RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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INTRODUCTION

This Article will focus on some recent developments and cases concerning criminal law that have been addressed by the Indiana appellate courts since the last Survey and will detail statutes created and modified by the 1994 Indiana General Assembly.

I. 1994 LEGISLATIVE ACTS

The 1994 Indiana General Assembly created a host of new statutes in the areas of sex offenses, gun possession, and sentencing guidelines.

A. Sex Offenses

The murder of twelve-year old Zachary Snider[1] in 1993 by an individual who was on probation for a prior child molest conviction directed a great deal of media attention to the issue of returning convicted sex offenders to the community after they serve their sentences. The General Assembly addressed the concerns about probation for these offenders and protection for potential future victims in several significant ways.

First, the General Assembly created a "sex offender registry." It is administered through the Indiana Criminal Justice Institute and maintained in cooperation with Family and Social Services.[2] The statute defines a sex offender[3] as "a person who commits rape if the victim is less than eighteen,[4] criminal deviate conduct if the victim is less than eighteen,[5] child molesting,[6] child exploitation,[7] vicarious sexual gratification,[8] child solicitation,[9] child seduction,[10] and incest if the victim is less than eighteen."[11] The law

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1. *See Body of Cloverdale Boy Found; Neighbor Faces Murder Charge*, INDIANAPOLIS STAR, July 22, 1993, at A1.
2. IND. CODE §§ 5-2-12-1 to -13 (Supp. 1994).
3. *Id.* § 5-2-12-4.
4. *Id.* § 35-42-4-1.
5. *Id.* § 35-42-4-2.
6. *Id.* § 35-42-4-3.
7. *Id.* § 35-42-4-4(b).
8. *Id.* § 35-42-4-5.
9. *Id.* § 35-42-4-6.
10. *Id.* § 35-42-4-7.
11. *Id.* § 35-46-1-3.

requires sex offenders to "register with each local law enforcement authority having jurisdiction in the area where the offender resides . . . for more than seven days,"[12] and makes it a class A misdemeanor to knowingly or intentionally fail to register.[13] Correctional facilities are required to advise committed sex offenders of their duty to register.[14]

Civil libertarians have questioned the statute, particularly the section that requires the Criminal Justice Institute to send an updated list of sex offenders to all schools and child care facilities in the state and to send the list to *any* other entity that provides services to children, if the entity requests a copy of the register.[15] The law also requires that a warning accompany the registry list, informing entities who employ a person on the list that continuation of such employment "may result in civil liability for the employer."[16] Additional statutes require the termination of offenders who are state employees and who work with or around children[17] and mandate the revocation of a teaching license of anyone *ever* convicted of such an offense.[18] Therefore, it is extremely important that the practitioner advise a client who may be deemed a "sex offender" of the significant ramifications of a guilty plea or a finding of guilt on these charges. Judges, too, should consider these statutes when they determine the voluntariness of a plea, especially in order to avoid later problems with post-conviction relief petitions.

In the area of probation, Indiana Code section 35-50-2-2[19] was amended to *require* that the court place a sex offender on probation for not more than ten years and provides that the parole board place a parole-eligible sex offender on parole for not more than ten years.[20] This amendment not only lengthens the period of time that a probation or parole officer can monitor an individual who has committed a sex offense, but it also extends the time that the offender may be on the newly created sex offender registry. The new statute also allows that while on probation, the court is authorized to require a sex offender to participate in court-approved sex offender treatment programs and to avoid contact with persons under sixteen years of age, unless the offender receives prior court approval or successfully completes the treatment program.[21]

Effective July 1, 1994, the General Assembly amended the child molesting statutes by increasing the maximum age of the victim from twelve to fourteen years old.[22] In addition, the General Assembly created a completely new statute entitled "Sexual Misconduct With A Minor," which prohibits sexual intercourse, deviate sexual conduct, and touching or fondling by a person eighteen years of age or older with a child at least

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12. *Id.* § 5-2-12-5.
13. *Id.* § 5-2-12-9.
14. *Id.* § 5-2-12-7.
15. *Id.* § 5-2-12-11.
16. *Id.* § 5-2-12-12.
17. *Id.* § 4-13-2-14.7.
18. *Id.* § 20-6.1-3-7(b).
19. *Id.* § 35-50-2-2.
20. *Id.* § 35-50-2-2(e).
21. *Id.* § 35-38-2-2.4.
22. *Id.* § 35-42-4-3.

fourteen but less than sixteen years of age.[23] This statute substantially changes the description of the offense for those adults involved in sexual activities with fourteen or fifteen year olds, because a conviction will no longer brand them as child molesters but instead will label them with a less stigmatizing description: sexual misconduct with a minor. The General Assembly also increased the penalty for incest from a class D to a class C felony[24] and changed the child solicitation crime to a class D felony, rather than a class A misdemeanor.[25]

There were several changes in the child hearsay statute, which determines whether out-of-court statements or video tape may be admitted as substantive evidence in criminal trials.[26] The new statute provides that mental health experts may testify if the protected person, generally a child, is unavailable as a result of a substantial likelihood of emotional or mental harm. The new provision also requires the court to render a finding that the testimony of the protected person "will cause the protected person to suffer serious emotional distress such that the protected person cannot reasonably communicate."[27] Second, the out-of-court statement or video tape may be admitted into evidence *only* if the protected person was available for cross-examination either at the hearing on availability or when the statement or video tape was made.[28] Finally, when the statement or video tape is admitted, the court is obliged to

> instruct the jury that it is for the jury to determine the weight and credit to be given the statement or video tape and that, in making that determination, the jury shall consider the following:
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> (1) The mental and physical age of the person making the statement or video tape.
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> (2) The nature of the statement or video tape.
>
> (3) The circumstances under which the statement or video tape was made.
>
> (4) Other relevant factors.[29]

The General Assembly also amended the Code section that allows testimony by a protected person outside the courtroom.[30] The amendment allows the court to require that closed circuit television testimony be "two-way" and allows the protected person to see the accused and the trier of fact. The closed circuit testimony also may allow the accused and the trier of fact to see and hear the protected person (even if the testimony is video taped for use at trial).[31] The amendment requires testimony from a psychiatrist, physician, or psychologist and any other evidence available to establish that if the protected person testifies in the physical presence of the defendant, the protected person would suffer

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23. *Id.* § 35-42-4-9.
24. *Id.* § 35-46-1-3.
25. *Id.* § 35-42-4-6.
26. *Id.* § 35-37-4-6.
27. *Id.* § 35-37-4-6(d)(2)(B)(i).
28. *Id.* § 35-37-4-6(e).
29. *Id.* § 35-37-4-6(g).
30. *Id.* § 35-37-4-8.
31. *Id.* § 35-37-4-8(c).

serious emotional harm.[32] Additionally, the court must find that the protected person could not reasonably communicate to the trier of fact in the presence of the defendant.[33] The General Assembly also changed the required method of determining the emotional or mental harm to the protected person from "testifying in the courtroom" to "testifying in the physical presence" of the defendant.[34] Finally, the amendment limits those persons who may be present when the protected person gives live, closed-circuit testimony to: the defense attorney (if the defendant is represented by one), the prosecuting attorney, a bailiff or other court representative, any person necessary to operate the video equipment, and any person whom the court finds will contribute to the protected person's well being.[35]

B. Guns

Guns became an important topic in the General Assembly this year. Several high profile cases involving young children with guns prompted the creation of new laws. A new chapter of the Criminal Code, entitled *Children and Handguns*,[36] was created that established several new offenses. A new crime called "Dangerous Possession of a Handgun" makes it illegal for a child under the age of eighteen to possess a handgun or to provide a handgun to another child.[37] "An adult who knowingly, intentionally or recklessly provides a handgun to a child," commits the new offense of "Dangerous Control of a Handgun."[38] Finally,

> [a] child's parent or legal guardian who knowingly, intentionally or recklessly permits the child to possess a handgun:
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> (1) while:
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> (A) aware of a substantial risk that the child will use the handgun to commit a felony; and,
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> (B) [failing] to make reasonable efforts to prevent the use of [the] handgun by the child to commit a felony,

commits "Dangerous Control of Child."[39] Parents also may be subject to criminal penalty under this section if their "child has been convicted of a crime of violence or has been adjudicated as a juvenile for an offense that would constitute a crime of violence if the child were an adult."[40] This is a class C felony, which may be enhanced to a class B felony if the parent or guardian has a prior conviction under this section.[41] The statute also mandates a five-day consecutive sentence without good time credit[42] and mandates

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32. *Id.* § 35-37-4-8(e)(1)(B)(iii).
33. *Id.* § 35-37-4-8(e)(1)(B)(i).
34. *Id.* § 35-37-4-8(e)(1)(B)(iii).
35. *Id.* § 35-37-4-8(f).
36. *Id.* §§ 35-47-10-1 to -10.
37. *Id.* § 35-47-10-5.
38. *Id.* § 35-47-10-6.
39. *Id.* § 35-47-10-7(1).
40. *Id.* § 35-47-10-7(2).
41. *Id.*
42. *Id.* § 35-47-10-8.

consecutive sentencing for those who violate Indiana Code section 35-47-2-7 for illegally transferring ownership or possession of a handgun.[43] The General Assembly also made it a class C felony to possess a firearm in or on school property[44] and a class C felony to "sell, give or in any other matter transfer the ownership or possession of a handgun or assault weapon to any person under [eighteen] years of age."[45]

The other major change regarding weapons was an amendment that increased the penalty for possession of a handgun without a license from a class D felony to a class C felony if the defendant has a prior conviction of possession of a handgun without a license or has been convicted of a felony within fifteen years before the date of the offense.[46] Considering the apparent increase in the number of handguns in our society, this change may substantially increase the caseload of courts in urban areas, as well as overwhelm the capacity of local jails and community corrections programs, ultimately multiplying the inmate population at the Department of Corrections.

The General Assembly enacted a sentencing enhancement for any offense in which a person uses an assault weapon during the commission of the offense.[47] An assault weapon is defined as "a firearm that shoots automatically more than one (1) shot without manual reloading by a single function of the trigger."[48] If the State proves that an assault weapon was used, the statute requires that the court sentence the offender to an additional term of imprisonment of not less than the presumptive sentence for the underlying offense and not more than twice the presumptive sentence for the underlying offense, not to exceed ten years.[49]

C. Sentencing

The General Assembly amended the Indiana Code to provide that after July 1, 1994, the presumptive sentence for murder shall be fifty years instead of forty, with no more than ten years, rather than twenty, added for aggravating circumstances, and not more than ten subtracted for mitigating circumstances.[50] Thus, the range for murder is now forty to sixty years. In addition, the General Assembly amended the class A felony sentence range to provide that the presumptive sentence be twenty-five years, rather than thirty. The statute did not change the twenty-year maximum enhancement for aggravating circumstances; therefore, the maximum term of imprisonment is lowered from fifty years to forty-five. However, mitigating circumstances can decrease the penalty by ten years, making the range for a class A felony from fifteen to forty-five years.[51]

With regard to sentencing, the General Assembly not only attempted to comply with public pressure for a "three strikes and you're out" statute, but it also created a life without parole statute that appears to conflict with an amendment to the habitual offender

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43. *Id.* § 35-47-10-9.
44. *Id.* § 35-47-2-23.
45. *Id.* § 35-47-2-7.
46. *Id.* § 35-47-2-23.
47. *Id.* § 35-50-2-11.
48. *Id.* § 35-50-2-11(a).
49. *Id.* § 35-50-2-11(c).
50. *Id.* § 35-50-2-3.
51. *Id.* § 35-50-2-4.

statute. The "life without parole" statute provides that when a person is charged with one of the felonies for which the minimum sentence is not suspendable (listed as Indiana Code section 35-50-2-2(b)(4)) and the defendant is also alleged, in a separate page of the charging instrument, to have two prior unrelated felony convictions from the list of non-suspendable offenses, the allegations are to be tried in a bifurcated proceeding, as required in the habitual criminal offender statute. If the trier of fact finds that the person has two prior unrelated convictions, the court *may* sentence the defendant to life imprisonment without parole.[52] The General Assembly also modified the habitual offender statute to require that if all three felony convictions are for the crimes of murder, battery, aggravated battery, criminal recklessness, confinement, kidnapping, sex offenses, robbery, carjacking, or arson, then the offender would be deemed a "violent" habitual criminal and sentenced to an additional term of life imprisonment. It appears that the court may have the discretion to sentence one charged as a habitual offender under Indiana Code section 35-50-2-8 to a maximum of thirty years rather than life without parole.[53] Thus, Indiana now has three types of habitual offender statutes: one that adds a specific term of years pursuant to section 35-50-2-8(c); one that allows the court to impose a sentence of life without parole under section 35-50-2-8.5; and one that mandates life imprisonment under section 35-50-2-8(f).

The General Assembly also made an effort to curb gang violence by amending Indiana Code section 35-50-2-9 to add two aggravating circumstances to support the death penalty. The aggravating factors are: (1) committing murder by intentionally killing the victim while committing or attempting criminal gang activity; and, (2) committing murder by intentionally discharging a firearm into a inhabited dwelling or from a vehicle.[54]

However, the General Assembly softened its position on the death penalty by acknowledging that the death penalty should be precluded for persons determined to be "mentally retarded."[55] A "mentally retarded" person is one "who before becoming twenty-two (22) years of age manifests: (1) significantly subaverage intellectual functioning; and (2) substantial impairment of adaptive behavior" as documented in a court-ordered evaluation.[56]

Other legislative amendments give the trial court the discretion to impose consecutive sentences for offenses not joined in the same prosecution. However, the ability of the court to impose consecutive sentencing of felony offenses arising out of one episode is limited to the presumptive sentence for a felony one class higher than the highest class felony for which the person has been convicted arising out of the single episode.[57] Thus it appears that, absent the death penalty request, habitual enhancement, or life without parole enhancement, the maximum sentence for the most heinous of offenses arising out of the same episode is 110 years. If, for example, a defendant commits more than two murders he could only be sentenced to 110 years; the statute limits sentencing for the first murder to sixty years consecutive to the presumptive fifty years for the second murder.

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52. *Id.* § 35-50-2-8.5.
53. *Id.* § 35-50-2-8(f).
54. *Id.* § 35-50-2-9(b)(1)(I), (b)(14).
55. *Id.* § 35-36-9-6.
56. *Id.* § 35-36-9-2.
57. *Id.* § 35-50-1-2.

Every other offense arising out of the same episode must be served concurrently. If a person were convicted of more than three class A felonies, that person could serve no more than ninety-five years; forty-five years on the first A felony, forty-five years on the second and five years on the third. As a result, Indiana trial judges will not be permitted to order extraordinarily lengthy sentences in the future.

II. Case Developments

A. Disorderly Conduct and Free Speech

Since the Indiana Supreme Court rendered its decision in *Price v. State*,[58] several appellate court decisions have discussed the issue of criminal liability and free speech. In *Price*, Chief Justice Shepard of the Indiana Supreme Court reasoned that although the Indiana Constitution permitted the exercise of police power to promote the "health, safety, comfort, morals, and welfare, of the public,"[59] the State may not "punish expression when doing so would impose a material burden upon a core constitutional value."[60] After examining the free expression clause of the Indiana State Constitution, the court found that Price's conviction for "noisy protest"[61] of police conduct "implicates this [free speech] core value"[62] and concluded that the protest was not an "intrusion upon the interests of others which [the Indiana Code] was designed to remedy."[63] The court held that "political expression becomes 'unreasonably noisy' for purposes of [the Indiana Code] when and only when it inflicts upon determinant parties harm analogous to that which would sustain tort liability against the speaker."[64] Although Price's volume was described by the officer as "very loud,"[65] the court held that the length of time between Price's "noisy protest" and the harm that was suffered by neighbors leaving their houses to observe the scene had not been established because of the large number of officers and civilians in the alley and the commotion that had arisen before Price arrived.[66] Therefore, the disorderly conduct conviction was reversed.

In *Radford v. State*,[67] a conviction for disorderly conduct was reversed when the defendant loudly protested police "harassment"[68] and refused a police officer's request to see the contents of a box she was carrying. Radford's employment with the Indiana University hospital had been terminated and a report had been made to the Indiana University Police Department that she was improperly removing hospital property. The officer confronted Radford and asked her to move out of the hospital hallway, at which time Radford raised her voice. Radford was asked to quiet down at least three times, but

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58. 622 N.E.2d 954 (Ind. 1993).
59. *Id.* at 959.
60. *Id.* at 960.
61. *Id.* at 963.
62. *Id.*
63. *Id.* at 964.
64. *Id.*
65. *Id.*
66. *Id.*
67. 627 N.E.2d 1331 (Ind. Ct. App. 1994).
68. *Id.* at 1332.

she refused and "continually got angry and in a very loud and abusive voice."[69] In reviewing the conviction, the court noted police officer Leslie Mumford's testimony that "Radford 'very loudly complained about being hassled by Officer Leslie.'"[70] This evidence was deemed indistinguishable from the defendant's "very loud" objection in *Price*, declared by the Supreme Court as political speech. In reversing the conviction, the court found that "Radford's speech . . . protested the legality and appropriateness of police conduct. Therefore, like the speech of Price, Radford's speech was political speech . . . [which] at most comprised a public nuisance and [] did not inflict upon a determinant party any harm analogous to that which would sustain tort liability."[71]

Judge Staton, in a well-reasoned dissent, said that the majority misapplied *Price*. He noted that an examination of the forum employed by Radford indicated that her speech was "abusive and intrusive. Her remarks were not political in nature. Her remarks were those of [a] person avoiding discovery of wrong doing—defensive and repelling."[72] In contrasting *Price*, he concluded that the difference in location and circumstances between Price and Radford required an examination of the intrusiveness of the harm and abuse in the particular forum.[73]

Judge Staton reiterated this opinion when he wrote the unanimous affirmance of the disorderly conduct conviction in *State v. Stites*.[74] In *Stites*, police were called to the scene of an argument involving seven people. All had been calmed down by the police except Stites, who was "[v]ery loud, boisterous, rude, vulgar, swearing obscenities not only at me [the officer], but at the other party, her ex-boyfriend who was with Officer Ruszkowski trying to yell to get his attention."[75] Stites continued to yell at another group of people in the street.[76] The focus of this opinion was whether Stites "exercised her constitutionally protected right to comment on a matter of public concern."[77] The court determined that the mere presence of a police officer does not convert a defendant's speech into political expression and that these facts established sufficient evidence that Stites made unreasonable noise.[78]

In *Whittington v. State*,[79] the court reversed a disorderly conduct conviction where a police officer responded to a report of a domestic dispute at an Indianapolis apartment. Rhonda Whittington reported that her brother, the defendant, Eric Whittington, had struck her in the abdomen. As the police officer gathered information and summoned an ambulance, Eric continued to argue with James, Rhonda's boyfriend. The defendant refused to calm down and in a loud and angry manner uttered "this is all bull----" and "f---

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69. *Id.*
70. *Id.*
71. *Id.* at 1333.
72. *Id.*
73. *Id.* at 1334.
74. 627 N.E.2d 1343 (Ind. Ct. App. 1994).
75. *Id.* at 1344-45.
76. *Id.* at 1345.
77. *Id.* at 1334.
78. *Id.*
79. 634 N.E.2d 526 (Ind. Ct. App. 1994).

this s---."[80] Judge Staton reaffirmed that the statutory prohibition against unreasonable noise is content-neutral and noted that the State must show first, that the speech infringed upon a right of peace and tranquility enjoyed by others, and second, that it was not merely epithets.[81] He examined the forum of the defendant's conduct and found "no evidence that Whittington's speech was detectable by anyone outside his residence [nor] that it 'intolerably impaired' another person's privacy or use of his land."[82] Judge Hoffman, however, dissented, asserting that sufficient evidence existed to distinguish these facts from those of *Price*. Here, the police were investigating a physical fight where a person was injured. The police had summoned an ambulance when the defendant and the victim's boyfriend began arguing in the living room. The officer went there to calm and separate them but the defendant continued to yell epithets. The defendant's conduct was causing everyone else to become upset again.[83] The dissent noted that: "James and Rhonda were subjected to Eric's tirade under circumstances which did not allow them to escape. Further, the bombardment occurred within the privacy of the home. The officer gave Eric fair notice to refrain from unreasonable noise. After Eric refused, he subjected himself to criminal sanction."[84]

B. Status of Judicial Officers

Several decisions of the appellate courts have dealt with the issue of the authority of the judicial officer hearing criminal cases. Like civil courts, the criminal courts use master commissioners, referees, magistrates and judges pro tempore to handle expanding caseloads. It is generally acknowledged that only a judge, whether elected or appointed, a judge pro tempore, or a special judge, may enter an appealable final judgment.[85] If the court cannot determine from the record of proceedings how the judge or hearing officer was appointed, then the appellate court may dismiss the conviction.[86] The appellate courts are split on how to resolve these issues.[87]

In *Boushehrey v. State,*[88] Judge Barteau addressed the rationale for dismissal in a petition for rehearing. In *Boushehrey,* the trial judge had been appointed as a pro tempore in the Marion County Municipal Court. After the pro tem heard the evidence, he took the matter under advisement and attempted to enter a valid judgment nine days later. Neither side appealed the issue of the jurisdiction of the judge; however, the appellate court raised the issue sua sponte and determined that "[w]hile the judgment may be valid as between the parties when they fail to object, we retain the discretion to insist upon a validly entered judgment prior to review upon appeal."[89] Thus, although the parties may waive review by failing to object at trial, this court dismissed the appeal sua sponte.

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80. *Id.*
81. *Id.* at 527.
82. *Id.* (quoting Price v. State, 622 N.E.2d 954, 966 (1993)).
83. *Id.* at 528.
84. *Id.*
85. Wells v. State, 603 N.E.2d 903 (Ind. Ct. App. 1992).
86. Cassidy v. State, 626 N.E.2d 500 (Ind. Ct. App. 1993).
87. *Id.*
88. 626 N.E.2d 497 (Ind. Ct. App. 1993).
89. *Id.* at 499.

However, in *Billingsley v. State,*[90] a Second District panel said that the *Boushehrey* requirement "of a subsequent appointment is inconsistent with notions of judicial economy and, as a practical matter, may not be possible. If the regular judge has resumed the duties of the court, the judge pro tempore cannot be appointed as judge pro tempore."[91] In writing for the majority, Judge Kirsch declined to follow the reasoning in *Boushehrey* and specifically held that the general authority of a judge pro tem continues, with special jurisdiction to:

1. Rule upon any motion or matter taken under advisement during the term of appointment;
2. Conclude and rule upon any trial or hearing commenced, but not concluded, during such term;
3. Hear and determine all motions relating to the evidence or conduct of a trial or hearing commenced during the term of appointment; and
4. Conduct the sentencing hearing and impose sentence in a matter tried during the term of appointment.[92]

In October of 1994, the Second District decided *Woods v. State.*[93] Judge Friedlander noted sua sponte that the record reflected the valid appointment of the judge pro tempore for the date on which the trial occurred. However, the appointment term did not include the date on which the sentencing was conducted, and no subsequent appointment was made to include the date of the sentencing.[94] Judge Friedlander acknowledged the holdings of *Boushehrey* and *Billingsley*, and determined that the better line of reasoning was expressed in *Billingsley*. Therefore, he validated the pro tempore's appointment as judge for the purpose of entering judgment and presiding over the sentencing phase of the proceedings in the case.[95] Interestingly, Judge Sullivan's concurring opinion acknowledged his recent adherence to the holding of *Boushehrey,* but reconsidered his position in light of *Billingsley* and concurred with the affirmance in *Woods*. Conversely, Judge Barteau adhered to the *Boushehrey* decision and voted to dismiss the appeal. Although "the approach taken in *Billingsley v. State* and by the majority here is more workable than the rule and makes sense," she felt obliged to "apply the rule as it is written and the rule says the authority of the judge pro tempore terminates at the expiration of the term."[96]

The most recent case on this issue was decided by the Fifth District in *McMichel v. State.*[97] In this case, Judge Lopossa of the Marion Superior Court, Criminal Division, appointed Master Commissioner Alan Smith to serve as a pro tem judge in her court during her absence.[98] On May 28, 1992, Smith presided over McMichel's post-conviction

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90. 638 N.E.2d 1340 (Ind. Ct. App. 1994).
91. *Id.* at 1343.
92. *Id.*
93. 640 N.E.2d 1089 (Ind. Ct. App. 1994).
94. *Id.* at 1090.
95. *Id.*
96. *Id.* at 1091-92 (citation omitted).
97. 641 N.E.2d 1047 (Ind. Ct. App. 1994).
98. *Id.* at 1048.

relief petition hearing. At the conclusion of the hearing Smith announced that he would review the exhibits, take the matter under advisement, and rule the following day.[99] On May 29, Smith entered an order of findings of fact and conclusions of law and denied the petition. The record did not contain the appointment of Smith as judge pro tem for any time period on May 29, 1992.[100] The record further showed that Judge Lopossa had returned and conducted court business on May 29, 1992.[101] Writing for the majority, Judge Sharpnack found that because Judge Lopossa was available on May 29, Smith lacked the authority to enter a final appealable judgment in the case.[102] Judge Sharpnack continued by asserting that "[t]he appropriate procedure in this case would have been for Judge Lopossa to appoint Smith judge pro tempore on May 29, 1992, to permit him to enter final judgment, or for her to enter final judgment upon review of his findings."[103] Judge Sharpnack acknowledged the conflict between *Billingsley, Woods* and *Boushehrey*, and said "[t]his continuing conflict in the decisions of this court remains to be resolved by our supreme court."[104]

The Second District therefore would not require any additional documentation to establish the appointment of the judge pro tem at subsequent hearings. Nor does it appear that the Fourth District would make such a requirement, as its decision in *Dearman v. State*[105] allowed a properly appointed pro tem to conduct a sentencing hearing subsequent to the date of the appointment. In *Dearman*, Judge Brewer appointed Andrew Fogle as judge pro tem of the Marion Superior Court for several days in January of 1992. Dearman's jury trial began on January 30, while Fogle was acting as the duly appointed judge pro tem. Dearman was convicted, but his sentencing occurred after Fogle's term as judge pro tem expired. The court cited a previous appellate court decision in which transfer to the Supreme Court was denied on the grounds that once the judge pro tem has begun consideration of the case, he or she has jurisdiction to hear the case to completion.[106]

Attorneys preparing the records of proceedings for criminal appeals ought to follow the recommendations of *Boushehrey v. State*[107] and *Dearman*,[108] and make certain that the record contains a clear indication of how the hearing officer was appointed. Failure to do so may well result in dismissal at the appellate level.

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99. *Id.*
100. *Id.*
101. *Id.* at 1049.
102. *Id.*
103. *Id.*
104. *Id.*
105. Dearman v. State, 632 N.E.2d 1156 (Ind. Ct. App. 1994).
106. Harris v. State, 616 N.E.2d 25, 33 (Ind. Ct. App. 1993), *trans. denied*, Aug. 3, 1993.
107. 626 N.E.2d 497 (Ind. Ct. App. 1993).
108. 632 N.E.2d 1156.

C. Search and Seizure

The Indiana Supreme Court established new ground on a major search and seizure issue when it rendered its decision to resolve the conflicting court of appeals cases of *Moran v. State*[109] and *Bell v. State.*[110]

In *Moran*, Judge Sharpnack addressed the interlocutory appeal of Dominic Moran and Andrew Holland, who challenged the denial of a motion to suppress evidence seized from garbage bags outside their home. The evidence was used to obtain a search warrant for their shared residence.[111]

From May 1991 to April 1992, Indiana State Police operated a sting operation under the name of Circle City Hydroponics, a retail supplier of hydroponics supplies in Zionsville, Indiana. Its purpose was to identify people who grew marijuana in their homes. Between August 1991 and February 1992, Holland made several visits to Circle City Hydroponics to purchase supplies. Holland also had several conversations with undercover agents about growing facilities in his home.[112] Further police investigation revealed that, beginning in August 1991, the usage of electricity in Holland's home doubled that of the previous occupant of the house.[113] On January 8, 1992, state police used a thermal imaging device on Holland's home to measure the differences in temperature of an object or structure. It found "several warm areas . . . which were unique when compared to other residences in the immediate neighborhood."[114] On January 22, 1992, two state police officers removed materials from several plastic garbage containers that had been set out for the garbage collector at the end of the driveway in front of Holland's residence.[115] The garbage containers were sealed with lids and were placed about one foot from the edge of the street. The contents, which included several opaque plastic garbage bags and loose items, were dumped into a pick-up truck and taken to the state police office. Upon examination, they found a green, leafy substance later proved to be marijuana plant clippings.[116] On April 20, 1992, a search warrant, supported by the affadavit of Officer McClure, was issued. The affidavit was seventeen double-spaced pages detailing the sting operation, the process of hydroponic marijuana cultivation, and police surveillance of Holland.[117] The warrant was executed on April 22, and the officers seized several marijuana plants and three bags of leafy material believed to be marijuana from the home.[118]

A motion to suppress evidence filed by Holland was denied by the trial court. Holland sought an interlocutory appeal, claiming that the defendants had a reasonable expectation of privacy in garbage put out for disposal, and therefore, that police needed

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109. 625 N.E.2d 1231 (Ind. Ct. App. 1993), *aff'd*, 644 N.E.2d 536 (Ind. 1994).
110. 626 N.E.2d 570 (Ind. Ct. App. 1993).
111. 625 N.E.2d at 1233.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 1233, 1243.
118. *Id.* at 1234.

a warrant to seize the garbage, because no exception to the warrant requirement of the federal and state Constitutions existed. The motion also claimed that the search warrant lacked probable cause and was unlawful.[119]

The court first addressed the issue of whether the warrantless search of the garbage violated the United States Constitution. The court analyzed the United States Supreme Court's decision in *California v. Greenwood*,[120] where items found in trash bags picked up by the regular trash collector were used to support a warrant to search Greenwood's home. The *Greenwood* decision was based in part on the holding of an earlier case, *Katz v. United States*,[121] which formulated the "reasonable expectation of privacy" test. That test, first adopted in Indiana in *Blalock v. State*,[122] provides a two-part analysis. First, the individual must have an actual expectation of privacy. Second, society must recognize that expectation as reasonable.[123] The Court in *Greenwood* determined that an expectation of privacy in trash was unreasonable because plastic garbage bags left at the curb are accessible to "animals, children, scavengers, snoops and other members of the public."[124] Further, the Court held that garbage is placed at the curb "for the express purpose of conveying it to a third party, the trash collector, who might himself [sort] through [the] trash or permi[t] others, such as the police, to do so."[125] *Greenwood* also held that police "cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public."[126]

In *Moran,* Judge Sharpnack reasoned that no Fourth Amendment distinction exists between taking the garbage directly from the property or taking it after it had been picked up by the garbage collector. Thus, the court found that the warrant was in fact a police search and seizure of Moran and Holland's trash and did not violate the Fourth Amendment of the United States Constitution.[127]

The court then proceeded to examine the warrantless search in view of Indiana's Constitution. After noting that the language of the Indiana Constitution is virtually identical to its federal counterpart,[128] the court reiterated long standing constitutional principles when it acknowledged that "[t]he principle of the supremacy of federal law over state law prohibits Indiana courts from placing limitations on individual rights found to exist under the Federal Constitution by the United States Supreme Court; we may, however, impose higher standards on searches and seizures than required by Federal Constitution if we choose to do so."[129] The court discussed at length Indiana's protection of individual liberty prior to recognition by the United States Constitution, including: Indiana's prohibition against slavery; the provision of an attorney at public expense to

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119. *Id.* at 1233-34.
120. 486 U.S. 35 (1988).
121. 389 U.S. 347 (1967).
122. 483 N.E.2d 439, 441 (Ind. 1985).
123. *Id.* at 441-42. *See also* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).
124. *Greenwood*, 486 U.S. at 39.
125. *Id.*
126. *Id.* at 35.
127. Moran v. State, 625 N.E.2d 1231, 1235-36 (Ind. Ct. App. 1993), *aff'd*, 644 N.E.2d 536 (Ind. 1994).
128. *Id.* at 1236.
129. *Id.*

indigent defendants; the admission of women to the practice of law in Indiana; and the acknowledgement of the right of the defendant to a "face-to-face" confrontation with witnesses.[130] The Court further noted that the Indiana Supreme Court adopted the exclusionary rule for violations of search and seizure requirements nearly forty years before federal law did the same.[131]

In reviewing the Indiana cases, the court concluded that "[a]n expectation of privacy, therefore, has been considered reasonable under Indiana law when attached to a place of residence, whether temporary, permanent, rented, or owned, or to the contents of a closed, opaque container when the container is the subject of a possessory interest."[132] The court then rhetorically asked whether the abandonment of property necessarily meant that the individual abandoned his expectation of privacy in it. The court framed the issue as "not whether a bag of trash may have a reasonable expectation of privacy, but whether persons may expect reasonably that their privacy interests in the concealed contents of their trash bags will be respected."[133]

In the absence of existing precedent in Indiana, the court looked to "general social norms" to conclude that "[g]arbage is, by its very nature, the leavings of the wide range of human activity, and there are many secrets that garbage may disclose."[134] The court further concluded that, by placing trash into an opaque plastic bag, putting that bag into a can, putting a lid on the can, and then placing the can at the edge of the property with the sole purpose of having the trash collector take it and "mingle it with the trash of thousands of other citizens is to manifest an expectation that it will remain secure and private, at a minimum, until removed by the trash collector."[135] Recognizing that there is a reasonable expectation of privacy in garbage and finding no exception to the warrant requirement, the court concluded that the trial court erred in finding no reasonable expectation of privacy in trash; therefore, it held that the warrantless search of the trash violated the protection against unreasonable search and seizure afforded by Indiana's Constitution.[136]

The court then addressed the search of the residence, which was based on the warrant. The trial court had denied the motion to suppress in part because of the "good faith" exception, which allows the admission of evidence seized in good faith reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be defective.[137] In countering the defendant's argument that the affidavit was so "bare bones that no reasonably well trained police officer could have relied on its validity,"[138] the court cited the affidavit's detail of: the sting operation; the process of hydroponics marijuana plant cultivation; the police surveillance of Holland; the conversations between Holland and police; the purchase of products by Holland commonly used in marijuana cultivation;

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130. *Id.* at 1237.
131. *Id.*
132. *Id.* at 1238.
133. *Id.* at 1238-39.
134. *Id.*
135. *Id.* at 1239.
136. *Id.* at 1240.
137. *Id.* at 1240; *see also* IND. CODE § 35-37-4-5 (1994).
138. *Moran*, 625 N.E.2d at 1242.

the imaging of Holland's residence; and the police search of Holland's trash.[139] The court concluded that, based upon these facts, the magistrate had sufficient probable cause to issue a search warrant and therefore, the police officers could have relied upon its validity in good faith.

In *Bell v. State*,[140] a police officer drove by Bell's house and noticed that Bell had set out several opaque garbage bags near an alley outside of his home. The bags could be reached without stepping onto Bell's property, and appeared to be available for the garbage collector. The police officer seized the bags, acting on several tips he had received that Bell was dealing in marijuana. When the police searched the garbage, they discovered drug paraphernalia, a small amount of marijuana, and mail addressed to Bell. A search warrant was obtained, and Bell's home, automobile, and business were searched.[141] Writing for the majority, Judge Robertson agreed with the rationale of *Greenwood* and upheld the validity of the search.[142] In a footnote, he wrote, "[w]e accept as absolute truth the *Moran* court's observation that Hoosiers are distinguished by their civilized behavior. . . . Nevertheless, we believe that, unfortunately, not all uncivilized behavior has yet been eradicated from our state; and that, even in Indiana, it is common knowledge that garbage left out for collection is readily accessible to animals, children, scavengers, snoops, and other members of the public. Thus, we respectfully disagree that Hoosiers have a personal and legitimate expectation of privacy in the garbage they leave out for collection."[143] Judge Najam filed a dissent, agreeing with the holding in *Moran*.[144]

Indiana's Supreme Court decision in *Moran* upheld the police officer's seizure of the trash, holding that it was reasonable and did not taint the evidentiary basis for the search warrant.[145] Justice DeBruler wrote that "[w]e do not lightly entertain instrusions on those things that we regard as private, *i.e.* concealed and hidden. However, at the same time, the inhabitants of this state have always valued neighborliness, hospitality, and concern for others . . . ."[146] DeBruler noted that police conducted themselves in "the same manner as would be appropriate for those whose duty it was" to collect the trash—without disturbances or commotion.[147] The search warrant for the house also was upheld under the state standard of reasonableness.[148]

Indiana's Supreme Court dealt with the issue of consent to search in *Perry v. State*.[149] In *Perry,* the defendant claimed that the trial judge committed reversible error by admitting evidence that was obtained from an illegal search and seizure. Faceson, his girlfriend, signed a consent to search form.[150] The defendant argued that Faceson did not

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139. *Id.* at 1243.
140. 626 N.E.2d 570 (Ind. Ct. App. 1993).
141. *Id.*
142. *Id.* at 572.
143. *Id.* at 572 n.2.
144. *Id.* at 573.
145. *Moran v. State,* 644 N.E.2d at 541 (Ind. 1994).
146. *Id.*
147. *Id.*
148. *Id.*
149. 638 N.E.2d 1236 (Ind. 1994).
150. *Id.* at 1240.

have authority to consent to the police request to search the house without a warrant and, therefore, the evidence seized by the police should have been inadmissible.[151] The evidence showed that Faceson lived with the defendant "on and off" and Faceson told police after she was arrested for drug dealing that she and the defendant lived at the house. The search yielded narcotics and the defendant was charged. The court reviewed the authority for allowing a third party consent to search property, and found that consent arises from the mutual use of the property by "persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."[152] The consent was deemed valid on the basis that it was reasonable for police to believe that Faceson was a resident of the house to be searched.[153]

Motor vehicle searches have also been the subject of recent cases. In these situations, police routinely impound a vehicle and conduct an inventory search after an individual in that vehicle is stopped and subsequently arrested. Frequently, the issue becomes whether the impoundment and the subsequent inventory search are a mere subterfuge in order to conduct the search.

The Indiana Supreme Court granted transfer to examine the rules applicable to inventory searches of automobiles under the Fourth Amendment and reversed a conviction in violation of those rules in *Fair v. State*.[154] In October 1991, an Indianapolis police officer was dispatched to an apartment complex in response to a complaint that gun shots had been fired. The police dispatcher described the potential suspect. Upon arriving at the complex, the officer saw an individual who fit the description of the suspect placing a cylindrical object into the trunk of a car.[155] The officer lost sight of the suspect as he pulled into the parking lot, but re-established contact after the defendant closed the trunk and stood next to his car. The officer asked him to step away from the car and then performed a pat down search that turned up six twenty-gauge shotgun shells.[156] Convinced that Fair was intoxicated, the officer placed him under arrest, handcuffed him, and placed him in the back seat of the police car. The officer then entered the suspect's vehicle and searched the glove compartment for the stated purpose of locating rental papers to confirm Fair's claim that the car was leased.[157] After finding the rental papers, the officer decided to do an inventory search during which he found a green leafy substance that he believed to be marijuana. He then obtained keys from the defendant and looked in the trunk.[158] The officer found a shotgun on top of clothing in the trunk, and charged Fair with possession of marijuana, dealing in sawed-off shotguns, and public intoxication.[159]

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151. *Id.*
152. *Id.* at 1241 (citing Stallings v. State, 508 N.E.2d 550, 552 (Ind. 1987)).
153. *Id.*
154. Fair v. State, 627 N.E.2d 427 (Ind. 1993).
155. *Id.* at 429.
156. *Id.*
157. *Id.*
158. *Id.* at 430.
159. *Id.*

The Indiana Supreme Court reviewed the Fourth Amendment and its exceptions.[160] The "inventory exception" was defined by the United States Supreme Court in *South Dakota v. Opperman*, which allowed police to conduct a warrantless search of properly impounded automobiles if the search is designed to produce an inventory of the vehicle's contents.[161] The Indiana Supreme Court followed this decision[162] and restated *Fair* by concluding that inventory searches involve an administrative or caretaking function rather than a criminal investigative function. Therefore, the Fourth Amendment's warrant requirement is not material.[163] The court concluded that the reasonableness of the inventory search required an examination of the propriety of the impoundment, since the need for the inventory arises from that impoundment, as well as whether the scope of the inventory search is reasonable.[164]

In determining whether the decision to impound was reasonable, the court addressed the defendant's contention that the seizure of the car could only take place if a specific violation of a motor vehicle or forfeiture statute had occurred. The court rejected the argument, holding that impoundment was occasionally warranted by situations that were not set out in state statutes.[165] The court determined that police may discharge their caretaking function whenever circumstances compel them to do so, and that as long as the community caretaking function is invoked, impoundment is proper.[166] The court concluded that to justify impoundment, the prosecution must first demonstrate that "the belief that the vehicle posed some threat or harm to the community or was itself imperiled was consistent with objective standards of sound policing."[167] Next, the State must show "that the decision to combat that threat by impoundment was in keeping with established departmental routine or regulation."[168]

The court further considered whether the officer could have found that the needs of the community were "implicated" where the arrest of the driver left the car unattended.[169] The court found that an undamaged vehicle had been neatly parked in a secure, private parking facility. The owners of the property had not complained and the offer's action would not have left the car in the possession of an unqualified driver.[170] The court concluded that the claim by the officer that the vehicle required police attention because "it might be damaged" was speculative and was insufficient to serve as the sole justification for impoundment.[171] "In short, there [was] nothing in the record to indicate that [the] vehicle constituted a potential hazard" that needed police attention.[172]

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160. *Id.*
161. South Dakota v. Opperman, 428 U.S. 364, 373 (1976).
162. Dixon v. State, 437 N.E.2d 1318, 1323 (Ind. 1982).
163. *Fair*, 627 N.E.2d at 430 (citing *South Dakota*, 428 U.S. at 370 n.5).
164. *Id.* at 431.
165. *Id.*
166. *Id.* at 432.
167. *Id.* at 433.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 435.

The court next examined the second stage of the requirement: whether the scope of the inventory was reasonable. The court determined that rules standardizing criteria or establishing routine must exist as a precondition to a valid inventory search to ensure that the inventory is not a pretext "for a general rummaging in order to discover incriminating evidence."[173] The procedures must be rationally designed to meet the objectives that justify the search and must limit the discretion of the officer in the field.[174] Thus, to defeat a charge of pretext, the State must establish the existence of well-defined regulations and show that the search was conducted in conformity with them.[175] Here, the search was conducted at the scene of the crime rather than in the impoundment lot. Furthermore, the inventory was conducted by the officer involved in the criminal investigation and not by the officer in charge of the impounded property, and there was no evidence of the completion of formal inventory sheets. Finally, the officer did not take note of the defendant's personal effects, and no evidence in the record indicated that the car was actually impounded. The court held that these facts collectively established that the inventory search was nothing more than a pretext to conduct a full search and, thus, was improper.[176] Justice Givan dissented, noting that inventory search was justified for several reasons: the officer had reason to believe the defendant was the person who had fired the shots; the officer had a duty to protect the owner's property; the officer saw the defendant place an object in the trunk of the car; and the officer discovered shotgun shells on the defendant.[177]

In *Moore v. State*,[178] a police officer stopped a car in which Moore was a passenger after he observed erratic driving and excessive speed. The deputy placed the driver under arrest for driving while intoxicated, and other deputies observed that Moore also showed signs of intoxication. After determining that Moore was too impaired to drive, the police called for a tow truck and conducted an inventory search of the vehicle. In a paper bag in the glove compartment, police found cocaine packaged for sale. Moore was charged and convicted of dealing in cocaine in an amount greater than three grams.[179] On appeal, Moore claimed that the warrantless search of the glove compartment was not a proper inventory search and thus violated his Fourth Amendment rights.[180]

After reviewing the standards set out by the Indiana Supreme Court in *Fair*, the appellate court determined that because the car would have been left unattended on the highway after the driver's arrest, the decision to impound was lawful.[181] The court further held that the Tippecanoe County Sheriff Department had standard operating procedures regarding inventory searches and that those procedures were followed.[182] The court stated that "[t]he potential risks and essential issue in this case [are] whether the inventory

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173. Florida v. Wells, 495 U.S. 1, 4 (1990).

174. *Fair*, 627 N.E.2d at 435.

175. *Id.*

176. *Id.* at 436.

177. *Id.* at 437.

178. Moore v. State, 637 N.E.2d 816 (Ind. Ct. App. 1994), *cert. denied*, 115 S. Ct. 1132 (1995).

179. *Id.* at 818.

180. *Id.*

181. *Id.* at 819.

182. *Id.* at 820.

search was actually conducted in a routine manner pursuant to department standard operating procedures or rather, whether it was used as a pretext to camouflage a complete investigatory search. If the facts of this case fall into the latter type of search, the search is unreasonable and will not be tolerated."[183] Because the inventory search in this situation was completed pursuant to standard operating procedures, the court found that the contraband was seized properly.[184]

In *State v. Smith*,[185] the court held that police can make investigatory stops based on information from concerned citizens received via police dispatch. In *Smith*, the trial court granted a motion to suppress based upon illegal search and seizure. The police officer did not personally observe Smith's erratic driving, but relied upon a police dispatch report to provide a "reasonable suspicion" of criminal activity.[186] The dispatch was based on a 911 call on citizen band radio reporting that a car on the interstate had driven into the median and was weaving from lane to lane. As the officer caught up with Smith on the interstate, he did not observe erratic driving; however, he saw that a general description of the vehicle and its license plate number matched the dispatch. The officer pulled Smith over and smelled alcohol on his breath. Smith also failed a field sobriety test.[187] The court reversed the trial court's ruling on the motion to suppress, holding that "[u]nder appropriate circumstances, the police may stop a vehicle to briefly investigate the possibility of criminal activity, without having probable cause to make an arrest."[188] The court noted that police must have specific and articulable facts which, when considered together with the rational inferences from those facts, create a reasonable suspicion of criminal conduct on the part of the vehicle's occupants. There must be a particularized and objective basis for suspecting the driver of criminal activity.[189] The court cited the Indiana Supreme Court decision in *Moody v. State*,[190] which held that when "police officers act in good faith reliance on a police dispatch report that a crime has been committed, there is no need to show that the source of the dispatcher's information is reliable."[191] In this case, the police officer possessed sufficiently articulable facts to give him a reasonable suspicion that Smith's vehicle was being operated by an impaired driver, thus sustaining the legality of the investigatory stop.[192]

The Indiana Supreme Court reviewed circumstances that justify warrantless entry into a home in *Esquerdo v. State*.[193] In *Esquerdo*, the State attempted to justify a warrantless entry into Esquerdo's home to prevent the destruction of evidence as an exigent circumstance exception to the warrant requirement. The officers testified that their suspicion that evidence was being destroyed in the residence rested on certain "beliefs"

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183. *Id.* (citing Paschall v. State, 523 N.E.2d 1359 (Ind. 1988)).
184. *Moore*, 637 N.E.2d at 821.
185. 638 N.E.2d 1353 (Ind. Ct. App. 1994).
186. *Id.* at 1355.
187. *Id.* at 1354.
188. *Id.* at 1355 (citing State v. Nesius, 548 N.E.2d 1201, 1203 (Ind. Ct. App. 1990)).
189. *Id.*
190. 448 N.E.2d 660 (Ind. 1983).
191. *Smith*, 638 N.E.2d at 1355 (citing *Moody*, 448 N.E.2d 660, 663)).
192. *Id.* at 1356.
193. 640 N.E.2d 1023, 1026 (Ind. 1994).

that a confidential informant had given to the officers: that the defendant was "paranoid"; that the defendant "may have seen" the police officers outside the residence at the time of the controlled buy; and that the defendant "might be destroying or getting ready to leave with the evidence."[194] When police entered without a warrant, they had in their possession the cocaine purchased during a controlled buy, but they did not know that additional narcotics were present in the house.[195] The confidential informant did not specifically tell the police that evidence was being destroyed.[196] The house and its entrances were under constant surveillance, and the defendant could not escape.[197] Therefore there was no possibility that the marked money used to purchase the narcotics could be distributed before a warrant could be obtained.[198]

The court held that the State was required to show, by clear and convincing evidence, that the police had an objective and reasonable fear that evidence was about to be destroyed.[199] Writing for the majority, Justice DeBruler explained that the rationale for the exception to the warrant requirement is the need for quick action, because evidence is actually in the process of being destroyed or is about to be destroyed.[200] In this situation, the court found that the evidence presented at trial was not sufficient to support a finding that the police officers held an objective and reasonable fear of the loss of either the marked money or other possible evidence of drug dealing. The court held that the police should have obtained a search warrant before entering the residence.[201]

Furthermore, in *Esquerdo*, police conducted a protective sweep of the residence and found some quantities of cocaine and marijuana in plain view.[202] After the protective sweep, the police wrote a probable cause affidavit that included the information gained from the improper warrantless search. Police then obtained a search warrant for the residence.[203] The court reviewed state and federal constitutional law, including *Segura v. United States*,[204] in which federal agents used improperly seized evidence as the basis for a search warrant. The court in *Segura* had to decide whether the challenged evidence was obtained by exploitation of the initial warrantless entry and search or by another method that was distinguishable from the illegal entry.[205] The *Segura* court affirmed the use of this evidence, holding that a sufficient, independent source of probable cause existed for the warrant.[206] In *Esquerdo*, however, such independent source of probable cause was lacking. Rather, the judge who issued the warrant relied solely on the

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194. *Id.* at 1027.

195. *Id.*

196. *Id.*

197. *Id.* at 1028.

198. *Id.*

199. *Id.* at 1027.

200. *Id.* at 1028. *See also* Harless v. State, 577 N.E.2d 245, 248 (Ind. Ct. App. 1991); Ludlow v. State, 314 N.E.2d 750, 752 (Ind. 1974).

201. *Esquerdo*, 640 N.E.2d at 1028.

202. *Id.*

203. *Id.* at 1029.

204. 468 U.S. 796 (1984).

205. *Id.* at 797.

206. *Id.* at 810.

improperly obtained information, as marijuana was not mentioned by the confidential informant, and its presence was known only after illegally entering the defendant's residence.[207] As a result, the misconduct of the police led to the discovery of evidence that was crucial to the formation of probable cause for the issuance of the warrant, and therefore, the warrant was not sustained.[208]

D. Criminal Rule 4

Several recent decisions regarding Criminal Rule 4 dealt with the courts' congested calendars and the defendant's right to a speedy trial. While a court's congested calendar is the only acceptable justification for exceeding the speedy trial limits set by Rule 4,[209] the Indiana courts are split over what constitutes a congested calendar.

In *Raber v. State,* the court remanded the case to the trial court because no factual basis for the court's congested calendar was documented in the court records.[210] Raber was arrested and charged with operating a motor vehicle while intoxicated and other driving violations on March 17, 1989. The case was moved to a superior court on March 23, 1989 and a trial date of June 26, 1989 was set.[211] Thereafter, the State requested one continuance and Raber requested four. Two notices of congested calendar were also filed, which extended the trial date to May 8, 1991.[212]

On February 7, 1991, the State moved to continue and a new trial date was set for July 1991. A congested calendar notice was again filed on that date, and the trial was reset for October 28, 1991.[213] However, that jury trial was vacated on October 23, when the court determined during a hearing that Raber did not have counsel and could not proceed without pauper counsel.[214] Raber's trial finally began March 9, 1992, and ended in a conviction on March 10. On June 3, 1992, the defense filed a motion for discharge, which was denied.[215]

The court held that Raber acquiesced to the July 1 date, even though it exceeded the speedy trial limit, since he appeared on that date with counsel and was ready for trial. However, that fact did not preclude him from enforcing his right to a speedy trial without delay, as guaranteed by the Sixth Amendment to the United States Constitution and Article 1, Section 12 of the Indiana Constitution, as implemented by Indiana Criminal Rule 4.[216] The court held that while Raber did not file a timely motion for discharge (immediately after his counsel withdrew), his oral motion at the October 23 hearing was sufficient to preserve his right to a speedy trial.[217] At that hearing, Raber said that he felt

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207. *Esquerdo*, 640 N.E.2d at 1030.

208. *Id.*

209. Crosby v. State, 597 N.E.2d 984, 987 (Ind. Ct. App. 1992).

210. 622 N.E.2d 541, 547 (Ind. Ct. App. 1993), *appeal after remand*, Raber v. State, 626 N.E.2d 506 (Ind. Ct. App. 1993).

211. *Id.* at 544-45.

212. *Id.* at 545.

213. *Id.*

214. *Id.* at 546.

215. *Id.* at 545.

216. *Id.* at 544.

217. *Id.* at 546.

his rights were violated and that he wanted a speedy trial, which the court likened to an oral motion for discharge.[218] The court wrote, "[w]e must be attentive when a defendant, proceeding pro se, asserts this right and clearly presents the question of discharge for the trial court's determination."[219]

After remanding the case to determine whether a factual basis existed for the court's congested calendar, the court affirmed Raber's conviction, holding that the trial court's findings were reasonable and did not amount to an abuse of discretion.[220] The trial court's record reflected that another jury trial had started and would not end by the day Raber's trial was set, thereby forcing the court to congest its calendar.[221]

However, two recent decisions reject *Raber's* requirement of documented findings of fact to establish a court's congested calendar. In *Bridwell v. State*,[222] the defendant based his appeal on a 209-day delay, which resulted from the court's congested calendar. The delay prevented him from being brought to trial within one year, as mandated by Rule 4(C). The court, in affirming Bridwell's conviction, wrote that "[t]here is a point where delay (due to a congested calendar), regardless of the justification, violates the right to a speedy trial."[223] It further stated that "[b]ecause the delay was not excessive in this case, that point was not reached."[224] However, Judge Sullivan furnished a strong dissenting opinion echoing *Raber's* charge to the court: "It is not the obligation of the defendant to monitor and schedule the court's trial calendar. It is the court's function to protect the right to a speedy trial."[225]

In *Clark v. State,* the defendant orally requested a speedy trial during his initial hearing and later filed a written motion.[226] The court held that his oral motion was sufficient to preserve his right to a speedy trial, but the 133-day delay caused by the congested calendar was not excessive.[227] Furthermore, the court held that a trial court's calendar may be congested "for a variety of reasons"—not only the fact that another jury trial is in progress.[228] In declining to follow *Raber*, the court wrote, "[a]bsent an allegation that the court congestion continuance was merely subterfuge, we accept the court's affirmation of congestion. The exact nature of that congestion is immaterial."[229]

Judge Najam delivered a strong dissent, noting that "[t]he finding of congestion should be sufficiently specific to assure meaningful appellate review and to assure that use of the congestion exception does not eviscerate the Rule itself."[230]

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218. *Id.* at 546-47.
219. *Id.* at 547.
220. Raber v. State, 626 N.E.2d 506, 508 (Ind. Ct. App. 1993).
221. *Id.*
222. 640 N.E.2d 437 (Ind. Ct. App. 1994).
223. *Id.* at 439.
224. *Id.*
225. *Id.* at 440.
226. 641 N.E.2d 75, 76 (Ind. Ct. App. 1994).
227. *Id.* at 77.
228. *Id.*
229. *Id.* (quoting Bridwell v. State, 640 N.E.2d 437, 439 (Ind. Ct. App. 1994)).
230. *Id.* (quoting Raber v. State, 622 N.E.2d 541, 547 (Ind. Ct. App. 1993)).

Indiana's Supreme Court used a balancing test to determine whether a defendant's right to a speedy trial had been violated in *Roseborough v. State.*[231] In *Roseborough,* the court affirmed the defendant's murder conviction after examining the facts of the case and the reasons for delay. Roseborough was charged on January 17, 1992, but was not brought to trial until February 1, 1993.[232] During that time, Roseborough's first defense attorney was suspended from the practice of law.[233] The court found that because of the extensive pretrial investigation and preparation required in the case, the second attorney needed more time to prepare an adequate defense.[234] Therefore, the court balanced the defendant's right to a speedy trial with his right to effective representation, and determined that neither was violated in setting the trial beyond the one-year limitation.[235]

The court held in *Nance v. State* that the burden of ensuring that a defendant is tried within one year rests with the State.[236] In reversing Nance's convictions for drug and other charges, the court held that the defendant's only duty is to object if a trial date is set beyond the one-year period.[237]

At issue in *Nance* were two delays at pretrials, where the court set other pretrial dates, but did not set other jury trial dates.[238] No reason was given for either delay. The court held that when the record is silent, delay is not attributable to the defendant.[239] A defendant who is incarcerated must be brought to trial within seventy days under Rule 4(B).[240] However, the court in *Hornaday v. State* held that "when identical charges are refiled they are regarded as if no dismissal occurred or as if the subsequent charges were filed on the date of the first charges."[241] The clock stops during the period between dismissal and refiling, but then begins running where it left off.[242] However, the court denied Hornaday post-conviction relief on his robbery conviction because he did not object when the court set the trial date beyond the seventy-day period, thus abandoning his prior request for an early trial.[243] The court also noted that the circuits are in conflict on this issue.[244]

Indiana's highest court also considered the Rule 4(D) extension in *Ewing v. State.*[245] In *Ewing,* the defendants appealed their convictions for dealing in marijuana and other drug-related charges because they were not brought to trial within one year. The State pursued a continuance on Rule 4(D) grounds, which allows a ninety-day extension when

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231. 625 N.E.2d 1223, 1225 (Ind. 1993).
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. 630 N.E.2d 218, 220 (Ind. Ct. App. 1994).
237. *Id.* (citing Butts v. State, 545 N.E.2d 1120, 1124 (Ind. Ct. App. 1989)).
238. *Id.* at 221.
239. *Id.*
240. Williams v. State, 631 N.E.2d 485, 486 (Ind. 1994).
241. 639 N.E.2d 303, 307 (1994) (quoting Young v. State, 521 N.E.2d 671, 673 (Ind. 1988)).
242. *Id.* at 308.
243. *Id.* at 309.
244. *Id.* at 306.
245. 629 N.E.2d 1238, 1239 (Ind. 1994).

the court is satisfied that the State's evidence is temporarily unavailable but can be produced in ninety days.[246] The State also must show that reasonable efforts to procure the missing evidence have been made, and that just cause exists to believe it can be produced in ninety days.[247] The court reversed the convictions and remanded the case with instructions to grant the defendants' motion for discharge because the record did not indicate that the requirements of the rule were satisfied.[248] The court noted that the trial court failed to issue findings of fact and law when it denied the defendants' motion for discharge.[249] Furthermore, the court held that the record gave no evidence that the State had met the criteria of the rule, thereby warranting reversal.[250]

E. Jury Deliberations

Indiana's Supreme Court handed down several interesting decisions in the past year relating to jury deliberations. In *Farrell v. State,* the court found that allowing jurors to deliberate for nearly thirty hours without rest warranted a new trial for the defendant.[251] Farrell's kidnapping trial lasted three days, and the jurors began deliberations about 8:15 p.m. on the evening of the third day.[252] Sometime in the early morning hours of the fourth day, the jury returned to court with four questions. At that time, the foreman indicated that they could possibly reach unanimous verdicts on each of the six counts with additional time.[253] Instructions were re-read to the jury, exhibits were reviewed, and the trial court judge ordered breakfast for the panel—with no objection from the defense.[254]

Around noon on the fourth day, the jury again returned to open court and indicated that they had reached verdicts on some of the counts, but not all six. The foreman again told the court that more time might enable the jury to agree on the remaining counts.[255] Defense counsel objected at this time, because the jury had been deliberating for sixteen hours without rest. However, the trial judge and attorneys agreed to provide the jury lunch, give them a few more hours together, and then sequester them so they could rest. The jury returned guilty verdicts on all six counts within the next two or three hours.[256]

In ordering a new trial, the court deemed this the first case in Indiana law in which the trial court abused its discretion by retaining a jury in deliberations for an excessive period of time without a break.[257] Although the length of jury deliberations is within the sound discretion of the trial judge,[258] this power is coupled with a duty to conduct trial proceedings "in a manner that facilitates ascertainment of truth, insures fairness, and

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246. *Id.*
247. *Id.*
248. *Id.* at 1240.
249. *Id.* at 1239.
250. *Id.* at 1240.
251. 622 N.E.2d 488, 493 (Ind. 1993).
252. *Id.* at 490.
253. *Id.*
254. *Id.*
255. *Id.* at 490-91.
256. *Id.* at 492.
257. *Id.* at 493.
258. *Id.* at 492 (citing King v. State, 531 N.E.2d 1154, 1161 (Ind. 1988)).

obtains economy of time and effort commensurate with the rights of both society and the criminal defendant."[259] In its opinion, the court noted the findings of several studies on sleep deprivation and its detrimental effects, and concluded that "[a]fter twenty-four hours without sleep, we question the ability of many people to remain rational and clear-thinking."[260]

However, in *Pruitt v. State*, the Indiana Supreme Court affirmed a murder conviction resulting from a jury trial in which the jurors were permitted to separate during deliberations.[261] The jury began deliberating on May 21, 1992, at 3 p.m., and about two hours later, the judge admonished them and sent them home for the evening.[262] On the following day, the jury deliberated for about one and one-half hours before rendering a guilty verdict.[263] On appeal, the defendant asserted that allowing the jury to separate constituted reversible error.[264]

The court reiterated the general rule that a jury should remain together until a verdict is reached.[265] However, if a jury is allowed to separate, the State must prove beyond a reasonable doubt that the deliberations of the jurors were not affected by the separation and that the verdict was clearly supported by the evidence.[266]

In this case, the trial court judge clearly announced his intention to let the jury go home for the evening, and defense counsel raised no objection. Therefore, the court held that the issue cannot be raised for the first time on appeal.[267] Additionally, during a post-trial hearing, all twelve jurors said they were not affected by the separation; thus, the court found that the State had sustained its burden.[268]

Once a jury begins deliberating, communication between the jury and the court is limited to questions directed to the court through the bailiff in charge of the jury. Questions are examined in open court, with the prosecutor, defense attorney and defendant present. Failure to follow these procedures constituted reversible error in *Jewell v. State*.[269] In *Jewell*, the bailiff had several contacts with the jury during deliberations, including bringing them certain requested instructions. Further, the bailiff asked if the jury needed overnight accommodations; and when asked by the foreman how much lodging would cost, the bailiff conferred with the judge before telling the foreman it would cost about $750.[270] The foreman responded that they would continue deliberations, and the jury later returned with verdicts.

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259. *Id.* (citing Proctor v. State, 584 N.E.2d 1089, 1091 (Ind. 1992)).

260. *Id.* at 493.

261. 622 N.E.2d 469, 476 (Ind. 1993).

262. *Id.* at 471.

263. *Id.*

264. *Id.*

265. *Id.* (citing Walker v. State, 410 N.E.2d 1190, 1192 (Ind. 1980)).

266. *Id.*

267. *Id.* at 472.

268. *Id.*

269. 624 N.E.2d 38, 44-45 (Ind. Ct. App. 1993).

270. *Id.* at 40-41.

The court held that the accumulated ex parte communication between the judge and the jury warranted reversal, even if each incident taken individually was harmless.[271] Furthermore, in order to protect the defendant's constitutional right to be present at all critical stages of his criminal prosecution, the written jury instructions should not have been sent to the jury room after deliberations began unless the action was discussed and the ruling made in open court.[272]

Failure to follow the established open-court procedure for deliberations resulted in a reprimand, but no reversal in *Grant v. State*.[273] In *Grant*, the trial court received a question from the jury and indicated, without discussing the question in open court, that it could not answer. Because the court did not preserve the note, the exact wording of the question was not known. The charge in the case was conspiracy to commit dealing in cocaine, and the trial judge said the question dealt with the entrapment defense and the role of special agents.[274]

The court rebuked the trial court for not preserving the record and for failing to respond to the question in open court, but held the error harmless.[275] The court determined that when a trial judge merely responds to a jury question by denying the request, any inference of prejudice is rebutted and any error is deemed harmless.[276]

F. Criminal Gang Activity

As a response to the crisis caused by violent street gangs whose members threaten and terrorize citizens and neighborhoods, Indiana's General Assembly enacted a statute prohibiting criminal gang activity in 1991. In the past year, the statute was scrutinized in two cases and passed constitutional muster.

The statute prohibits criminal gang activity and criminal gang intimidation. A person who "knowingly or intentionally actively participates in a criminal gang commits criminal gang activity, a class D felony."[277] Criminal gang intimidation, a class C felony, occurs when a person threatens another person for refusing to join a criminal gang or withdrawing from a criminal gang.[278] A criminal gang is defined as a group with at least five members that "specifically (1) either: (A) promotes, sponsors or assists in; or (B) participates in; or (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."[279]

In *Helton v. State*, the court analyzed the statute and determined that it was not void for vagueness, overbroad nor violative of the equal protection guaranteed under the Due

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271. *Id.* at 43.

272. *Id.* (citing Cornett v. State, 436 N.E.2d 765, 766 (Ind. 1982)).

273. 623 N.E.2d 1090, 1097-98 (Ind. Ct. App. 1993), *trans. denied*, March 18, 1994.

274. *Id.* at 1097.

275. *Id.*

276. *Id.* (citing Thompson v. State, 555 N.E.2d 1301, 1304 (Ind. Ct. App. 1990), *trans. denied*, Oct. 30, 1990).

277. IND. CODE § 35-45-9-3 (Supp. 1994).

278. *Id.* § 35-45-9-4.

279. *Id.* § 35-45-9-1.

Process Clause.[280] Additionally, the court found that the statute did not give the prosecutor unfettered discretion to enforce it arbitrarily and discriminatorily.[281]

Helton was a member of the Imperial Gangster Disciples (IGD).[282] In February, 1992, twelve to fourteen members of the gang met to initiate a new member, Travis Hammons. During the ritual, Helton delivered twenty bare-fisted blows to Hammons's head.[283] Hammons knew of the initiation procedure and had consented to the blows in order to become an IGD member.[284] Helton was convicted of criminal gang activity in a trial before the court and was given a three-year sentence, which was suspended as long as he complied with the terms of his probation.[285]

Helton first argued that the criminal gang statute was void for vagueness. The appellate court agreed that "under the basic principles of due process, a law is void for vagueness if its prohibitions are not clearly defined."[286] The court noted that "a statute is not void for vagueness if individuals of ordinary intelligence would comprehend it to fairly inform them of the generally proscribed conduct."[287] The court held that the "Gang Statute clearly forbids a person from knowingly and actively participating in a group with five or more members which participates in and requires as a condition of membership the commission of a battery. . . . Helton's conduct is clearly proscribed by the Gang Statute."[288]

Helton also argued that the statute was vague because it did not warn him of the consequences of striking a consenting victim. The court disagreed, stating that lack of consent is not a statutory element of the offense of battery in Indiana.[289] Furthermore, the Indiana Supreme Court also has held that the victim's consent is not a defense to the charge of battery in certain circumstances.[290]

Helton next claimed that the statute was void for vagueness because its terms invited arbitrary and discriminatory enforcement. Again, the court emphasized that the statute does not prohibit mere association.

> [U]ndesirable groups, the wrong type of crowd, or annoying conduct alone is not punishable under the Gang Statute. . . . Rather the group must be one which promotes, sponsors, assists in, or participates, and requires as a condition of membership the commission of a felony or battery and the person must actively

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280. 624 N.E.2d 499 (Ind. Ct. App. 1993).

281. *Id.* at 507.

282. *Id.* at 504.

283. *Id.*

284. *Id.*

285. *Id.* at 505.

286. *Id.* (citing Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).

287. *Id.* at 505-06 (citing Broadrick v. Oklahoma, 413 U.S. 601, 607-08 (1973)).

288. *Id.* at 506.

289. *See* IND. CODE § 35-42-2-1(a) (1994), which defines battery as "when a person knowingly or intentionally touches another person in a rude, insolent, or angry manner."

290. *Helton*, 624 N.E.2d at 506 (citing Jaske v. State, 539 N.E.2d 14, 17-18 (Ind. 1989)).

> participate in the group, with knowledge of the group's criminal conduct and a specific purpose to facilitate the group's criminal conduct . . . .[291]

Helton next charged that the statute was overbroad and may therefore interfere with the exercise of First Amendment rights and other legally permissible conduct, such as contact sports. Indiana law has no overbreadth analysis[292] and because the gang statute is not incapable of constitutional application, the issue is whether its application in this case was constitutional.[293] The court held the application of the statute constitutional, noting that Indiana's protections of free speech and free association do not protect associations made in furtherance of criminal activity.[294]

Under the federal law analysis, the court found that the statute was not overbroad. "[T]he Gang Statute does not impermissibly establish guilt by association alone, but it requires that a defendant's association pose the threat feared by the General Assembly in proscribing it, that is, the threat of criminal gang activity which terrorizes peaceful citizens."[295] Furthermore, the court reasoned that the commission of a felony or a battery is not protected activity even when committed by a group exercising their constitutional right to free association.[296] "The Gang Statute does not cut deeper into the freedom of association than is necessary to deal with the substantive evil of gang violence," the court wrote.[297]

Lastly, Helton argued that he was denied equal protection under due process because he was prosecuted for a class D felony under the criminal gang activity statute, but could have been prosecuted for a class B misdemeanor under Indiana's Hazing Statute.[298]

The court explained that the class B misdemeanor hazing applies to acts creating only a risk of bodily injury. If the hazing results in serious bodily injury, the perpetrator may be prosecuted for criminal recklessness, a class D felony.[299] The court held that the statutes do not proscribe different punishment for the same conduct depending upon the actor; under each statute, the person commits a class D felony for the same type of act.[300] The court went further to note that the fact that the prosecutor's power to decide to prosecute a crime extends to two crimes "does not convert this discretion into an unconstitutional delegation of legislative authority or constitute an equal protection violation."[301]

Helton was upheld later in *Jackson v. State*.[302] Jackson, a member of the "Gs" gang in Marion, was charged with criminal gang activity and conspiracy to commit burglary.

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291. *Id.* at 507.
292. Price v. State, 622 N.E.2d 954, 957 (Ind. 1993).
293. *Helton*, 624 N.E.2d at 507.
294. *Id.* at 508.
295. *Id.* at 508-09.
296. *Id.* at 509.
297. *Id.* at 511.
298. *Id.* at 511-12; *see also* IND. CODE § 35-42-2-2 (1994).
299. *Helton*, 624 N.E.2d at 512.
300. *Id.*
301. *Id.*
302. 634 N.E.2d 532 (Ind. Ct. App. 1994).

A jury acquitted Jackson of the burglary charge but convicted him under the gang statute.[303] Evidence at trial revealed that the "Gs" had at least nine members in Marion and anyone who wanted to be a member had to fight. Additionally, new members were "jumped" or beaten, and members who broke rules were "violated," or made to stand in a corner and be beaten.[304] Like Helton, Jackson argued that the beatings among group members were not batteries. But this court followed the *Helton* decision and held that the criminal gang statute covered intra-group fighting, specifically the beatings that were given to other members as part of initiation or punishment.[305]

Jackson further argued that he did not actively participate in the gang as required by the statute because no evidence indicated that he committed a battery or was involved in the burglary. The court reasoned that the State did not have to prove that Jackson himself administered the beating or committed the felony to prove that he actively participated in the gang.[306] Active participation requires more than mere membership. However, in this case, the evidence showed that Jackson was leader of the "Gs" during the summer of 1990, when the burglary occurred, and he was known as the "Chief Violator."[307] Therefore, the court affirmed that the evidence was sufficient to show that Jackson was an active member of a criminal gang.

G. Misconduct Evidence

Case law continues to redefine and refine the use of misconduct evidence since Indiana adopted the Federal Rules of Evidence in *Lannan v. State.*[308] Indiana and Federal Rules 404(b) and 403 set out the two-prong test for admission of misconduct evidence.[309] The conduct first must be admitted under one of the listed exceptions to the general rule that such evidence is inadmissible.[310] Secondly, its probative value must substantially outweigh its prejudicial value.[311]

The *Lannan* case also abolished the depraved sexual instinct exception that allowed prosecutors to use evidence of the defendant's prior sexual conduct at trial to show the defendant's depraved sexual instinct.[312] Since then, prosecutors have attempted to have such evidence admitted under one of the other exceptions. In *Martin v. State,*[313] the court affirmed convictions for criminal deviate conduct, attempted child molesting, and child molesting, in a crime involving neighbor children.[314] Here, the trial court allowed the

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303. *Id.* at 533.

304. *Id.*

305. *Id.* at 534.

306. *Id.* at 534-35.

307. *Id.* at 535.

308. 600 N.E.2d 1334, 1335 (Ind. 1992).

309. FED. R. EVID. 403-04; IND. R. EVID. 403-04.

310. *Id.* (Under IND. R. EVID. 404(b) prior acts of a defendant may be admissible for purposes such as proof of motive, intent, preparation, plan, knowledge, identity or absence of mistake or accident. FED. R. EVID. 404(b) is almost identical, but includes "opportunity" as an exception.).

311. FED. R. EVID. 403; IND. R. EVID. 403.

312. *Lannan*, 600 N.E.2d at 1341.

313. 622 N.E.2d 185 (Ind. 1993).

314. *Id.* at 188.

defendant's daughter to testify to prior acts of sexual misconduct.[315] The court held that it was error to admit such evidence because it did not fall into one of the exceptions.[316] However, the court found that the error was harmless because the totality of the evidence did not reveal a substantial likelihood that the improper evidence contributed to the conviction.[317]

Conversely, the supreme court reversed a child molestation conviction based on improper admission of misconduct evidence in *Wickizer v. State*.[318] In *Wickizer,* the victim was a fourteen-year-old male, and the trial court admitted evidence of the defendant's prior sexual conduct with other male youths under the intent exception of Indiana Rule 404(b).[319] The court held that "Indiana is best served by a narrow construction of the intent exception in [Federal Rule of Evidence] 404(b)."[320] "To allow the introduction of prior conduct evidence [as proof of a general or specific intent element in a criminal offense] would be to permit the intent exception to routinely overcome the rule's otherwise emphatic prohibition against [such evidence] . . . and produce the 'forbidden inference.'"[321]

The intent exception is "available when a defendant goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent."[322] In *Wickizer*, independent proof of the defendant's intent consisted only of testimony from the victim and the defendant. The court found that such error warranted reversal, because it was unable to conclude that the jury was not substantially swayed by the prior conduct testimony.[323]

Evidence of prior sexual misconduct was properly admitted under the intent exception in *Butcher v. State*.[324] In this case, the court affirmed Butcher's child molestation conviction even though the trial court admitted evidence from two nieces about the defendant's past misconduct. The court relied on *Wickizer* and found that this defendant claimed a contrary intent, which allowed this evidence to be admitted under the intent exception.[325] The defendant made a pre-trial statement to police that "something happened" in his daughter's bedroom.[326] The court held that the defendant put his intent in issue and did not deny touching his daughter. He only said, at different times, that he was forced against his will and that he could not resist his daughter's advances.[327] The court held that his version of events constituted a claim of contrary intent.[328] The court

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315. *Id.* at 186.
316. *Id.* at 188.
317. *Id.*
318. 626 N.E.2d 795, 801 (Ind. 1993).
319. *Id.* at 796.
320. *Id.* at 799.
321. *Id.* (citing Hardin v. State, 611 N.E.2d 123, 129 (Ind. 1993)).
322. *Id.*
323. *Id.* at 800-01.
324. 627 N.E.2d 855, 859 (Ind. Ct. App. 1994).
325. *Id.*
326. *Id.* at 858-59.
327. *Id.*
328. *Id.* at 859.

also held that the evidence met the balancing test of Indiana Rule 403 and was not so prejudicial as to deny Butcher a fair trial.[329]

However, in a case decided after *Butcher,* the court reversed a child molestation conviction in which prior sexual misconduct evidence was admitted, even though the defendant had put his intent in issue.[330] Fisher was convicted of molesting his granddaughter. At his trial, the court allowed Fisher's daughter to testify that he had sexually abused her at least twenty-three years earlier.[331] Fisher also took the stand, saying that if anything improper had occurred, it was accidental.[332] The court here held that, in applying *Wickizer*, the admission of such evidence must be further limited by examining the remoteness of the conduct and its similarity to the alleged present offense. "A prior bad act, despite its remoteness, may still be relevant if it is strikingly similar to the charged offense."[333] In *Fisher*, the court found that the daughter's abuse was too remote to be relevant,[334] and that the similarity of the conduct did not overcome its remoteness in time.[335]

The common scheme or plan exception was examined in *Bolin v. State.*[336] In *Bolin,* the defendant was convicted of arson for hire resulting in serious bodily injury.[337] The defendant hired the same person to set both the fire for which the defendant was charged in this case, and another fire, for which the defendant was not charged.[338] The trial court admitted into evidence testimony concerning the uncharged subsequent fire on the basis of the modus operandi branch of the common scheme or plan exception.[339]

The court held that two types of evidence may fit the common scheme or plan exception. The first is evidence to prove identity by showing that the defendant committed crimes with similar modus operandi.[340] In this case, the acts must be so similar that they "can be considered akin to the accused's signature."[341] The State claimed that the uncharged fire was akin to the accused's signature because so many of the details were the same in both fires. The court disagreed, holding that commission of similar crimes is not enough to qualify for the exception.[342]

The second type of evidence under the common scheme or plan exception is evidence that demonstrates a common plan from which the accused originated the charged crime.[343] The test is whether or not "the other offenses tend to establish a preconceived plan by

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329. *Id.*
330. Fisher v. State, 641 N.E.2d 105 (Ind. Ct. App. 1994).
331. *Id.* at 107.
332. *Id.*
333. *Id.* at 109.
334. *Id.*
335. *Id.*
336. 634 N.E.2d 546, 548 (Ind. Ct. App. 1994).
337. *Id.* at 547.
338. *Id.*
339. *Id.*
340. *Id.* at 548.
341. *Id.* at 549 (citing Penley v. State, 506 N.E.2d 806, 809 (Ind. 1987)).
342. *Id.*
343. *Id.*

which the charged crime was committed."[344] The court determined that the evidence in this case did not meet this test either, because the evidence of uncharged arson did not result in completion of the present offense.[345]

The court reversed the conviction, holding that the State failed to establish a sufficient foundation for the admission of the misconduct evidence. The repeated commission of similar crimes is insufficient to qualify for the exception.[346] Furthermore, the court held that because the similarity between the charged crime and the uncharged crime was so great, the error was not harmless and was likely to allow the jury to draw the "forbidden inference."[347]

However, in *Gardner v. State,* the court affirmed the use of misconduct evidence to prove the defendant's common scheme or plan.[348] Gardner was convicted of burglarizing a residence and of being a habitual offender. He argued that the trial court erred when it admitted evidence of two other residential burglaries for which he was not charged.[349] The court held that the burglaries were "nearly identical" to the charged offense: All three were committed on the same morning in rural secluded areas.[350] Additionally, the burglar gained access to each home by breaking into the residence through the door. The court held that admitting such testimony was not improper.[351]

The Indiana Supreme Court affirmed a murder conviction in which misconduct evidence was used to prove the defendant's motive in *Elliott v. State.*[352] Elliott threatened to harm his ex-wife and her boyfriend, once leaving a telephone message for his ex-wife stating that he would "blow [her] brains out."[353] During a subsequent fight and struggle over a weapon, Elliott shot and killed the boyfriend. The trial court admitted evidence of Elliott's past threats and statements, including the taped telephone conversation, to his ex-wife and to the victim, her boyfriend.[354] The court held that the evidence was admissible "to show the relationship between the parties," as well as Elliott's motive, plan, and absence of mistake.[355]

Although misconduct evidence may never be used for the sole purpose of portraying a defendant as a person of bad character, it may be used to rebut specific factual claims made by the defense. In *Koo v. State,*[356] Dr. Young Soo Koo was convicted of raping a female patient during a pelvic examination. Koo claimed that the trial court erred when it allowed two witnesses to testify regarding alleged prior uncharged acts of sexual

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344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.* at 550.
348. 641 N.E.2d 641, 646 (Ind. Ct. App. 1994).
349. *Id.* at 643.
350. *Id.* at 646.
351. *Id.*
352. 630 N.E.2d 202, 205 (Ind. 1994).
353. *Id.* at 203.
354. *Id.* at 204.
355. *Id.*
356. 640 N.E.2d 95 (Ind. Ct. App. 1994).

misconduct.[357] One former patient testified that in 1983, when she was twelve, she went to see Koo for an ear infection and that Koo had sex with her during a pelvic examination. She testified that she did not know of the rape until later, when she went to the restroom and discovered semen in her vaginal area.[358] The other witness testified that in 1984, Koo asked her to undress for an examination, taped her legs to stirrups and had sex with her against her will.[359]

At trial, Koo defended himself by insisting that the patient who accused him in this case hallucinated the sexual encounter.[360] The court held that "the defense had presented a specific factual claim of hallucination that the prosecution was entitled to rebut with evidence of prior misconduct."[361] Furthermore, the court instructed the jury that the testimony of the two witnesses was admitted for the limited purpose of helping the jury decide if the testimony of the victim was based in reality or fantasy.[362] The court also reminded the jury that Koo was only on trial for the alleged rape of the victim.[363] With such precautions, the court found that the evidence admitted was not more prejudicial than probative.[364]

However, in *James v. State,*[365] the court reversed the defendant's conviction after finding that misconduct evidence was admitted solely to prove his bad character. At trial, the State referred to his prior encounters with police, his former imprisonment on a drug conviction, and his status as a probationer to prove knowledge and intent to possess drugs.[366] The court relied on *Haynes v. State,* where a conviction was reversed because the trial court admitted evidence of the defendant's prior drug transactions to prove knowledge and intent.[367] The *Haynes* court held that "to admit the extrinsic offense testimony . . . was to admit evidence of a point not in issue."[368]

The *James* court held that the evidence was irrelevant to the present case because knowledge and intent were not issues of genuine dispute.[369] "The steady drumbeat of the deputy prosecutor's references to James's prior conviction, bad acts, and probation status repeatedly reminded the jury that James was a person of bad character."[370]

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357. *Id.* at 95.
358. *Id.* at 100.
359. *Id.*
360. *Id.* at 101-02.
361. *Id.*
362. *Id.* at 102.
363. *Id.*
364. *Id.*
365. 622 N.E.2d 1303 (Ind. Ct. App. 1993).
366. *Id.* at 1307.
367. *Id.* at 1308-09 (citing Haynes v. State, 578 N.E.2d 369, 370-71 (Ind. Ct. App. 1991)).
368. *Id.* at 1309 (citing *Haynes*, 578 N.E.2d at 370).
369. *Id.* at 1309.
370. *Id.* at 1310.