting) ("Once we conclude a challenged sentence was legal, I would stop there and not expend our limited resources substituting our collective view of what sentence is appropriate for that of the trial judge.").