Recent Developments Affecting the Criminal Procedure in Indiana

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This Article covers criminal cases decided between September 1987 and September 1988 which impact criminal procedure in Indiana. The Article focuses primarily on cases from the Indiana Supreme and Appellate Courts but also includes United States Supreme Court and Seventh Circuit Court of Appeals cases where cases from those courts alter existing state court precedent.

I. Pretrial Issues

A. Amendment of Charges

In *Brooks v. State*,[1] the court was confronted with the issue of whether a person could be convicted of an offense with which the person had not been charged. Brooks was originally charged with Class C child molesting (deviate conduct).[2] At the close of the state's case, the trial court granted judgment on the evidence.[3]

However, the trial court then submitted instructions to the jury on the offenses of attempted child molesting (deviate conduct), a Class C Felony and child molesting (fondling), a Class D Felony.[4] Brooks was convicted of the Class D fondling charge.[5] No objection was made by the defendant to the submission of the additional charges[6] nor was the issue raised in the motion to correct errors.[7]

The court of appeals, in a two to one decision, held that fondling was not a lesser included offense of child molesting (deviate conduct)

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1. 526 N.E.2d 1171 (Ind. 1988).
2. *Id.* at 1172.
3. *Id.*
4. *Id.*
5. *Id.*
6. Brooks v. State, 518 N.E.2d 1109, 1110 (Ind. Ct. App.), *vacated*, 526 N.E.2d 1171 (Ind. 1988).
7. 526 N.E.2d at 1172.

with which Brooks was charged.[8] However, the court then held that Brooks had waived the error by failing to object and that the error was not fundamental.[9]

The supreme court granted transfer and in a unanimous decision reversed Brooks' conviction holding that Brooks was convicted of an offense for which he was not charged and that the error was fundamental.[10] The court also found that the trial court had exceeded its authority by instructing the jury on offenses not charged where the state failed to amend the charges.[11] The supreme court reiterated that trial courts have no jurisdiction to bring criminal charges or to amend them.[12]

B. Discovery

1. Notice of Rebuttal Witnesses.—The most significant case concerning discovery in Indiana this year is *Mauricio v. Duckworth*,[13] a case decided by the United States Court of Appeals for the Seventh Circuit. In *Mauricio*, the defendant filed a motion for discovery requesting the names, addresses, and prior statements of all witnesses the state intended to call at trial.[14] The state filed a similar motion and additionally requested disclosure of any defenses Mauricio intended to use.[15] Mauricio responded by filing a notice of alibi defense and list of witnesses. After two motions requesting sanctions, the state responded with a list of fifty-nine potential witnesses. The state's witness list did not include the name of a person they intended to call as a rebuttal witness if Mauricio presented an alibi defense.[16]

Mauricio moved to strike the testimony of this witness or, in the alternative, for a mistrial.[17] The trial court denied these motions and Mauricio was convicted of aiding an attempted robbery and felony murder.[18] The Indiana Supreme Court affirmed Mauricio's conviction,[19] adhering to its previously established rule that the names of rebuttal witnesses need not be provided.[20] Further, the court held that there was

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8. 518 N.E.2d at 1110.
9. *Id.*
10. 526 N.E.2d at 1171-72.
11. *Id.* at 1172.
12. *Id.*
13. 840 F.2d 454 (7th Cir. 1988).
14. *Id.* at 456.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 455.
19. Mauricio v. State, 476 N.E.2d 88 (Ind. 1985).
20. *Id.* at 94 (citing Smith v. State, 439 N.E.2d 634 (Ind. 1982); Tillman v. State, 274 Ind. 39, 408 N.E.2d 1250 (1980)).

no clear record of a request for discovery by the defendant nor proof that there was a request for a continuance when the testimony was offered.[21] Absent such a showing the Indiana court held that the defendant had failed to show an abuse of discretion in allowing the rebuttal witness to testify.[22]

On appeal from the denial of habeas corpus relief, the United States Court of Appeals for the Seventh Circuit determined that the failure of the state to divulge the identity of the rebuttal witness constituted a due process violation which was not harmless.[23] To require a defendant to reveal the particulars of his alibi defense, without giving him an equal opportunity to discover the state's rebuttal witnesses, constitutes a due process violation.[24]

Indiana's alibi statute,[25] does not require that the defendant list witnesses who will support the alibi nor does it require the state to list witnesses who will rebut the alibi.[26] However, "the trial court's discovery order requiring the defense to list *all* its witnesses should have triggered a corresponding and reciprocal obligation on the part of the State to list *all* of its potential witnesses—including likely rebuttal witnesses."[27]

The Seventh Circuit dismissed the state's argument that the defendant was not entitled to relief because he failed to request a continuance.[28] The court found that Maurico was entitled to an "opportunity *pre-trial* to make a fully informed decision as to whether or not to put on an alibi defense."[29] Concluding that absent the rebuttal witness tainted testimony, the state's case was not overwhelming, the court granted Mauricio *habeas* relief.[30]

Mauricio is significant because it overrules that line of cases holding that the state is not required to disclose rebuttal witnesses.[31] The Seventh Circuit opinion is not limited solely to alibi rebuttal witnesses. Discovery must be reciprocal. If the defense is required, by statute, rule or court order, to list all its witnesses, this triggers a reciprocal obligation for the state.

2. Witness Statements.—In *State ex. rel. Keaton v. Rush Circuit Court*,[32] a 1985 case, the court held that the prosecutor was not required

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21. 476 N.E.2d at 94.
22. *Id.*
23. 840 F.2d 454 (7th Cir. 1988).
24. 840 F.2d at 457 (citing Wardius v. Oregon, 412 U.S. 470 (1973)).
25. IND. CODE § 35-36-4-2 (1988).
26. 840 F.2d at 457.
27. *Id.* (emphasis in original).
28. *Id.* at 458 n.6.
29. *Id.* (emphasis in original).
30. *Id.* at 460.
31. *See supra* note 20.
32. 475 N.E.2d 1146 (Ind. 1985).

to produce verbatim copies of police reports over a timely assertion of the work product privilege. In the 1987 case of *Burns v. State*,[33] the Indiana Supreme Court refused to extend the privilege established in *Keaton* to include the verbatim statements taken pretrial by prosecution authorities of witnesses who had already testified. Once the witness testifies, any prior verbatim statement must be made available to the defense unless the state can demonstrate a paramount interest in non-disclosure.[34] If the state makes such a claim, then the trial court should review the documents *in camera*.[35] However, in *Burns* the documents were not released to the defense, nor did the court conduct an *in camera* review. Therefore, the defendant's right to a fair trial was substantially impaired, requiring a reversal of his conviction.[36]

II. Trial Issues

A. Alibi Notice

In *Baxter v. State*,[37] the defendant filed a notice of alibi which was both late[38] and factually inadequate[39] under Indiana Code section 35-36-4-1. As a result, the trial court refused to admit any testimony concerning the alibi, including the testimony of the defendant.[40] A trial court has discretion to permit the filing of a late alibi notice within its discretion for good cause shown.[41]

Initially, the court rejected Baxter's argument that the trial court abused its discretion.[42] Baxter argued that his employer's driving log was the only way he could determine his exact location at the time the offense was alleged to have occurred.[43] Baxter argued that he had inadequate time to procure this log because of his pre-trial incarceration immediately followed by hospitalization and separation from his spouse.[44]

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33. 511 N.E.2d 1052 (Ind. 1987).
34. *Id.* at 1054.
35. *Id.*
36. *Id.*
37. 522 N.E.2d 362 (Ind. 1988).
38. The notice was filed one day prior to the omnibus date. *Id.* at 367. Ind. Code § 35-36-4-1 (1988) requires that notice of alibi be filed twenty days before the omnibus date.
39. The notice stated that he was driving a truck in Pennsylvania. 522 N.E.2d at 367. Ind. Code § 35-36-4-1 (1988) requires that the notice of alibi include "specific information concerning the exact place where the defendant claims to have been."
40. 522 N.E.2d at 367.
41. *Id.*
42. *Id.* at 368.
43. *Id.* at 367.
44. *Id.*

The supreme court held that these explanations did not establish just cause for the delay because no effort was made to obtain the records until two months after Baxter's arraignment and the appellate records does not indicate that Baxter ever acquired the records.[45]

The court then dealt with Baxter's argument that Indiana Code section 35-36-4-1 is unconstitutional because it interferes with a defendant's right to testify. Exclusion of testimony due to noncompliance with the alibi statute is "designed to protect the State from fabrication of defenses and enable prosecutors to prepare adequately for trial."[46] Analysis of whether the defendant's right to testify has been infringed upon is fact-sensitive.[47] The risk of fabrication here was great as evidenced by the ease with which the driving log could be subpoenaed and the failure of Baxter to make such an attempt or make an offer to prove.[48] The state had minimal opportunity to investigate or rebut the vague alibi offered by Baxter.[49] Thus, the court concluded by a four to one[50] margin that Baxter's right to testify did not outweigh the legitimate interests protected by the alibi notice requirement.[51] The court noted, however, that the United States Constitution required at least that the accused be permitted to testify where the defendant's failure to file a timely alibi notice is due to a lack of diligence and the state had sufficient time to investigate and respond.[52]

In *Jennings v. State*,[53] the court was confronted with the effect of the filing of an alibi notice. Jennings was charged with numerous counts of burglary and theft.[54] The state alleged that the offenses occurred on or about September 17, 1981.[55] Jennings filed an alibi notice. In response, the state specified that the alleged offenses occurred between 10:00 p.m. on September 16, 1981, and 6:00 a.m. on September 17, 1981.[56] At trial Jennings presented testimony that he spent the evening with his girlfriend.[57] The jury was given proper instruction concerning alibi but was

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45. *Id.*
46. *Id.* at 369 (citing Riggs v. State, 268 Ind. 453, 376 N.E.2d 483 (1978)).
47. 522 N.E.2d at 369.
48. *Id.*
49. *Id.*
50. In his dissenting opinion, Justice DeBruler concluded that the exclusionary sanction of the alibi notice statute may not be used to prohibit the accused from testifying on his own behalf and that the interest of the state in having advance notice of the accused's intent to testify is "small potatoes." *Id.* at 371 (DeBruler, J., dissenting).
51. *Id.* at 369-70.
52. *Id.* at 369.
53. 514 N.E.2d 836 (Ind. 1987).
54. *Id.* at 837.
55. *Id.*
56. *Id.*
57. *Id.*

also instructed that if they found that the crime or crimes were committed by the defendant the state was not required to prove the crimes were committed on the date alleged in the charge.[58] The court in *Jennings* noted that an exception to this rule exists where an alibi defense is mounted.[59] The interjection of an alibi defense makes time "of the essence."[60] The effect of the state's answer to the notice of alibi is to restrict the state to proof of the date in its answer.[61]

Prior case precedent has established that when the state charges a specific date of an offense it may prove that the offense occurred on any date before the charge was filed and within the statute of limitations.[62] The instructions here had the effect of permitting conviction even if the jury believed Jennings' alibi defense, if they found that the offense occurred at a different time than was alleged by the state.[63] This precedent refers to bribery cases and other cases of the type where time is not of the essence—cases unlike this case where instructions served to nullify Jennings' defense of alibi which resulted in the denial of Jennings' right to a fair trial and required reversal.[64]

B. Judicial Interrogation of Witnesses

The decision of the court of appeals in *Decker v. State*[65] underscores the importance of trial court neutrality. In *Decker*, the court of appeals reversed Decker's conviction because the trial court abandoned its position of impartiality and neutrality. The trial judge questioned a state's witness in a way designed to impeach that portion of the witness' testimony which was favorable to the defendant.[66] Additionally, the trial court advised the witness in the presence of the jury concerning the offense of perjury.[67]

The appellate court noted that a trial judge may properly question a witness in order to clarify the testimony.[68] However, such questioning must be conducted in an impartial manner which does not improperly influence the jury.[69] The questioning at issue here exceeded that stan-

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58. *Id.*
59. *Id.*
60. Moritz v. State, 465 N.E.2d 748 (Ind. Ct. App. 1984).
61. 514 N.E.2d at 837.
62. *Id.*
63. *Id.* at 838.
64. *Id.*
65. 515 N.E.2d 1129 (Ind. Ct. App. 1987).
66. *Id.* at 1134.
67. *Id.*
68. *Id.* (citing Church v. State, 471 N.E.2d 306, 311 (Ind. 1984)).
69. 515 N.E.2d at 1134 (citing Kennedy v. State, 258 Ind. 211, 226, 280 N.E.2d 611, 620 (1972); Thomas v. State, 249 Ind. 271, 274-75, 230 N.E.2d 303, 305 (1967)).

dard.[70] The court found that the error prejudiced Decker because of the aura of authority and integrity which juries attribute to trial judges.[71] This required reversal of Decker's convictions even though his attorney failed to object.[72]

The court of appeals reviewed this error in *Decker* in spite of the fact that no specific objection was made at trial.[73] The court was reluctant to apply the waiver doctrine to unobjected incidents of improper judicial intervention because "a fair trial by an impartial judge and jury is an essential element in due process."[74] The court noted further that in this case counsel twice attempted to object and was twice told by the trial judge to be quiet.[75] Not all instances of judicial overreaching will constitute fundamental error but the combination of factors presented by this case was deemed sufficient to overcome the state's waiver argument.[76]

C. Entrapment—Admission of Prior Convictions to Show Predisposition

In *Allen v. State*,[77] a majority of the supreme court held that evidence of the accused's prior convictions is admissible to show predisposition where the defendant has indicated an intent to raise entrapment as a defense in a pre-trial proceeding even though he does not actually raise this defense at trial. The court concluded that it would be "unfair to preclude the prosecution from introducing all evidence relevant to predisposition until the defendant has introduced evidence of entrapment."[78] Justice DeBruler, dissenting, would hold that such evidence is not admissible unless and until the defense raises the entrapment issue, either by presentation of its own evidence or through cross-examination of the state's witnesses.[79] In light of the state's opportunity to present a case in rebuttal and a general judicial desire to avoid interjection of prejudicial extraneous issues, this position seems better reasoned.

In another entrapment case, the United States Supreme Court held that the defendant is not required to admit all elements of an offense in order to be entitled to an instruction on entrapment.[80] In *Mathews*

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70. 515 N.E.2d at 1134.
71. *Id.*
72. *Id.* at 1135.
73. *Id.* at 1131.
74. *Id.* (quoting Kennedy v. State, 258 Ind. 211, 218, 280 N.E.2d 611, 615 (1972).
75. 515 N.E.2d at 1132.
76. *Id.*
77. 518 N.E.2d 800 (Ind. 1988).
78. *Id.* at 802.
79. *Id.* at 804-05.
80. Mathews v. United States, 108 S. Ct. 883 (1988).

v. United States,[81] the accused testified that he committed all acts necessary to constitute the offense but denied that he possessed the requisite *mens rea*.[82] The court held that even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable juror could find entrapment.[83]

D. Jury Selection—Racial Discrimination

An area of criminal law that should prove very active in the next few years concerns resolution of issues left unanswered by the landmark decision in *Batson v. Kentucky*.[84] In *Batson*, the United States Supreme Court held that the defendant may make a *prima facie* case of purposeful discrimination in the selection of the petit jury solely on the basis of the prosecutor's exercise of peremptory challenges at the defendant's trial.[85] *Batson* is significant because it overrules *Swain v. Alabama*,[86] a 1965 case which had required a showing that the prosecutor in case after case used peremptories to exclude blacks with the result that no blacks served on petit juries. Indiana had followed the *Swain* rule.[87]

In *Love v. State*,[88] the supreme court remanded the case to the trial court for an evidentiary hearing on whether the prosecutor exercised its peremptory challenges in a racially discriminatory manner. At trial, the prosecutor used peremptory challenges to remove black jurors after cursorily questioning them.[89] Love's counsel objected to this use of peremptories which he alleged was designed to ensure that Love, a black man, was tried before an all white jury.[90] The prosecutor responded that Love had not met his burden under *Swain* because he failed to establish a systematic, intentional pattern of excluding blacks.[91] The court denied Love's motion to strike the jury panel and was subsequently convicted.[92] Shortly after Love was convicted, the United States Supreme Court decided *Batson*.[93] The *Batson* rule applies retroactively to all cases

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81. *Id.*
82. *Id.* at 885.
83. *Id.* at 886.
84. 476 U.S. 79 (1986).
85. *Id.*
86. 380 U.S. 202 (1965).
87. *See* Hobson v. State, 471 N.E.2d 281 (Ind. 1984).
88. 519 N.E.2d 563 (Ind. 1988).
89. *Id.* at 564.
90. *Id.* at 564-65.
91. *Id.* at 565.
92. *Id.*
93. *Id.*

which were not yet final at the time *Batson* was decided.[94] Applying *Batson*, the Indiana Supreme Court found that the prosecutor's questioning of the striken black venirepersons suggested that they might be partial to the defendant because of their shared race.[95] This suggestion and the removal of all three blacks from the panel point to the possibility of purposeful discrimination.[96] However, the court remanded to the trial court to determine in the first instance, whether the defendant has made a *prima facie* case.[97] If the trial court determines that a *prima facie* case of race discrimination has been established, the prosecutor will then have the burden to come forward with a neutral, nonracial explanation for excusing the black jurors.[98] If the trial court concludes that the jurors were excluded on racial grounds, a new trial should be ordered.[99]

The *Batson* case itself seems to open up more questions than it answers. What sorts of explanations will be deemed sufficiently nonracial to overcome a *prima facie* case? Does the rule in *Batson* apply equally to the prosecutor's assertion that a defense attorney is exercising his peremptories in a racially discriminatory manner?[100] Undoubtedly, *Love* represents the first of a number of cases to address the problem of race discrimination in the selection of petit juries in Indiana.

III. Guilty Plea

A. Protestations of Innocence—Felony Cases

Over the past year, the appellate courts have created more confusion concerning the status in Indiana of "best interest" pleas. A "best interest" plea is a guilty plea wherein the defendant maintains "innocence but pleads guilty because he has accepted what he considers to be an advantageous bargain."[101] These pleas are accepted in the federal system[102] but have historically constituted reversible error in Indiana.[103]

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94. *Id.* In Griffith v. Kentucky, 479 U.S. 314 (1986), the Court held that new rules of law announced by the Supreme Court are to be applied retroactively to all cases which are not yet final at the time the new rule is announced. A case is final when judgment of conviction has been rendered, the availability of appeal exhausted and the time for filing a petition for writ of certiorari has either elapsed or the petition has been finally denied.

95. 519 N.E.2d at 566.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Batson v. Kentucky, 476 U.S. 79, 90 n.12 (1986).

101. Bates v. State, 517 N.E.2d 379, 382 (Ind. 1988).

102. North Carolina v. Alford, 400 U.S. 25 (1970).

103. Ross v. State, 456 N.E.2d 420 (Ind. 1983); *see also* Gary v. State, 502 N.E.2d 497 (Ind. Ct. App. 1988).

In *Cross v. State*,[104] the appellate court held that Cross' guilty plea must be set aside because after the plea was tendered,[105] Cross denied guilt in an interview with the probation officer who was preparing the presentence investigation report.[106] The court held that in such a situation the trial court is under a duty to initiate a meaningful dialogue with the defendant as to the validity of the guilty plea.[107] Cross' affirmative responses at the guilty plea hearing to the court's "standard inquiry" concerning his desire to plead guilty were not sufficient to override his assertions of innocence made to the probation officer.[108] The appellate court set aside Cross' guilty plea stating that precedent precluded it from accepting defendant's plea when prior to sentencing the defendant claimed to be innocent, even though a sufficient factual basis had been made to which the defendant acceded.[109]

In *Bates v. State*,[110] the defendant pled guilty to unlawful deviate conduct, a Class A Felony. The offense is a Class A Felony when committed by threat of deadly force or use of a deadly weapon.[111] At the guilty plea hearing, Bates refused to admit that he used or threatened to use deadly force or a deadly weapon.[112] The complainant's statement was admitted into evidence at the guilty plea hearing.[113] This statement provided a sufficient factual basis to support the guilty plea.[114] The court upheld Bates' plea even though in tendering it, counsel referred to it as a "best interest" plea and even though Bates refused to admit the force element of the offense.[115] The supreme court found that although Bates never admitted the use of a deadly weapon, he never denied it,[116] and that this was not a sufficient protestation of innocence to make the plea invalid.[117]

In light of *Bates*, it must be concluded that *Cross* was wrongly decided. The state did not petition for rehearing or transfer in *Cross*.

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104. 521 N.E.2d 360 (Ind. Ct. App. 1988).

105. The factual basis required for the plea was presented by the state. Cross indicated that it was correct and declined to add to it. *Id.* at 361.

106. *Id.*

107. *Id.* at 362.

108. *Id.*

109. *Id.* at 363 (citing Stockey v. State, 508 N.E.2d 793 (Ind. 1987); Gibson v. State, 490 N.E.2d 297 (Ind. 1986)).

110. 517 N.E.2d at 380.

111. IND. CODE § 35-42-4-2 (1988).

112. 517 N.E.2d at 382.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

B. Protestations of Innocence—Death Penalty Cases

A pair of capital cases decided on the same day further muddy the waters surrounding this issue. In *Patton v. State*,[118] the supreme court set aside *sua sponte* Patton's guilty plea and death sentence. At the guilty plea hearing, the court read Patton the charging information which alleged that Patton knowingly killed the victim.[119] Patton admitted the facts as true.[120] At his sentencing hearing, the state sought the death penalty.[121] In order to impose a death sentence in Patton's case, the prosecutor had to prove beyond a reasonable doubt that the killing was intentional.[122] At sentencing, Patton testified that he did not intend to kill the victim.[123] He testified that he shot into the car in which the victim was sitting but that he was unaware that it was occupied.[124]

In setting aside Patton's plea, the court noted that its precedent required such reversal only when the guilty plea and protestation of innocence were simultaneous.[125] However, the court in Patton established a new rule for capital cases that a "trial court abuses its discretion when it fails to set aside a guilty plea . . . on its own motion at a capital sentencing hearing when the defendant denies the intent to murder."[126]

In its first opportunity to apply its newly announced rule, the court refused to grant relief to a defendant in a posture that was remarkably similar to Patton. In *Van Cleave v. State*,[127] the defendant pled guilty to felony murder. The state sought the death penalty alleging as an aggravating factor that Van Cleave intentionally killed the victim while attempting to commit robbery. At the sentencing hearing, the state presented evidence that the killing was intentional.[128] Van Cleave's mother testified that the killing "was an accident" and that Van Cleave "panicked."[129]

The *Van Cleave* opinion itself does not address any possible distinction between *Van Cleave* and *Patton*. However, in *Patton* the court noted that Van Cleave admitted the crime and contested the aggravating

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118. 517 N.E.2d 374 (Ind. 1987).
119. *Id.* at 375.
120. *Id.*
121. *Id.*
122. *Id.* at 376.
123. *Id.* at 375.
124. *Id.*
125. *Id.* at 376.
126. *Id.*
127. 517 N.E.2d 356 (Ind. 1987).
128. *Id.* at 360-61.
129. *Id.* at 361.

factor.[130] By contrast, the court found that Patton denied the crime charged.[131]

The distinction appears to be that Van Cleave pled guilty to felony murder,[132] which has no mental element, while Patton plead guilty to a "knowing" murder.[133] Thus, when Patton appeared at sentencing and alleged that he didn't realize there were people in the car when he shot into it, he was actually asserting his innocence to the crime for which he had pled guilty. Had Van Cleave's guilty plea been to a "knowing" murder, one can assume that his conviction would also have been set aside.

IV. Sentencing

A. Consecutive Sentences for Multiple Habituals

In *Starks v. State*,[134] the defendant was separately sentenced on each of eighteen theft convictions. The state filed two allegations of habitual offender status. Starks was sentenced to three years on each of the theft convictions and thirty years on each of the habitual offender counts.[135] The two theft convictions to which the habitual offender allegations were attached were ordered to run consecutively for a total sentence of sixty-six years.[136]

The supreme court held that two habitual offender findings in a single proceeding cannot be ordered to be served consecutively.[137] The basis for the court's holding is the "absence of express statutory authorization for such a tacking of habitual offender sentences . . . ."[138] Apparently, the court was unsatisfied that the provisions of Indiana Code section 35-50-1-2[139] contained such authorization. That statute provides that "the court shall determine whether terms of imprisonment shall be served concurrently or consecutively."[140] The *Starks* court noted that this provision "appears unlimited in scope, applying to the class of all sentences."[141] But the court found that the power to order con-

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130. *Patton*, 517 N.E.2d at 376.
131. *Id.*
132. *Van Cleave*, 517 N.E.2d at 359.
133. *Patton*, 517 N.E.2d at 375.
134. 523 N.E.2d 735 (Ind. 1988).
135. *Id.*
136. *Id.*
137. *Id.* at 737.
138. *Id.*
139. Ind. Code § 35-50-1-2 (1988).
140. 523 N.E.2d at 735-36.
141. *Id.* at 736.

secutive sentences is subject to "the rule of rationality and the limitations in the constitution."[142] The court did not explain how the sentence is either irrational or unconstitutional but, nevertheless, held it to be impermissible to order consecutive sentences in such a situation due to the lack of express statutory authorization.[143]

B. Vindictive Sentencing

In *Flowers v. State*,[144] the defendant was originally convicted of attempted murder for which he received a fifty-year sentence.[145] He also received the presumptive sentence of thirty years for numerous other Class A Felonies of which he was convicted.[146] The court ordered these sentences served consecutively.[147] On appeal, the court instructed the trial court to vacate the Class A convictions and sentences and to enter convictions and appropriate sentences for two Class B Felonies and a Class C Felony.[148]

On remand, the lower court entered the same aggregate sentence of eighty years.[149] The court accomplished this by entering aggravated sentences on the two class B Felonies to be served consecutively to each other and to the sentence for attempted murder.[150] The court also ordered an aggravated sentence on the Class C Felony but ordered that it be served concurrently to all other sentences.[151]

On appeal, Flowers argued that the court could not resentence him to eighty years because he was being sentenced for lesser felonies than those which were the basis for the original eighty-year sentences.[152] The court rejected this argument finding that the trial court properly found aggravating facts to support the increased sentence on remand.[153] The supreme court noted that the trial court used the same aggravating circumstances on remand that it had originally used to aggravate the attempted murder conviction.[154]

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142. *Id.*
143. *Id.* at 737.
144. 518 N.E.2d 1096 (Ind. 1988).
145. *Id.* at 1097 (appellant received a presumptive sentence of thirty years which was enhanced by twenty years because of aggravating circumstances).
146. *Id.*
147. *Id.*
148. Flowers v. State, 481 N.E.2d 100, 107 (Ind. 1985).
149. *Flowers*, 518 N.E.2d at 1097.
150. *Id.*
151. *Id.*
152. *Id.* at 1098.
153. *Id.*
154. *Id.*

The supreme court held that the imposition of the eighty-year sentence did not violate the double jeopardy clause of the Fifth Amendment.[155] The court noted that there are certain circumstances in which sentences may be increased on remand.[156] However, those circumstances were irrelevant in Flowers' case because he was not given an increased sentence.[157] Nor does the double jeopardy clause bar the eighty-year sentence because Flowers had already started serving his time.[158] There are many situations in which a sentence may be changed after the defendant begins serving it.[159] One example is when, as here, the defendant attacks the legality of his original sentence.[160] Finding no sentencing error, the court affirmed the trial court's actions.[161]

V. Post-Conviction Relief

During the survey period, the supreme and appellate courts continued the trend of making post-conviction relief less available to convicted persons and narrowing the grounds for such relief. In one case, the court held the remedy unavailable to juveniles. In another case, the court held that a petitioner may not raise ineffective assistance of prior post-conviction counsel as a ground for relief in a subsequent post-conviction petition.

A. Post-Conviction Relief Not Available to Juveniles

In *Jordan v. State*,[162] a majority of the supreme court held that state provisions for post-conviction relief are not available to juveniles adjudicated delinquent. The court first noted that the post-conviction rules themselves provide a post-conviction remedy for "any person who has been *convicted* of, or sentenced for, a crime by a court of this State."[163] Juvenile adjudications do not constitute criminal convictions.[164] The juvenile process is civil, not criminal.[165] The nature of the juvenile process is rehabilitation.[166] When a juvenile is found to be delinquent,

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155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 1099.
162. 512 N.E.2d 407 (Ind.), *reh'g denied*, 516 N.E.2d 1054 (Ind. 1987).
163. *Id.* at 408 (quoting Ind. R. P. Post-Conviction Rem. 1, § 1(a) (emphasis added)).
164. 512 N.E.2d at 408 (citing Pallet v. State, 269 Ind. 396, 401, 381 N.E.2d 452, 456 (1978)).
165. 512 N.E.2d at 408.
166. *Id.*

a program is attempted to aid the juvenile in rehabilitation.[167] Adjudication of delinquency does not impose any civil disability nor does it disqualify the juvenile from any governmental application, examination or appointment.[168]

In contrast, an adult conviction is a stigma which affects the adult throughout life.[169] It can subject the adult to habitual criminal sentencing provisions.[170] It can affect the adult's credibility as a witness in future trials.[171] In its discussion of the relative legal innocuousness of juvenile adjudications, the court did not address the fact that otherwise suspendible felonies are made nonsuspendible by the fact that the offender has a juvenile record.[172]

Finally, the court noted that the procedure for direct appeal is available for review of juvenile adjudications.[173] Additionally, the juvenile court has discretion to expunge a person's juvenile record.[174] The dissenters expressed concern that some procedure must, as a matter of due process, be available to challenge on legal grounds an adjudication after appeal time has expired.[175] Chief Justice Shepard responded to the dissenters in a concurring opinion to the denial of rehearing and stated his belief that Trial Rule 60[176] could provide an avenue of review in such instances.[177]

B. Petitioner's Presence at Hearing

In *Page v. State*,[178] the court held that the petitioner's presence at the hearing on his post-conviction petition is not required. The right to be present at all critical stages of the proceedings applies only to trial.[179]

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167. *Id.* at 409.
168. *Id.* (quoting IND. CODE ANN. § 31-6-3-5 (Burns 1980)).
169. 512 N.E.2d at 409.
170. *Id.*
171. *Id.*
172. IND. CODE § 35-50-2-2.2(a) (1988) provides that the court may not suspend a sentence for a felony if the person has a juvenile record which includes acts which would constitute the following felonies if committed by an adult:

1 one Class A or Class B Felony;

2 two Class C or Class D Felonies; or

3 one Class C and one Class D Felony; and less than three years have elapsed between commission of the juvenile act(s) and the commission of the felony for which the person is currently being sentenced.

173. 512 N.E.2d at 409.
174. *Id.* at 409-10 (quoting IND. CODE ANN. § 31-6-8-2 (Burns 1980)).
175. 512 N.E.2d at 411 (DeBruler, & Dickson, J. J., dissenting).
176. IND. R. TR. P. 60.
177. Jordan v. State, 516 N.E.2d 1054 (Ind. 1987) (Shepard, C.J., concurring).
178. 517 N.E.2d 427 (Ind. App. 1988).
179. *Id.* at 429 (citing Gallagher v. State, 466 N.E.2d 1382 (Ind. Ct. App. 1984)).

Here, the facts which supported Page's allegations were not in dispute.[180] Page's affidavit was admitted into evidence at the hearing without objection.[181] Page's presence was not constitutionally required.[182] A post-conviction court does not abuse its discretion when it conducts the post-conviction hearing without the petitioner.[183]

C. Laches

In *Perry v. State*,[184] Chief Justice Shepard, writing for the majority, clarified the degree of proof required to establish the defense of laches to a post-conviction petition. Post-conviction relief may be pursued at any time.[185] However, the doctrine of laches infers a waiver of the right to challenge a judgment.[186] The elements of laches which the state must prove by a preponderance of the evidence are: (1) that the petitioner unreasonably delayed in seeking relief, and (2) that the state has been prejudiced by the delay.[187] The court concluded that the doctrine of laches may not be predicated upon constructive knowledge, that is, knowledge imputed by operation of law.[188] Nor may laches be imputed to a petitioner by charging him with "inquiry notice," that is, a duty to inquire about the validity of his conviction upon the happening of a certain event such as incarceration.[189] Rather, the court will require the state to prove actual knowledge in order to prevail on a laches defense.[190] However, the state is not required to present direct evidence on this point; circumstantial evidence is sufficient to show state of mind.[191] Facts from which a reasonable factfinder could infer actual knowledge include: the petitioner's "repeated contacts with the criminal justice system, consultation with attorneys and incarceration in a penal institution with legal facilities. . . ."[192] The sufficiency of the showing of laches must be made by the post-conviction court in the first instance.[193]

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180. 517 N.E.2d at 429.
181. *Id.*
182. *Id.*
183. *Id.*
184. 512 N.E.2d 841 (Ind. 1987).
185. *Id.* at 843 (citing IND. R. P. POST-CONVICTION REM. 1, § 1(a)).
186. 512 N.E.2d at 843.
187. *Id.* (citing Lacy v. State, 491 N.E.2d 520 (Ind. 1987); Pinkston v. State, 479 N.E.2d 79 (Ind. 1985)).
188. 512 N.E.2d at 844.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 845.
193. *Id.*

Provided there is probative evidence to support its determination, the appellate court will affirm its judgment.[194]

D. Ineffective Assistance of Post-Conviction Counsel

In *Alston v. State*,[195] the defendant entered a guilty plea. At his guilty plea hearing, the court neglected to advise him of three of the rights he was waiving by pleading guilty.[196] Alston filed a post-conviction petition but did not allege as error that the court had neglected to advise him of these rights.[197] Clearly, had counsel raised these errors Alston would have prevailed and he would have been granted a new trial.[198] However, after that time, the supreme court held in *White v. State*[199] that when a petitioner alleges the sort of error present in Alston's case, he must show that the omissions made a difference in the defendant's decision to plead guilty. The court denied Alston relief holding that the decision in *White* controlled in his case even though it was his attorney's ineffectiveness which had operated to deny him the relief he was admittedly entitled to when his first petition was filed.[200] In a bitterly worded opinion, the court made much of the fact that Alston never disputed the factual basis for the plea or that he was factually guilty.[201] The court concluded that, if counsel is inadequate at a prior post-conviction proceeding, the remedy is to permit the petitioner to start over.[202] The new proceeding, however, must be determined by prevailing law as if no prior post-conviction petition had been filed.[203]

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194. *Id.*
195. 521 N.E.2d 1331 (Ind. Ct. App. 1988).
196. *Id.* at 1334.
197. *Id.*
198. *Id.*
199. 497 N.E.2d 893 (Ind. 1986).
200. 521 N.E.2d at 1335.
201. *Id.* at 1334.
202. *Id.* at 1335.
203. *Id.*