

## Update—Criminal Law & Procedure

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### INTRODUCTION

The Supreme Court of the United States remained extremely active accepting and deciding criminal issues with constitutional dimension and, therefore, with implications for state criminal practice. The strong trend of these decisions is to strengthen law enforcement; constitutional protections are clearly contracting. Although the subject matter mix was refreshingly eclectic, the Fourth Amendment, confessions, habeas corpus, and the death penalty continued to occupy a large share of the Court's time. Surprisingly, the Confrontation Clause, the subject of much recent Court activity, was not addressed this past term. However, the Indiana Supreme Court issued important decisions in the confrontation area as well as in many others. Several significant statutory developments in the substantive crime area will also be discussed.

### I. SUBSTANTIVE CRIMINAL LAW

#### A. Burglary

Both the Indiana courts and legislature were active in the burglary area. The cases continued to explore the question of when a building is a "dwelling," a circumstance that elevates burglary from a Class C felony to a Class B.<sup>1</sup> In *Ferrell v. State*<sup>2</sup> the supreme court held that

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1. The common-law formulation of burglary (and arson) embraced only dwellings. To break and enter a building other than a dwelling was simply not burglary, though it may have been some lesser offense. This was no mere quibble over semantics. The particular evil at which the crime of burglary was aimed was the intrusion into the sacred space of the habitation. It was not a property crime; it was the threat to personal safety and the sanctity of the habitation which was breached. "A person's home is his castle" fairly depicts the idea. A person's store, warehouse, or office were his property, to be sure, but not his castle. Slowly, especially in America, burglary was broadened to include all sorts of buildings and structures, sometimes even automobiles. Whether that development was even coherent is a question of some complexity, but there is no doubting that it happened and that Indiana has followed that development by broadening the subjects of burglary to include buildings and structures of all sorts. Recognizing the greater dangers and affront inherent in house intrusions, Indiana elevated a breaking and entry of a dwelling to a Class B felony. See IND. CODE § 35-43-2-1 (1988) (burglary); *id.* § 35-41-1-10 (definition of "dwelling").

2. 565 N.E.2d 1070 (Ind. 1991).

a building remained an occupant's<sup>3</sup> "dwelling" even though he had not slept there for four months.<sup>4</sup> The victim did maintain an address and phone at that location and visited the house on a regular basis. This was sufficient contact to treat the building as his dwelling. In *Brown v. State*,<sup>5</sup> the victims physically relocated to another house, but maintained the right of occupancy and in fact, left personal items in the house. Again, this was held sufficient contact so that the building was still legally, if not factually, their "dwelling."<sup>6</sup>

In Indiana Code 35-43-2-1.5 the legislature created a new crime, Residential Entry: "A person who knowingly or intentionally breaks and enters the dwelling of another person commits residential entry, a Class D felony."<sup>7</sup> This statute was prompted presumably by problems of proof in certain housebreaking scenarios. The Indiana Burglary Statute<sup>8</sup> requires proof that the defendant entered with the intent to commit a felony. Often the state will have proof that the defendant broke and entered a house without consent, but the defendant takes the position either that he intended no target crime at all or that the target crime is a misdemeanor.<sup>9</sup> The new statute permits prosecution for a felony (Class

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3. Burglary has always been understood as a crime against the occupant, not the owner, because the theory of the harm was not property centered but privacy centered.

4. *Ferrell*, 565 N.E.2d at 1072.

5. 580 N.E.2d 329 (Ind. Ct. App. 1991).

6. *Id.* at 330. The "dwelling" cases all seem bizarre unless one first firmly fixes on the precise harm that the common law understood burglary to perpetrate. Any ordinary observer of the buildings in these cases would say, "This is a house. This is a dwelling." The common law had, however, no special interest in protecting one type of architecture (house) more than others (store, warehouse, etc.). They were all subject to property-centered crimes such as trespass, theft, or vandalism. The crime of burglary protected the special, human connection to the place one lived. Of course, threat to physical safety in housebreakings was often entailed, but this too was not the heart of the problem. Occupants out for the evening or on vacation were still understood to be subject to the special harm of outsiders intruding into their space. Indeed, psychologists are familiar with cases in which people can no longer live in their homes after they have been burglarized. What the recent dwelling cases in Indiana are really exploring is: "When does this special relationship with the habitational place start and when does it end?"

7. IND. CODE § 35-43-2-1.5 (Supp. 1991).

8. IND. CODE § 35-43-2-1 (1988).

9. Part of the problem here is theft, the most common target crime in burglary. Indiana Code § 35-43-4-2, the basic theft statute, has been interpreted to require an intent to deprive the owner of the property substantially permanently. *See, e.g., Nelson v. State*, 337 N.E.2d 877 (Ind. Ct. App. 1975). Thus, if the defendant claims that he intended to take the property temporarily (which, in some cases, is a plausible claim, especially with motor vehicles), there is no theft, but only criminal conversion, IND. CODE § 35-43-4-3 (1988), which is only a misdemeanor and thus, does not support burglary. If the prosecutor cannot prove an intent to commit theft, the state is left with two misdemeanors—criminal trespass, IND. CODE § 35-43-2-2 (Supp. 1991), and criminal conversion.

D) without any requirement of proof of intention to commit a target crime. Of course, if such intention is shown, the crime becomes a Class B burglary.<sup>10</sup>

### B. Criminal Gangs

The legislature also enacted Indiana Code 35-45-9,<sup>11</sup> a series of provisions on criminal gangs, and amended the RICO statute<sup>12</sup> to incorporate gang activity. The subject of these provisions is a broad one. Any adequate treatment of the legal and constitutional implications of such changes is beyond the scope of this Article. Like RICO and "organized crime" statutes, the new legislation is an attempt to add enforcement weapons in fighting a problem which is proving intractable to solution by more conventional penal statutes. Clearly, the question of whether these provisions unduly offend First Amendment associational rights will have to be addressed.<sup>13</sup>

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10. Note that the statute does not cover illegal breaking and entry of a building other than a dwelling. In such cases, intent to commit a felony will still be necessary to convict of Class C burglary. If such intent cannot be proved, the state will be left with a misdemeanor prosecution for criminal trespass. *Id.*

11. Indiana Code § 35-45-9 provides as follows:

Sec. 1. As used in this chapter, "criminal gang" means a group with at least five (5) members that specifically:

(1) either:

(A) promotes, sponsors, or assists in; or

(B) participates in; and

(2) requires as a condition of membership or continued membership; the commission of a felony or an act that would be a felony if committed by an adult or the offense of battery.

Sec. 2. As used in this chapter, "threatens" includes a communication made with the intent to harm a person or the person's property or any other person or the property of another person.

Sec. 3. A person who knowingly or intentionally actively participates in a criminal gang commits criminal gang activity, a Class D felony.

Sec. 4. A person who threatens another person because the other person:

(1) refuses to join a criminal gang; or

(2) has withdrawn from a criminal gang;

commits criminal gang intimidation, a Class C felony.

12. The criminal RICO statute is Indiana Code § 35-45-6-1, -2 (Supp. 1991). The civil RICO statute is Indiana Code § 34-4-30.5-1 to -4.5 (Supp. 1991).

13. There would be clear constitutional problems in making mere membership in a group a crime, especially if the group is multi-purposed, if some purposes were legal and if liability did not require proof of actual involvement in the illegal purposes. *See, e.g., Scales v. United States*, 367 U.S. 203 (1961). The criminal gangs statute seems to be drafted to avoid this difficulty insofar as possible. The question is whether, because it is so tightly drawn, anyone can ever be successfully prosecuted under it. It would seem, at least, to be difficult to obtain proof that a gang actually conditions membership on



## II. ARREST, SEARCH, & SEIZURE

The most important Fourth Amendment decisions of the past term dealt with the parameters of the "seizure" of a person, a topic the United States Supreme Court had not addressed directly for several years. Both decisions clearly forward a law enforcement agenda.

In *California v. Hodari D.*<sup>14</sup> and *Florida v. Bostick*,<sup>15</sup> the Court dramatically changed the understanding of the initial phase of the police-suspect confrontation. Prior to *Hodari D.*, the principal question involving whether a suspect had been "seized" was whether an objectively reasonable person would "feel free to leave."<sup>16</sup> This could be proved either by proof that the police physically restrained the suspect or engaged in shows of authority clearly signalling compulsion and not a voluntary conversation. The focus was on police conduct. *Hodari D.*, a seven to two decision, adds a new aspect, because now the "seizure" question depends, in part, on the suspect's reaction to the police. The police, concededly with neither probable cause nor reasonable suspicion, engaged in a chase of *Hodari D.* and others. There is no question that the police clearly signalled an intention to detain him without his voluntary consent. As he ran, he tossed away an object which later proved to be crack cocaine. The admissibility of that evidence was argued to be a "fruit of the poisonous tree" seizure. The Court held that *Hodari* had not yet been seized and redefined a seizure to mean (a) the application of physical restraint (a touching) or (b) a show of authority or force *to which the suspect yields*.<sup>17</sup> Thus, until the suspect is caught or submits to the authority, no seizure has taken place. Thus, the abandonment of the cocaine was not the product of a seizure as none had yet taken place. The old definition of not feeling "free to leave" remains as a *necessary* aspect of this second type of seizure; it is, however, not *sufficient*. The dissent worried about the potential for abuse. Police may now engage in a "threatening, but sufficiently slow chase" to prompt various behaviors from suspects without needing any level of suspicion to do so.<sup>18</sup>

In *Bostick*, the suspect clearly submitted to the police; thus, the *Hodari D.* issue was not presented. Attention focused on the anterior

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active participation in felonies. Groups such as this ordinarily do not have written charters. The purpose for the statute is understandable. The question is whether it successfully navigates between the Scylla of First Amendment difficulty and the Charibdis of requiring more proof than can be obtained.

14. 111 S. Ct. 1547 (1991).

15. 111 S. Ct. 2382 (1991).

16. See, e.g., *United States v. Mendenhall*, 446 U.S. 544 (1980).

17. *Hodari*, 111 S. Ct. at 1552.

18. *Id.* at 1559 (quoting 3 WAYNE LAFAVE, SEARCH AND SEIZURE § 9.2, at 61 (2d ed. 1987 & Supp. 1991)).

question: How much police behavior constitutes a sufficient show of authority so that the suspect does not objectively believe he is free to leave or ignore the police? Florida police were "working the buses," a procedure which entails boarding public buses during layovers and asking everyone (or some subgroup of people in some cases) to answer questions, present identification, and often, to consent to a search of their carry-on or stored luggage. Two uniformed, badged, armed police approached Bostick, positioned themselves in the aisle between Bostick and the door, and after preliminary questioning, asked him to consent to a search of his luggage. He did so and the search disclosed cocaine. Because he so clearly submitted to the police, the *Hodari D.* question was not presented. Rather, the court held that the police conduct was not a seizure because a reasonable person would not feel compelled to submit to such a request.<sup>19</sup> The Court noted that any failure to cooperate could not be used as the basis for any probable cause or reasonable suspicion.<sup>20</sup> The dissent argued that the average traveler does not know this to be true and that the conduct of the police in this case was rife with compulsion.<sup>21</sup> The case is complicated by the fact that bus travelers are not "free to leave" the bus in the same way that a suspect approached on the street is free to leave.

The combination of *Hodari D.* and *Bostick* presents a Hobson's choice to a suspect confronted by police who have no lawful right to arrest or stop him. *Bostick* requires great fortitude to withstand marginally coercive tactics, yet *Hodari D.* makes anything the suspect says or does not the product of a seizure and thus, usable against him to support further police inferences. The third choice is to submit "voluntarily" as did Bostick.

In *Florida v. Jimeno*,<sup>22</sup> the Court held that consent to search a car includes consent to open any containers within the car in which the

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19. *Id.* at 1557.

20. *Id.* at 1556-57.

21. *Florida v. Bostick*, 111 S. Ct. 2382, 2389 (1991) (Marshall, J., dissenting). The majority argues that any pressure against leaving is not of police origin. If a suspect does not mind missing his bus (a matter about which the police are presumably indifferent), he is "free to leave." The dissent points out that "working the buses" is a technique designed to exploit the very fact that the suspect has his own reasons for not exiting the situation. It seems that this debate is an illustration of the limitation of language. When the Court first penned "free to leave," it was dealing with situations in which the suspect was walking, driving, or otherwise going somewhere. To be free of the police contact was to "leave." Had the first case arose in the suspect's home, "free to leave" would hardly have been chosen. When the issue arises in situations like *Bostick*, when what the suspect wants is to "stay" and have the police "leave," one needs to get behind the words of a doctrine to its function. What if the police hounded a suspect sitting or lying in a hospital emergency room and claimed that he was, after all, free to leave?

22. 111 S. Ct. 1801 (1991).

sought item could be located.<sup>23</sup> Therefore, the defendant could not complain that following his consent to search his car for controlled substances, the police opened a brown paper bag which contained cocaine. The Court distinguished this situation from one in which the police, having received consent to search a car's trunk, pried open a locked briefcase in the trunk.<sup>24</sup> There, the Court reasoned that a policeman could not reasonably believe that the consenter meant to authorize such conduct.<sup>25</sup>

*California v. Acevedo*<sup>26</sup> overrules *Arkansas v. Sanders*<sup>27</sup> and *United States v. Chadwick*,<sup>28</sup> wherein the so-called *Chadwick-Sanders* rule was developed. Police in *Acevedo* had probable cause that a paper bag being carried by a suspect contained controlled substances. The police waited until the suspect reached his car and placed the bag in the car, then detained the suspect, searched the bag, and found the evidence. Although it has long been true that automobile searches upon probable cause can be conducted without a warrant<sup>29</sup> and that such a search could extend to all containers within the vehicle,<sup>30</sup> the *Chadwick-Sanders* rule held that when probable cause was directed not to the car generally but to a particular container in a car, the police could not wait until that container was deposited in the car and then employ the automobile exception.<sup>31</sup> The Court rejected *Chadwick-Sanders* as anomalous. The dissent noted that the potential for abuse was high because the police, had they seized the bag before it was put in the car, would have needed a warrant.<sup>32</sup>

The case of *County of Riverside v. McLaughlin*<sup>33</sup> further elaborates on the requirement of *Gerstein v. Pugh*,<sup>34</sup> which held that an arrestee held without an arrest warrant is entitled to a prompt determination of probable cause.<sup>35</sup> *McLaughlin* progresses toward defining "prompt." The

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23. *Id.* at 1804.

24. *Id.*

25. *Id.* (citing *State v. Wells*, 110 S. Ct. 554 (1990)).

26. 111 S. Ct. 1982 (1991).

27. 442 U.S. 753 (1979)

28. 433 U.S. 1 (1977).

29. *Carroll v. United States*, 267 U.S. 132 (1925).

30. *See United States v. Ross*, 456 U.S. 798 (1982).

31. The idea, of course, is that if the police could not search a container without a warrant when it was outside the car, the police should not be permitted to wait until it is placed in a car and then claim the exigency of the mobility of the vehicle to avoid the warrant requirement.

32. *California v. Acevedo*, 111 S. Ct. 1982, 1995 (1991) (Stevens, J., dissenting).

33. 111 S. Ct. 1661 (1991).

34. 420 U.S. 103 (1975).

35. *Id.* at 118.



Court held that this determination (which may be *ex parte*)<sup>36</sup> must occur "as soon as reasonably feasible, but in no event later than 48 hours after arrest."<sup>37</sup> The case resolved a division among the circuits, some of which had followed a forty-eight hour rule and some of which (including the Seventh Circuit) had required a prompt finding. The decision makes it absolutely clear that intervening weekends or holidays are insufficient reasons for not complying with the forty-eight hour rule, but other "extraordinary circumstances" might be.<sup>38</sup>

As a practical matter, it should be noted that while many states combine the probable cause determination with other procedural events (arraignment, presentment, or bail hearing), nothing requires them to do so. Thus, in weekend or holiday situations when these other proceedings cannot occur within forty-eight hours, the Fourth Amendment is satisfied with a post-arrest warrant issued by a neutral magistrate following the same process as a pre-arrest warrant.

Indiana courts also devoted much of their time to Fourth Amendment issues. In *Smith v. State*,<sup>39</sup> the Indiana Supreme Court reviewed facts generating issues calling for refinement of the doctrine of a 1990 case, *Maryland v. Buie*.<sup>40</sup> *Buie* permitted, incidental to arrest in a house, a "protective sweep" of the house to protect police from incipient danger from accomplices, sympathizers, and others.<sup>41</sup> The police in *Smith* made such a sweep and then entered a locked storeroom and found drying marijuana. The Indiana Supreme Court held that because there was no evidence that the room immediately adjoined the locus of arrest so that an attack on officers could be launched therefrom, and because no specific and articulable facts demonstrating any reasonable suspicion of danger existed, this entry did not fall within the *Buie* exception.<sup>42</sup> Once the defendant is arrested and the immediate danger past, the police may

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36. Applications for arrest warrants made prior to physical arrest have always, of course, been *ex parte*. *Gerstein*, as a Fourth Amendment case, never imposed anything more than a requirement of a warrant in cases in which the physical arrest was made without one as a condition precedent for holding the arrestee for any longer than was necessary for administrative processing. The *Gerstein* requirement, thus, should not be confused with other procedural requirements to prove probable cause at other stages of the formal judicial process. This confusion is prompted because many jurisdictions have chosen to satisfy the *Gerstein* requirement by amalgamating it with some other step in that process, such as presentment (preliminary arraignment).

37. *McLaughlin*, 111 S. Ct. at 1671.

38. *Id.*

39. 565 N.E.2d 1059 (Ind. 1991).

40. 494 U.S. 325 (1990).

41. *Id.* at 336.

42. *Smith*, 565 N.E.2d at 1063.

search, under the search-incident-to-arrest exception,<sup>43</sup> only within the rules of *Chimel v. California*.<sup>44</sup> Beyond the *Chimel* scope, police may only search further after obtaining a search warrant.

### III. CONFESSIONS

The United States Supreme Court decided three cases involving confessions, two on the *Edwards* rule and one on coerced confessions. *Minnick v. Mississippi*<sup>45</sup> elaborated further on the much litigated *Edwards* rule. In *Edwards v. Arizona*,<sup>46</sup> the Court held that when a suspect during custodial interrogation invokes the right to consult with a lawyer, all questioning must cease and may not be reinitiated by the police until the suspect consults with an attorney.<sup>47</sup> The *Minnick* case addressed whether the prohibition of initiating interrogation continues even after a suspect has consulted with counsel. The Court held, 6-2, that it does.<sup>48</sup> *Edwards* protection requires that a suspect not be interrogated without counsel *present*. Thus, the intervening consultation does not toll the *Edwards* prohibition. Of course, if the suspect initiates the dialogue, the *Edwards* rule has been satisfied and the analysis follows traditional *Miranda* lines.<sup>49</sup>

In *McNeil v. Wisconsin*,<sup>50</sup> the defendant was arrested for robbery. At arraignment, he requested a lawyer to represent him. Later, while still in custody, he was interrogated on an unrelated murder. The defendant had not invoked *Edwards*, which would have prevented police-initiated interrogation on any subject.<sup>51</sup> However, he had requested Sixth

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43. The police may have some basis for a warrantless search wholly apart from the search-incident-to-arrest theory on which *Buie* is based. For example, an occupant may consent to a search or the presence of others, who present no physical threat to the officers but who may destroy evidence, might give police the right to make a warrantless search provided they have probable cause of the presence of crime-connected items. See, e.g., *Vale v. Louisiana*, 399 U.S. 30 (1970).

44. 395 U.S. 752 (1969). *Chimel* permits a search of the arrestee's person and the area within his immediate control.

45. 111 S. Ct. 486 (1990).

46. 451 U.S. 477 (1981).

47. The invocation of a lawyer in *Edwards* must be kept distinct from the procedure which follows a suspect's invocation of silence. On invocation of silence, see *Michigan v. Mosley*, 423 U.S. 96 (1975).

48. *Minnier*, 111 S. Ct. at 492.

49. Under the Rehnquist Court, it is critically important to keep separate the Fifth Amendment *Miranda* line from the Sixth Amendment line of cases springing from *Massiah v. United States*, 377 U.S. 201 (1964). This court has interpreted *Miranda* grudgingly, but the *Massiah* line quite expansively.

50. 111 S. Ct. 2204 (1991).

51. See *Arizona v. Roberson*, 108 S. Ct. 2093 (1988).



Amendment counsel at his arraignment which the Court, in *Michigan v. Jackson*,<sup>52</sup> seemed to treat as tantamount to an *Edwards* invocation. The *McNeil* Court held that *Jackson* did not control this case.<sup>53</sup> Whereas the *Edwards* invocation is not offense-specific, but terminates police-initiated interrogation on *any* subject, the *Jackson* rule, founded on the Sixth Amendment right to counsel (and not the Fifth Amendment counsel right as *Miranda-Edwards*), is "offense-specific" and thus does not bar police-initiated interrogation on subjects not the subject of the current prosecution.<sup>54</sup> Defense counsel should note that *McNeil* can be obviated easily (if counsel is present at the arraignment) by having the defendant make a clear *Edwards* invocation on the record.

The Indiana Court of Appeals decided another *Edwards* issue in *Rider v. State*.<sup>55</sup> A mother's statement to police, "We need an attorney," was urged by her twenty-year-old son to constitute an *Edwards* invocation for him as well, especially since her statement was made after consultation with him. The court held that only the defendant could invoke his *Edwards* right; therefore, his confession, given after full *Miranda* warnings and waiver, was admissible.<sup>56</sup>

The United States Supreme Court's holding in *Arizona v. Fulminante*<sup>57</sup> is unremarkable, but the *dictum* is a striking reversal of precedent. The Court held that a confession was coerced and therefore, inadmissible.<sup>58</sup> Then, however, the Court overruled a long line of cases and held that a coerced confession could be harmless error under the doctrine of *Chapman v. California*.<sup>59</sup> This leaves a denial of counsel and a biased trial judge as the only two errors which cannot be harmless under *Chapman*. The Court distinguished these cases from coerced confessions by noting that they involve structural errors rather than "trial" errors.<sup>60</sup> Finally, the Court held that there was not proof beyond a reasonable doubt (the *Chapman* standard) that this particular error was harmless.<sup>61</sup>

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52. 475 U.S. 625 (1986).

53. *McNeil*, 111 S. Ct. at 2209.

54. *Id.* at 2204.

55. 570 N.E.2d 1286 (Ind. Ct. App. 1991).

56. *Id.* at 1288.

57. 111 S. Ct. 1246 (1991).

58. *Id.* at 1252.

59. 386 U.S. 18 (1967).

60. *Fulminante*, 111 S. Ct. at 1251.

61. *Id.* at 1257. Given the devastating effect of a confession, ordinarily it will not be clear at all, much less clear beyond a reasonable doubt, that the jury's hearing of an inadmissible confession was harmless. The decision, important as it may be to harmless-error scholars, will probably have little practical impact. One has to imagine a case where the other evidence is so compelling (perhaps the defendant had the bad form to commit the crime on videotape) that the confession is clearly surplusage.

## IV. JURY SELECTION

The Court decided two cases further developing the rule in *Batson v. Kentucky*.<sup>62</sup> In *Powers v. Ohio*,<sup>63</sup> the Court addressed a question left open last term in *Holland v. Illinois*.<sup>64</sup> In *Holland*, the Court denied a Sixth Amendment claim of a white defendant that blacks had been peremptorily challenged by the prosecution in violation of *Batson*. In *Batson*, Justice Powell strongly intimated that had the case been argued as an equal protection case, the result would have been different.<sup>65</sup> Writing for a seven to two majority, Justice Kennedy made good on that promise (threat?) in *Powers*. The opinion notes that the equal protection interests of the jurors themselves (well beyond the idea in *Batson* that the *defendant's* equal protection rights were violated), are of constitutional dimension and that a white defendant has sufficient standing to raise those claims.<sup>66</sup> Thus, prosecutors must state race neutral reasons for peremptory challenges of racial minority jurors regardless of the race of the defendant.<sup>67</sup>

As a counterpoint to *Powers*, the holding in *Hernandez v. New York*<sup>68</sup> indicates that the Court may be in a receptive mood to accept as "racially neutral" prosecutors' justifications for a *Batson* strike. Here, the prosecutor struck many Spanish speaking jurors (the defendant is variously described as Latino and Hispanic). The prosecutor explained that he was not confident that these potential jurors would accept as final the official court interpreter for Spanish speaking witnesses. The Court felt that this was sufficiently "race neutral" over a strong dissent from three justices.<sup>69</sup>

## V. BEYOND A REASONABLE DOUBT

In *Cage v. Louisiana*<sup>70</sup> the Court once again made clear that trial courts that embellish the meaning of "reasonable doubt" do so at great peril. In *Cape*, the trial court included within the standard "beyond a reasonable doubt" instructions: "It must be such doubt as would give rise to a grave uncertainty. . . . It is an actual, substantial doubt"; it

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62. 476 U.S. 79 (1986).

63. 111 S. Ct. 1364 (1991).

64. 110 S. Ct. 803 (1990).

65. *Batson*, 476 U.S. at 100.

66. *Id.* at 91.

67. *Powers*, 111 S. Ct. at 1374. The *Powers* decision was acknowledged by the Indiana Supreme Court in *Holifield v. State*, 572 N.E.2d 490 (Ind. 1991).

68. 111 S. Ct. 1859 (1991).

69. *Id.* at 1873.

70. 111 S. Ct. 328 (1990).

amounts to a "moral, not a mathematical, certainty." The conviction was reversed *per curiam*.<sup>71</sup>

#### VI. RAPE-SHIELD STATUTES<sup>72</sup>

In *Michigan v. Lucas*,<sup>73</sup> the Court held that a Michigan trial court properly precluded evidence of a past sexual relationship between the defendant and the prosecutrix because the defendant had not complied with the notice requirement of the Michigan statute<sup>74</sup> (which is quite similar to the Indiana statute<sup>75</sup> and to Federal Rule of Evidence 412).

#### VII. FAIR TRIAL

The decision in *Mu'Min v. Virginia*<sup>76</sup> reinforces the basic Burger Court direction in publicity cases staked out in *Murphy v. Florida*.<sup>77</sup> *Voir dire* examination disclosed that eight of the twelve jurors had heard of the case, which was highly publicized, but that they could be impartial. The judge did not inquire of those who had been exposed to publicity as to the content of what they had read or heard. The defendant claimed that his Sixth Amendment fair trial rights dictated that the judge probe content. The Supreme Court disagreed, holding that this was within the sound discretion of the trial court.<sup>78</sup> The jurors must agree to judge the case on the evidence, and the judge must be certain they will do so. However, this can be done without full disclosure by each prospective juror as to exactly what publicity has reached him or her.<sup>79</sup>

#### VIII. PRESUMPTIONS

In *Yates v. Evatt*,<sup>80</sup> the Court struck down as unconstitutional an instruction allowing the jury to presume the necessary malice for murder from either the use of a deadly weapon or from the committing of any

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71. *Id.* at 330.

72. The effect of such statutes is to render inadmissible as a matter of policy any evidence on the alleged victim's past sexual conduct or reputation or opinion evidence of the same. The purposes are to prevent a criminal trial for rape or other sex crimes from becoming a review of the victim's sexual history and, by removing such possibility, to encourage victims to come forth and seek help through the criminal process.

73. 111 S. Ct. 1743 (1991).

74. *Id.* at 1748.

75. IND. CODE § 35-37-4-4 (1988).

76. 111 S. Ct. 1899 (1991).

77. 421 U.S. 794 (1975).

78. *Mu'Min*, 111 S. Ct. at 1908.

79. *Id.*

80. 111 S. Ct. 1884 (1991).



unlawful act.<sup>81</sup> (South Carolina had no felony murder statute.) The Court noted that juries can be instructed on a permissive inference (as opposed to a presumption), provided there is a sufficiently rational connection between the basic facts and the facts to be presumed.<sup>82</sup>

#### IX. CRUEL AND UNUSUAL PUNISHMENT

*Harmelin v. Michigan*<sup>83</sup> generated deep division and long exposition on the "proportionality" aspect of the Eighth Amendment prohibition against cruel and unusual punishment. Defendant, a first offender, was sentenced to life with no possibility of parole for possession of 672 grams of cocaine under a statutory sentencing mandate. The Court upheld the sentence as not "grossly disproportionate."<sup>84</sup> Two Justices would jettison the proportionality aspect entirely as being outside the history and intent of the Eighth Amendment. Five held the statute was not in fact grossly disproportionate even though it mandated the sentence with no case-specific findings.

#### X. PROSECUTORIAL IMMUNITY

*Burns v. Reed*,<sup>85</sup> a case from Delaware County, was not itself a criminal case, but a section 1983 action against a prosecutor. However, it has obvious and far-reaching consequences for those in criminal practice. A six Justice majority of the Court reinforced the total immunity of public prosecutors set forth in *Imbler v. Pachtman*<sup>86</sup> for actions arising out of judicial proceedings. Thus, even though the plaintiff alleged that the prosecutor had been party to misleading a judge during a probable cause hearing, because such hearing is part and parcel of the judicial proceeding, absolute immunity applied. However, the plaintiff also alleged that the prosecutor gave improper advice to the police in advising that they could hypnotize the plaintiff (who was a suspect). As to this charge, the Court unanimously held that the prosecutor is to have only qualified immunity because giving advice to police during the investigative stage is not within the judicially connected part of the prosecutor's function.<sup>87</sup> The Court noted that it was anomalous to extend total immunity to a prosecutor for giving legal advice to police and to give police only qualified immunity for following it.<sup>88</sup>

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81. *Id.* at 1888.

82. *Id.* at 1897.

83. 111 S. Ct. 2680 (1991).

84. *Id.* at 2704.

85. 111 S. Ct. 1934 (1991).

86. 424 U.S. 409 (1976).

87. *Borus*, 111 S. Ct. at 1943.

88. *Id.*

## XI. DUE PROCESS

In *Schad v. Arizona*,<sup>89</sup> a five to four Court decided an intriguing set of questions arising in a first degree murder prosecution. The Arizona murder statute, as is common, collected under the one heading, "first-degree murder," both premeditated killings and felony murder killings.<sup>90</sup> Although this grouping is not historically unusual, no one ever seriously doubted that premeditated killing and felony murder were different crimes. Their constituent elements are clearly different.<sup>91</sup> There was some evidence supporting each crime — the killing was arguably premeditated and was alleged to have occurred during a robbery. The instructions did not require that the jury unanimously agree on a single theory. In effect, the trial court instructed the jury that these were merely two different ways to get to the same crime — first degree murder. Nor was the jury required to announce how it arrived at a verdict; it was sufficient that all twelve agreed to first degree murder. Thus, even though theoretically only six believed the killing was premeditated and only six believed it was committed during a robbery, the jury could, and did, convict. The Supreme Court held that there was no constitutional infirmity in the instruction since these were two theories which underlay the same offense, first-degree murder.<sup>92</sup> This decision is truly astounding. It calls into question the protections afforded by the "beyond a reasonable doubt" protection and the "substantial majority decision" requirement.<sup>93</sup>

The defendant also complained that the jury was not given the option of finding him guilty of robbery as a lesser included offense in contravention of the rule in *Beck v. Alabama*.<sup>94</sup> *Beck* stands for the proposition that omitting the lesser included offense choice (assuming, of course, it is supported by evidence) places the jury in an all-or-nothing

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89. 111 S. Ct. 2491 (1991).

90. ARIZ. REV. STAT. ANN. § 13-452 (repealed 1978).

91. First degree premeditated murder requires proof of an intent to kill plus the aspect of premeditation which implies an intent achieved after deliberation, thought, or planning. It requires no proof that the defendant was engaging in an independent felony. Felony murder, on the other hand, requires no proof of intent to kill, but instead requires proof that death was caused by the defendant while engaging or attempting to engage in one of the felonies listed in the statute, such as burglary, rape, or robbery.

92. *Schad*, 111 S. Ct. at 2505. This decision has an obvious application in Indiana. The Indiana murder statute, IND. CODE § 35-42-1-1 (Supp. 1991), groups under the one heading and statute "intentional" or "knowing" killing on the one hand and felony murder on the other.

93. Until 1972, criminal juries had to be unanimous to convict. In *Apodaca v. Oregon*, 406 U.S. 404 (1972), the Court upheld the constitutionality of a statute which permitted conviction (or acquittal) on fewer than 12 (in that case 10). Yet, the Court's opinion in *Apodaca* made it clear that a bare majority is insufficient.

94. 447 U.S. 625 (1980).

posture and exerts unfair pressure toward conviction.<sup>95</sup> The *Schad* Court found that *Beck* was not controlling because the jury, though it was not given a robbery option, was given a second degree murder option, thereby taking this out of the all-or-nothing rule.<sup>96</sup> This second holding is, of course, generated by the first and demonstrates the kind of problems such a holding can produce. If one begins by understanding premeditated first degree murder and felony murder as the *same crime*, then second degree murder surely is a lesser included offense. However, second degree murder is not lesser included in felony murder because felony murder requires no proof of intent to kill and second degree murder does. Those jurors (anywhere from zero to twelve) whose verdict was based on a felony murder theory had no lesser crime to select other than as a purely irrational compromise verdict. Those jurors were in precisely the posture that the *Beck* rule was designed to avoid.

## XII. CONFRONTATION

In *Brady v. State*,<sup>97</sup> criminal law practitioners were reminded of the importance of basing their clients' claims on all available grounds, including the Indiana Constitution. State procedures which meet the minimal requirements of the federal constitution may not pass muster when examined for compliance with the requirements of the Indiana Constitution. The right of confrontation serves as a recent example.

In *Brady*, the State sought leave to videotape the testimony of a child witness who was alleged to have been sexually abused. Videotaping such testimony was authorized by statute.<sup>98</sup> The statute permitted a court to order the videotaping of a child's testimony for use at trial if, among other requirements, the child was the victim, was less than ten years old, and would be traumatized by testifying in the courtroom. Finding all statutory requirements to be met, the trial court ordered the child's testimony to be videotaped prior to trial. The testimony was taken in the child's home with the child, judge, prosecutor, defense counsel, child's mother, and video operator present. The defendant was located in the garage of the home and was able to see and hear the child via closed circuit television. The defendant could speak with his counsel by microphone. The child could not see or hear the defendant and was not aware of his presence.

The Indiana Supreme Court first focused on the Sixth Amendment requirement that the accused shall enjoy the right "to be confronted

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95. *Id.* at 645-46.

96. *Schad v. Arizona*, 111 S. Ct. 2491, 2505 (1991).

97. 575 N.E.2d 981 (Ind. 1991)

98. IND. CODE § 35-37-4-8 (Supp. 1991).



with the witnesses against him.”<sup>99</sup> On this issue, the court found *Maryland v. Craig*<sup>100</sup> to be controlling. In *Craig*, the United States Supreme Court upheld the constitutionality of a similar Maryland procedure which permitted the child’s live testimony to be transmitted to the courtroom via one-way closed circuit television.<sup>101</sup> *Craig* made clear that the Confrontation Clause does not require an actual face-to-face encounter at trial in every instance.<sup>102</sup> Rather, the Sixth Amendment confrontation right is generally met if the defense is given a full and fair opportunity to probe through cross-examination.<sup>103</sup> Although the Indiana statutory procedure was slightly different than that analyzed in *Craig*,<sup>104</sup> the essential requirements of confrontation as defined by *Craig* were present.<sup>105</sup>

The procedure did not fare so well when tested against the right of the accused “to meet the witnesses face to face” as guaranteed by the Indiana Constitution.<sup>106</sup> The court recognized that the federal confrontation requirement and the Indiana provision have much the same meaning and share a similar history.<sup>107</sup> Both are designed primarily to protect the right of cross-examination.<sup>108</sup> Nevertheless, unlike the Sixth Amendment confrontation right, the Indiana guarantee is not fulfilled by merely ensuring that the right to cross-examine is scrupulously honored.<sup>109</sup> The specific language guaranteeing “the right . . . to meet the witnesses face to face” recognizes that face-to-face encounters do influence recollection, veracity, and communication.<sup>110</sup>

Because the statutory procedure mandated that the child not be able to see or hear the accused, those particular provisions of the statute

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99. U.S. CONST. amend. VI.

100. 110 S. Ct. 3157 (1990).

101. *Id.* at 3166.

102. *Id.* at 3164.

103. *Id.*

104. The Maryland procedure provided for the child’s live testimony to be taken outside the courtroom and transmitted to the factfinder and defendant. The Indiana statute authorized the same procedure or, as actually employed in the instant case, videotaping the testimony prior to trial with the defendant separated from the child.

105. *Craig* holds that the presence of an oath, cross-examination, and the ability to observe the witnesses’ demeanor, albeit by close circuit camera, are sufficient to ensure reliability and that adversarial probing occurs. With these attributes, the testimony is deemed the functional equivalent of live, in-person testimony. *Maryland v. Craig*, 110 S. Ct. 3157, 3166 (1990).

106. IND. CONST. art 1, § 13. Failure to apply the face-to-face requirement in circumstances such as these is not fundamental error. *Hart v. State*, 578 N.E.2d 336 (Ind. 1991). Thus, failure to assert the claim at trial precludes the claim on appeal. *Id.* at 338.

107. *Brady v. State*, 575 N.E.2d 986, 987 (Ind. 1991).

108. *Id.* at 985, 988.

109. *Id.* at 988.

110. *Id.* (citing IND. CONST., art 1, § 13).

must fail as violative of the defendant's right to a face-to-face meeting with the witness.<sup>111</sup> Thus, the Indiana confrontation requirement provides greater protection to the accused than does its federal counterpart embodied in the Sixth Amendment.

The court noted that a face-to-face meeting could be accomplished by use of a two-way closed circuit arrangement which would permit the separated witness and the accused to see one another.<sup>112</sup> Such a procedure would not only satisfy the face-to-face requirement, but would also accomplish the essential purpose of the statute, affording protection to the child witness.

### XIII. TRIAL EVIDENCE

The next significant case, *Modesitt v. State*,<sup>113</sup> also involved the admissibility of a child's statements in a sex abuse case. Although not of constitutional dimension, the ruling has far-reaching effects. In *Modesitt*, the accused was pummeled by testimony from the child's mother, a welfare case worker, and a psychologist regarding statements the child had made to each of them. The hearsay statements were admitted on the authority of *Patterson v. State*.<sup>114</sup> The child testified after this testimony was received. She corroborated most of the acts previously narrated via the hearsay, but not all. She was not asked specifically whether she made the statements attributed to her by the other three witnesses nor whether the statements were true.

The court first inquired whether the *Patterson* rule was abused. The court noted that the rationale for the *Patterson* holding, which permitted admission of prior statements as substantive evidence, was that the truthfulness of the statement could be tested by cross-examination of the declarant.<sup>115</sup> This rationale was the basis for the *Patterson* requirement that the declarant be present and available for cross-examination. The rule was not intended to permit the out-of-court statements to serve as a substitute for direct testimony.<sup>116</sup> Such substitution occurred in *Modesitt* because the three witnesses told the victim's story and continually repeated her accusations before the victim testified. As a result, the accused was denied the opportunity to cross-examine the declarant in a timely fashion

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111. *Id.* The offensive provisions are subsections (c) and (f)(7) of IND. CODE § 35-37-4-8 (Supp. 1991).

112. *Brady v. State*, 575 N.E.2d 980, 989 (Ind. 1991).

113. 578 N.E.2d 649 (Ind. 1991).

114. 324 N.E.2d 482 (Ind. 1975). *Patterson* permitted the admission of prior out of court statements, not under oath, as substantive evidence if the declarant was present and available for cross-examination at the time of admission.

115. *Modesitt*, 578 N.E.2d at 651.

116. *Id.*

regarding the truthfulness of the statements. Moreover, the constant repetition of the accusations resulted in the victim's credibility being established before the victim said a word. The court concluded that the *Patterson* rule had been abused and the defendant prejudiced by the "drumbeat repetition of the victim's original story prior to calling the victim to testify."<sup>117</sup>

The court then overruled *Patterson* because the simple rule first adopted in that case was no longer recognizable as applied.<sup>118</sup> Instead, the court adopted the content of Rule 801(d)(1)(A) of the Federal Rules of Evidence.<sup>119</sup> Prior statements may be admitted as substantive evidence only if the declarant testifies at trial and is subject to cross-examination concerning the statement and the statement is: (a) inconsistent with the declarant's testimony and was given under oath; (b) consistent with the declarant's testimony and is offered to rebut a charge of recent fabrication, improper influence or motive; or (c) one of identification of a person made after perceiving the person.<sup>120</sup>

In another case involving the admissibility of prior statements, *Thomas v. State*,<sup>121</sup> the issue was intertwined with the right of the accused to present a defense. In *Thomas*, the defendant sought to introduce the prior statements of one Nelson. Nelson allegedly bragged to others that he committed the robbery for which Thomas was on trial. In addition, other evidence existed which implicated Nelson. Specifically, early in the police investigation a clerk from a store near the robbery scene had selected Nelson's picture from a photo array and identified him as being present near the scene at the time of the robbery.

Nelson was called as a witness but declined to testify and invoked his right against self-incrimination. Thomas then offered Nelson's prior statements that he committed the robbery. The trial court declined to admit the statements attributed to Nelson on hearsay grounds. The court of appeals affirmed finding that third party confessions and declarations against penal interest are permeated with untrustworthiness. The Indiana Supreme Court reversed and observed that an accused has a constitutional right to put on a defense<sup>122</sup> citing *Chambers v. Mississippi*.<sup>123</sup> The court did not sanction the blanket admissibility or inadmissibility of declarations against penal interest. Rather, it concluded that declarations against penal interest should be admitted if corroborating circumstances clearly indicate

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117. *Id.* at 652.

118. *Id.*

119. *Id.* at 653.

120. *Id.* at 653-54.

121. 580 N.E.2d 224 (Ind. 1991).

122. *Id.* at 226.

123. 410 U.S. 284 (1973).



the trustworthiness of the statement.<sup>124</sup> This approach is the same as that identified in *Chambers* and the Federal Rule of Evidence 804(b)(3). Applying this test to the facts of *Thomas*, the court concluded that corroboration was provided by the initial identification of Nelson, the number of people to whom he had bragged, and the detail of the statements in which he admitted that he had perpetrated the robbery.<sup>125</sup> Accordingly, the court found that Thomas should have been allowed to present Nelson's statements against his penal interest as exceptions to the hearsay rule.

The last significant case to be surveyed pertaining to trial evidence is *Hopkins v. State*.<sup>126</sup> *Hopkins* deals with the admissibility of forensic DNA evidence. By statute, Indiana has already provided that the results of forensic DNA analysis are admissible without antecedent expert testimony that such evidence provides a trustworthy and reliable method of identifying characteristics in an individual's genetic material.<sup>127</sup> The statute was passed after the events giving rise to the *Hopkins* case. Thus, some aspects of the *Hopkins* decision, specifically the question of whether the theory and techniques of DNA analysis can produce reliable results generally accepted in the scientific community, has been mooted by the statute. The *Hopkins* court answered this inquiry in the affirmative.<sup>128</sup>

Notwithstanding the statute, *Hopkins* is important for two reasons. First, the court utilized the test of *Frye v. United States*,<sup>129</sup> to assess the reliability of the novel scientific evidence.<sup>130</sup> Although it utilized this test, the majority stopped short of holding that the *Frye* test is the required standard to be used in determining the admissibility of novel scientific evidence in Indiana. As it stands now, some cases, such as *Hopkins*, use the *Frye* test which requires general scientific acceptance of the theory and technique employed. Others require only a finding

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124. *Thomas*, 580 N.E.2d at 226.

125. *Id.* at 227.

126. 579 N.E.2d 1297 (Ind. 1991).

127. IND. CODE § 35-37-4-13 (Supp. 1991).

128. *Hopkins*, 579 N.E.2d at 1302.

129. 293 F. 1013 (D.C. Cir. 1923).

130. The *Frye* test, as discussed with apparent approval by the majority in *Hopkins*, has three elements: (1) "Is there a theory, which is generally accepted in the scientific community, which supports the conclusion that DNA forensic testing can produce reliable results?" (2) "Are there techniques or experiments that currently exist that are capable of producing reliable results in DNA identification and which are generally accepted in the scientific community?" (3) "Did the testing laboratory perform the accepted scientific techniques in analyzing the forensic samples in this particular case?" *Hopkins*, 579 N.E.2d at 1302. This test is more stringent, as pointed out by Justice Dickson, than Federal Rule of Evidence 702, which does not require general scientific acceptance of the theory or techniques. *Id.* at 1306 (Dickson, J., concurring) (observing that the majority's discussion of *Frye* should not be construed as an endorsement or rejection of the *Frye* test).

that the subject matter of the expert's opinion be beyond the knowledge of lay persons and that the expert's knowledge will aid the jury.<sup>131</sup>

The second important aspect of *Hopkins* involves the issue of whether claimed irregularities in the DNA testing procedure actually employed go to the admissibility of the evidence or merely to its weight. In *Hopkins*, the defendant asserted that irregularities had occurred. The court responded by indicating that once the trial court rules a witness qualified to give expert testimony as a matter of law, subsequent evaluation of the evidence goes only to its weight as a matter of fact.<sup>132</sup> Thereafter, on a chain of custody claim, the court indicated that "the proponent is not required to exclude all possibility of tampering, but need only provide a reasonable assurance that the evidence remained in undisturbed condition."<sup>133</sup> Does this mean that proof of some irregularities such as the mishandling of the specimen may go to admissibility?

Whether test procedure errors or omissions might affect more than the weight to be given the evidence and actually determine admissibility was addressed again in *Davidson v. Indiana*.<sup>134</sup> In *Davidson*, the admissibility of DNA evidence was again challenged on the ground that irregularities had occurred in the test procedures. Again, the court indicated that irregularities in the test procedures go to the weight of the evidence,<sup>135</sup> but then added, "[W]hile it might be that substantiated irregularities would be a basis for prohibiting admission of test results, the list of irregularities [defendant] Davidson perceives do not cause us to believe the evidence was erroneously admitted."<sup>136</sup> Thus, the fact finder is still out on the question of whether some test irregularities might affect admissibility and if so, the nature of those irregularities, the burden allocation, and the quantum of proof necessary to establish the same.

#### XIV. SENTENCING

In *Slocumb v. State*,<sup>137</sup> the court dealt with a new question of law concerning habitual offender sentencing and Indiana Code 35-50-2-8(h), which provides: "A person may not be sentenced as an habitual offender under this section if all the felonies relied upon for sentencing the person as an habitual offender are class D felonies."<sup>138</sup> Slocumb argued that

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131. See *id.* at 1305-06 (Dickson J., concurring).

132. *Id.*

133. *Id.* at 1304.

134. 580 N.E.2d 238 (Ind. 1991).

135. *Id.* at 243.

136. *Id.*

137. 573 N.E.2d 427 (Ind. 1991).

138. IND. CODE § 35-50-2-8(h) (Supp. 1991).

this statute precluded a thirty year enhancement of sentence if the prior convictions are from other states and the penalty imposed for each conviction was within the sentencing range for Indiana class D felonies. It is interesting to note that the court went out of its way to address this issue. Regardless of the resolution to this question, Slocumb's sentence had to be vacated because the State failed to prove that the prior convictions were felonies. Thus, the evidence was insufficient to establish that he was a habitual offender.<sup>139</sup> Notwithstanding the presence of this outcome determinative issue, the court addressed the effect of section 35-50-2-8(h) on Slocumb's case.

The court's discussion of the statute seems to go beyond the foreign versus domestic felony grading issue and indicates that when all prior felonies are at the class D level, the accused is not eligible for a thirty year enhancement *regardless of the nature of the present offense*.<sup>140</sup> Some vagueness remains for two reasons. First, Slocumb's current offense was a class D felony; thus, the court may not have believed it necessary to state that the statutory prohibition only applied if the current offense, as well as the prior convictions, were class D felonies. Second, such a construction would leave an apparent gap in the law. Note that the statute dealing with class D habitual offenders seems to require that the current offense, as well as all prior convictions, be class D felonies.<sup>141</sup>

Thus, the offender with a class C felony charge, as the current offense, and a history of D felony convictions, cannot be determined to be a class D habitual offender. Now assume that *Slocumb* precludes a thirty year enhancement when all the prior offenses are class D felonies, regardless of the nature of the current charge. The result is that the defendant currently charged with a class A, B, or C felony who has a history of class D felony offenses is not eligible for any enhancement. Regardless of the court's intent, *Slocumb* gives rise to such an argument.

In another sentencing case, *Hensley v. State*,<sup>142</sup> the court of appeals held that statements made during a "clean-up statement" which the accused provided as part of a failed plea agreement were not admissible at sentencing.<sup>143</sup> The court emphasized that the rule prohibiting the admission of such statements in evidence is a substantive rule and not

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139. *Slocumb*, 573 N.E.2d at 429.

140. *Id.* at 428 ("[T]he apparent purpose of these amendments was to render ineligible for 30-year enhancements those persons whose prior offenses were the least serious felonies.")

141. IND. CODE § 35-50-2-7.1 (Supp. 1991). *See id.* § 35-50-2-7.1(c) (providing that the eight year enhancement shall be added to the sentence imposed under Section 7 of the chapter). Section 7 deals with class D felony sentencing.

142. 573 N.E.2d 913 (Ind. Ct. App. 1991).

143. *Id.* at 918.



merely an evidentiary rule. Thus, admission of such statements is barred at sentencing as well as trial.<sup>144</sup>

As a final note regarding sentencing, the legislature extended the period for modification of sentence without the approval of the prosecuting attorney from 180 days to 365 days.<sup>145</sup> This modification probably is entitled to retroactive effect on the theory that an extension of time to do that which is permitted already is procedural and therefore, outside the general rule that the law in effect at the time the offense was committed controls sentencing.<sup>146</sup>

### XV. POST CONVICTION

The road to federal habeas review becomes more difficult with each successive term of the United States Supreme Court. This year was no exception. The Court reviewed several cases involving those dreaded omissions known as procedural defaults.

In *Coleman v. Thompson*<sup>147</sup> counsel filed a notice of appeal to secure review of the denial of state habeas corpus relief three days late. The State moved to dismiss the appeal as untimely. The parties filed briefs on the subject of the dismissal motion and on the merits. The state appellate court issued a summary order granting dismissal. The order did not discuss the grounds for dismissal except to state, after identifying all the papers filed, "Upon consideration whereof, the motion to dismiss is granted."<sup>148</sup>

At the Supreme Court, Coleman argued that the plain statement rule of *Harris v. Reed*<sup>149</sup> controlled. The *Harris* Court held that when a defendant fails to raise a claim in accordance with state procedures but did present the claim to a state court, the state court ruling rejecting the claim will not be viewed as resting on the procedural default unless the state court clearly indicates that it relied on that ground.<sup>150</sup> *Harris* unequivocally provided that a procedural default will not bar federal review unless the last state court rendering judgment clearly and expressly states that its judgment rests on a state procedural bar.<sup>151</sup>

In response, the Court found that "[a] predicate to the application of the *Harris* presumption is that the decision of the last state court to which petitioner presented his federal claims must fairly appear to rest

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144. *Id.*

145. IND. CODE § 35-38-1-17 (Supp. 1991).

146. *Willis v. State*, 567 N.E.2d 1170 (Ind. Ct. App. 1991).

147. 111 S. Ct. 2546 (1991).

148. *Id.* at 2553.

149. 489 U.S. 255 (1989).

150. *Id.* at 263.

151. *Id.*

primarily on federal law or to be interwoven with federal law."<sup>152</sup> On examination, the factual predicate did not appear to exist in *Coleman*. That is, it did not appear that the dismissal order rested on, or was interwoven with, federal law.<sup>153</sup> As a consequence, Coleman was not entitled to the *Harris* presumption. Coleman simply had defaulted under state law.

Coleman sought to excuse the procedural default by arguing that the omission occurred because of attorney error. The Court found that because Coleman had no right to counsel to pursue his state habeas corpus appeal, any attorney error regarding that appeal cannot constitute cause to excuse the procedural default.<sup>154</sup> Counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation.<sup>155</sup> Absent a constitutional right to counsel, there can be no independent constitutional violation because of counsel's ineffectiveness.

The *Harris* plain statement rule was limited further in *Ylst v. Nunnemaker*.<sup>156</sup> In *Ylst*, the Court faced a scenario in which the last state court denied relief summarily without stating that a state procedural bar was the basis for the judgment. However, an intermediate appellate court explicitly found a state procedural bar.<sup>157</sup> In *Ylst*, the plain statement rule was modified again by the following presumption: "[W]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground."<sup>158</sup> Thus, if the earlier decision addressed the merits of federal claims and denied relief, a later unexplained denial will be presumed to rest on federal law. On the other hand, if the earlier opinion finds that the defendant is not entitled to review on the merits because of a state procedural bar, a subsequent unexplained denial will be presumed to rest on the same grounds, i.e., the procedural default. The presumption is rebuttable by strong evidence.<sup>159</sup>

In another significant decision, *McCleskey v. Zant*,<sup>160</sup> the Court adopted a new rule redefining the doctrine known as "abuse of the writ." At McCleskey's state court murder trial, another jail inmate, Evans, testified that McCleskey boasted about the killing. After his direct appeal, McCleskey sought state habeas corpus relief on the ground that

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152. *Coleman v. Thompson*, 111 S. Ct. 2546, 2559 (1991).

153. *Id.*

154. *Id.* at 2568.

155. *Id.* at 2567.

156. 111 S. Ct. 2590 (1991).

157. *Id.* at 2592.

158. *Id.* at 2594.

159. *Id.* at 2595.

160. 111 S. Ct. 1454 (1991).

the statements to Evans were elicited in a situation created by the State to induce him to make statements without the assistance of counsel in violation of *Massiah v. United States*.<sup>161</sup> The state habeas court denied relief and the Georgia Supreme Court denied discretionary review.

Thereafter, McCleskey sought federal habeas corpus relief but did not raise the *Massiah* issue. Ultimately, that petition was denied. One month before filing his second petition, McCleskey finally received a twenty-one page statement that Evans had made to police two weeks before McCleskey's original trial began.<sup>162</sup> In addition, McCleskey located the jailer in whose office the statement from Evans was taken. At the hearing on the second federal petition, the jailer testified that he had been asked to move Evans close to McCleskey.

In the end, McCleskey's claim was of no avail. The Supreme Court found that he had "abused the writ" by failing to assert the *Massiah* claim in his first federal petition.<sup>163</sup> The claim was available at that time as was demonstrated by its inclusion in his earlier state habeas corpus petition. The Court found that the abuse of the writ doctrine was not limited to cases involving deliberate abandonment.<sup>164</sup> Anticipating criticism that such a limitation was imposed by *Sanders v. United States*,<sup>165</sup> the Court asserted that *Sanders* discussed deliberate abandonment as one example of conduct that results in forfeiture.<sup>166</sup>

Under the *McCleskey* rule, a petitioner can abuse the writ by raising a claim in a second petition that he could have raised in his first petition, regardless of whether the omission was deliberate.<sup>167</sup> To excuse such an omission, the petitioner must show cause and prejudice, as we now understand those terms, or show that a fundamental miscarriage of justice would result from a failure to entertain the claim.<sup>168</sup> A fundamental miscarriage of justice occurs when an innocent man suffers an unconstitutional loss of liberty.<sup>169</sup>

## XVI. DEATH PENALTY

Perhaps the most significant Indiana development in the area of death penalty law and practice was the amendment of Criminal Rule

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161. 377 U.S. 201 (1964).

162. McCleskey's claims under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. (1972) had already been denied.

163. *McCleskey*, 111 S. Ct. at 1471, 1473.

164. *Id.* at 1467.

165. 373 U.S. 1 (1963).

166. *McCleskey*, 111 S. Ct. at 1467.

167. *Id.* at 1468.

168. *Id.* at 1470.

169. *Id.* at 1471 (citing *Stone v. Powell*, 428 U.S. 465, 492-93 (1976)).



24 to provide standards for the appointment of counsel and for compensation of counsel.<sup>170</sup> Under the new rule, upon a finding of indigency, the court shall appoint two qualified attorneys for trial. To qualify as lead counsel, one must have at least five years of criminal litigation experience with no fewer than five completed felony jury trials and at least one capital case. Co-counsel must have at least three years experience with at least three felony jury trials tried to completion. Both counsel must have completed at least twelve hours of training in the defense of capital cases within two years of the appointment.<sup>171</sup> The rule also provides that trial counsel shall be appointed to serve as appellate counsel, if qualified.<sup>172</sup> Appellate counsel must have three years experience in criminal litigation and have appellate experience in at least three felony appeals within the five year period prior to appointment. The training requirements applicable to trial counsel must also be met by appellate counsel.<sup>173</sup>

When appointing trial or appellate counsel, the court is required to assess the nature and volume of counsel's workload to assure that sufficient attention can be directed to the defense of the capital case.<sup>174</sup> Specific workload limitations are imposed on salaried or contractual public defenders appointed as trial counsel in capital cases. Such a defender may be appointed only if his or her workload will not exceed twenty open felony cases while the capital case is pending; no new cases may be assigned to such counsel within thirty days of the trial setting in the capital case.<sup>175</sup> Similarly, if appellate counsel is under contract to provide other defense services, no new cases for appeal shall be assigned to that counsel until the brief is filed in the capital case.<sup>176</sup>

Compensation for counsel is set at an hourly rate of seventy dollars per hour for all necessary and reasonable services,<sup>177</sup> with adjustments to the compensation paid contract employees for other defense services to reflect the limitations on case assignments.<sup>178</sup> The rule also provides that trial counsel shall be provided with sufficient funds for investigative, expert, and other services necessary to present a defense at every stage of the proceeding, including sentencing.<sup>179</sup>

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170. IND. CRIM. R. 24.

171. IND. CRIM. R. 24(B)(1), (2).

172. IND. CRIM. R. 24(J).

173. *Id.*

174. IND. CRIM. R. 24(B)(3), (J)(2).

175. IND. CRIM. R. 24(B)(3).

176. IND. CRIM. R. 24(J)(2).

177. IND. CRIM. R. 24(C)(1), (K)(1).

178. IND. CRIM. R. 24(C)(3), (K)(2).

179. IND. CRIM. R. 24(C)(2).

In case law developments, the United States Supreme Court overruled *Booth v. Maryland*,<sup>180</sup> and *South Carolina v. Gathers*,<sup>181</sup> the victim impact cases. This reversal of recent precedent came in *Payne v. Tennessee*,<sup>182</sup> in which the Court held that the Eighth Amendment does not bar the admission of victim impact evidence or prosecutorial argument on the subject.<sup>183</sup> In *Payne*, the Court concluded that the reasoning of *Booth* and *Gathers* was flawed. Both were described as being premised on the notion that victim impact evidence does not reflect on the defendant's blameworthiness and that only evidence relating to blameworthiness is relevant in a capital sentencing.<sup>184</sup> The Court concluded that evidence of the harm inflicted, i.e., the impact on the victim, has been and is an important factor in determining the appropriate punishment to be imposed in criminal cases.<sup>185</sup> In the Court's view, a state could conclude that evidence of the specific harm caused by the accused is relevant to the defendant's moral culpability and blameworthiness.<sup>186</sup> This being the case, there is no reason to treat such evidence differently than other relevant evidence; at least, the Eighth Amendment erects no such bar.<sup>187</sup> If victim impact evidence is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause provides the vehicle for relief.<sup>188</sup>

## XVII. CONCLUSION

Federal and Indiana courts continue to hear a high volume of criminal cases. The overall direction of the trend, manifested both in court decisions and legislative enactments, continues to be toward providing greater scope to criminal law enforcement and a narrowing of constitutional due process interests. However, as the Supreme Court of the United States narrows constitutional rights, the Indiana Supreme Court clearly maintains the momentum established over the past several years to expanding protections under the state constitution. That document seems slowly to be rising from its torpor.

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180. 482 U.S. 496 (1987).

181. 490 U.S. 805 (1989).

182. 111 S. Ct. 2597 (1991).

183. *Id.* at 2609.

184. *Id.* at 2605.

185. *Id.* at 2608.

186. *Id.*

187. *Id.* at 2609.

188. *Id.* at 2608.

