RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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The survey period, October 1, 2000 to September 30, 2001, produced legislation and decisional law that both broke new ground and clarified existing confusion. The pages that follow provide a summary of some of the most significant developments in the realm of Indiana criminal law and procedure.

I. LEGISLATIVE ENACTMENTS

The General Assembly enacted a number of bills to define new crimes, toughen penalties for existing crimes, and correct or clarify issues and problems raised in recent court opinions.

A. New or Enhanced Offenses

The General Assembly both created new offenses and amended existing statutes to criminalize previously legal conduct or enhance the penalty for previously illegal conduct.

The new offense of "identity deception," a Class D felony, was created. It occurs when a person "knowingly or intentionally obtains, possesses, transfers, or uses the identifying information[1] of another person: (1) without the other person's consent; and (2) with intent to harm or defraud the other person . . . ."[2] The statute includes a number of exceptions, which apply to underage persons who use false identification to obtain alcohol, cigarettes, pornography, etc.[3] In addition, the legislature created the offense of "Interference with a Firefighter," which can vary from a Class C infraction to a Class D felony, for various forms of conduct that hamper firefighters' ability to perform their duties.[4]

The intimidation statute was amended to criminalize communication of a threat with intent "of causing: (A) a dwelling, a building, or another structure; or (B) a vehicle; to be evacuated . . . ."[5] The base offense is a Class A misdemeanor but becomes a Class D felony if "the threat is communicated using property, including electronic equipment or systems, of a school corporation or other governmental entity."[6] Finally, the battery statute was amended to create a Class A felony offense when the conduct "results in the death of a person less

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1. "Identifying information" is defined broadly to include, among other things, Social Security numbers, fingerprints, and telecommunication identifying information. IND. CODE § 35-43-5-1(h) (Supp. 2001).

2. *Id.* § 35-43-5-3.5(a).

3. *Id.* § 35-43-5-3.5(b).

4. *Id.* § 35-44-4.

5. *Id.* § 35-45-2-1(a)(3).

6. *Id.* § 35-45-2-1(b)(1)(D).

than fourteen (14) years of age and is committed by a person at least eighteen (18) years of age."[7]

B. DNA Evidence

The General Assembly also enacted two bills relating to DNA evidence that highlight such evidence may be a double-edged sword in criminal prosecutions. The first bill allows DNA evidence to be used to lengthen the statute of limitations for certain crimes, while the second bill allows many convicted felons greater access to DNA testing and analysis to exonerate themselves. First, the general statute of limitations of five years for Class B and C felonies was extended in prosecutions

> that would otherwise be barred . . . [to] one (1) year after the earlier of the date on which the state: (1) first discovers the identity of the offender with DNA (deoxyribonucleic acid) evidence; or (2) could have discovered the identity of the offender with DNA (deoxyribonucleic acid) evidence by the exercise of due diligence.[8]

The statute also extended the one-year period to July 1, 2002, for Class B and C felonies "in which the state first discovered the identity of the offender with DNA (deoxyribonucleic acid) evidence after the time otherwise allowed for prosecution and before July 1, 2001 . . . ."[9] The second bill established detailed procedures by which persons convicted of murder or a Class A, B, or C felony can petition the sentencing court to require DNA testing in certain circumstances.[10]

C. Crimes of Violence

In *Ellis v. State*,[11] the defendant was convicted of several crimes, including murder and two counts of attempted murder. He was sentenced to the maximum term of sixty-five years for murder and fifty years for each attempted murder, to be served consecutively. On appeal to the supreme court, he argued that the sentences for his attempted murder conviction could not exceed fifty-five years, the presumptive sentence for the next higher level felony. Indiana Code section 35-50-1-2(c) limits the total of the consecutive terms of imprisonment to which a defendant may be sentenced "for felony convictions arising out of an episode of criminal conduct," except for "crimes of violence," to "the presumptive term for a felony which is one (1) class felony higher than the most serious of the felonies for which the person has been convicted."[12] The court noted that the statute clearly listed "crimes of violence," including murder and aggravated

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7. *Id.* § 35-42-2-1(a)(5).
8. *Id.* § 35-41-4-2(b).
9. *Id.*
10. *Id.* § 35-38-7.
11. 736 N.E.2d 731 (Ind. 2000).
12. *Id.* at 736 (citing IND. CODE § 35-50-1-2(c) (1998)).

battery, but did not include attempted murder.[13] Although aggravated battery is a lesser included offense of attempted murder, the court found this to be of no consequence in the face of the clear statutory language.[14] In addition, the rule of lenity requires that the limitation be interpreted to apply "for consecutive sentences between and among those crimes that are not crimes of violence."[15] Accordingly, the court concluded that Ellis could be sentenced for his two attempted murder convictions to no more than fifty-five years, the presumptive sentence for murder.[16]

Justice Boehm, joined by Justice Dickson in dissent, reasoned that the majority's construction was not consistent with legislative intent, would produce "upside-down or absurd results," and seemed to violate the proportionality requirement of article I, section 16 of the Indiana Constitution.[17] Although a minority view in 2000, Justice Boehm's conclusion became the law in 2001 when the General Assembly made its intent clear and amended Indiana Code section 35-50-1-2(a) to include "attempted murder" as a "crime of violence."[18]

D. Sentencing

During the survey period the General Assembly either corrected or clarified a few statutory provisions regarding sentencing. First, the definition of "minimum sentence" was updated for the offenses of murder (to forty-five years) and Class D felonies (to one-half year) to be consistent with the statutory scheme and the presumptive sentences that had been altered years earlier.[19] Second, the misdemeanor probation statute was amended to clarify that probation for any class of misdemeanor may be one year but "the combined term of imprisonment and probation for a misdemeanor may not exceed one (1) year."[20] Finally, the habitual offender statute was amended, presumably in response to *Ross v. State*[21] and its progeny, as discussed in last year's survey.[22] Subsection (b) of the statute now prohibits the State from seeking to have a defendant sentenced as a habitual offender if "(1) the offense is a misdemeanor that is enhanced to a felony in the

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13. *Id.*

14. *Id.* at 737.

15. *Id.*

16. *Id.*

17. *Id.* at 741 (Boehm, J., dissenting).

18. IND. CODE § 35-50-1-2(a)(2) (Supp. 2001). The statute was also amended to include "sexual misconduct with a minor as a Class A felony (IC 35-42-4-9)" within the definition. *Id.* § 35-50-1-2(a)(11).

19. *Id.* § 35-50-2-1(c).

20. *Id.* § 35-50-3-1(b).

21. 729 N.E.2d 113 (Ind. 2000).

22. *See* Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 34 IND. L. REV. 645, 662-63 (2001). As explained in text, however, the amendment was the opposite of what prosecutors had vowed to seek, as certain offenses and categories of offenses have been removed from eligibility for enhancement under the general habitual offender statute.

same proceeding as the habitual offender proceeding solely because the person had a prior unrelated conviction; or (2) the offense is an offense under IC 9-30-10-16 or IC 9-30-10-17."[23] However,

> The requirements in subsection (b) do not apply to a prior unrelated felony conviction that is used to support a sentence as a habitual offender. A prior unrelated felony conviction may be used under this section even if the sentence for the prior unrelated offense was enhanced for any reason, including an enhancement because the person had been convicted of another offense [except several offenses under Title 9].[24]

II. DECISIONAL LAW DEVELOPMENTS

A. Search and Seizure

Scores of opinions during the survey period addressed issues relating to searches and seizures under the Fourth Amendment, article I, section 11 of the Indiana Constitution, and allied Indiana statutory law. This survey is limited to a few significant cases that either broke new ground or raised issues likely to lead to future litigation.

1. Vehicle Searches and Seizures.—In *Lockett v. State*,[25] the supreme court granted transfer to consider whether the Fourth Amendment[26] prohibits police from routinely inquiring about the presence of weapons during a traffic stop. After reviewing U.S. Supreme Court decisions on the general issues of the length and method of vehicle stops and concerns for officer safety, the court reiterated well-settled Fourth Amendment jurisprudence that allows police to order a motorist stopped for a traffic violation to exit his or her vehicle.[27] The court reasoned that "asking whether the stopped motorist has any weapons is far less intrusive and presents insignificant delay."[28] Although the federal circuits are split on whether the Fourth Amendment permits police to ask questions unrelated to the purpose of the traffic stop, the court found no Fourth Amendment violation in *Lockett*.[29] The court noted that the officer smelled alcohol as he approached the vehicle and asked the occupant if he had any weapons during his investigation of that offense: "The question was justified by police safety concerns, and it did not materially extend the duration of the stop or the nature

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23. IND. CODE § 35-50-2-8(b) (Supp. 2001).

24. *Id.* § 35-50-2-8(e).

25. 747 N.E.2d 539 (Ind. 2001).

26. The defendant waived any claim under the state constitution by failing to cite any authority or independent analysis supporting a standard different from the Fourth Amendment. *Id.* at 541.

27. *Id.* at 542.

28. *Id.*

29. *Id.* at 543.

of the intrusion."[30]

In a separate opinion in which he concurred in the result, Justice Rucker disagreed with the majority's adoption of a bright-line rule that allows officers routinely to ask drivers stopped for traffic violations if they are carrying a weapon.[31] Instead, he would require the officer to have "an objectively reasonable safety concern before making such an inquiry."[32] Quoting from a Tenth Circuit case, he agreed that such routine questioning "could conceivably result in a full-blown search of the passenger compartment of the detainee's vehicle, no matter how minor the traffic infraction that initially prompted the stop, and even if the officer had no reasonable safety concerns when he posed the question."[33]

Although the majority's approach is likely the one more consistent with the Fourth Amendment jurisprudence of the current membership of the U.S. Supreme Court, Justice Rucker's concurring opinion is arguably the better-reasoned approach. It is certainly true that a simple weapon inquiry does not materially extend the duration of a traffic stop or the nature of the intrusion; however, the notion that such an inquiry is "justified by police safety concerns" is not so clear. First, Supreme Court authority allows citizens the right to refuse to answer an officer's questions during a *Terry* stop.[34] Moreover, as Justice Rucker aptly pointed out, "the notion that asking a driver if he has any weapons somehow advances officer safety is suspect. In reality a driver could in fact be heavily armed and simply say no to an officer's inquiry."[35] Indeed, the holding in *Lockett* will likely do little to further the protection of police officers because the average citizen will likely answer truthfully in the negative and those who are illegally carrying guns may well be less forthright than Mr. Lockett, who admitted to having a handgun in his car.[36] Finally, by finding the state constitutional claim waived, the supreme court has left open the possibility of later striking down the practice under the reasonableness test of article I, section 11.[37] However, in light of the court's heavy reliance on officer safety concerns, a state constitutional challenge would appear unlikely to succeed.

Just a month before deciding *Lockett*, the supreme court took a slightly different approach in *Wilson v. State*,[38] in which it addressed the propriety of police officers performing pat-down searches of motorists pulled over for traffic stops before asking them to enter their police vehicle. In *Wilson*, the defendant was pulled over for speeding, and the officer suspected that he was intoxicated.

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30. *Id.*

31. *Id.* at 544 (Rucker, J., concurring).

32. *Id.*

33. *Id.* (quoting United States v. Holt, 229 F.3d 931, 940 (10th Cir. 2000)).

34. *Id.* at 545 n.4 (Rucker, J., concurring) (citing Florida v. Royer, 460 U.S. 491, 497-98 (1983)).

35. *Id.*

36. *See id.* at 541.

37. *See generally* Brown v. State, 653 N.E.2d 77, 79 (Ind. 1995).

38. 745 N.E.2d 789 (Ind. 2001).

Noting that neither the field sobriety tests nor the portable breath test required the motorist to enter the police vehicle and that the officer did not suspect that the motorist was armed, the court concluded that the search violated the Fourth Amendment because "the pat-down search was not supported by a particularized reasonable suspicion that Wilson was armed, and because there was no reasonably necessary basis for placing Wilson in the squad car . . . ."[39]

Wilson is not cited or discussed in *Lockett*, but the two cases can be easily reconciled. In *Lockett* the defendant was not subjected to a *Terry* frisk and therefore, in the majority's view, particularized suspicion was not required as it was in *Wilson*.[40] Although a pat-down *search* is certainly more intrusive than the mere asking of a question, which is not a search or seizure standing alone, the majority opinion in *Lockett* does not base its holding on this distinction but rather on the more dubious issue of officer safety concerns. It would appear that those concerns were equal in both cases of suspected drunk driving. Moreover, the holding in *Lockett* would appear to suggest that officers cannot routinely ask motorists if they have any drugs in their vehicles because such an inquiry would not be justified on officer safety concerns.

Finally, the supreme court and court of appeals addressed two other issues of first impression in the vehicle context. In *Mitchell v. State*,[41] the supreme court held that the Indiana Constitution does not prohibit pretextual stops. The court reasoned that the potential for unreasonable police conduct is most likely to arise "not in the routine handling of the observed traffic violation, but in the ensuing police investigatory conduct that may be excessive and unrelated to the traffic law violation."[42] Although it is certainly true that most constitutional violations will occur during subsequent investigatory conduct, the court did not acknowledge that pretextual stops allow officers to observe potentially incriminating items in plain view and, in light of *Lockett*, ask questions that could lead motorists to incriminate themselves.[43] It would seem that the larger problem with pretextual stops, if they were deemed unconstitutional, would be the means by which a defendant could establish that a valid traffic stop was a pretext for another purpose.[44] Short of an officer's admission that a stop was pretextual, the proof would seemingly come in the form of a pattern of pretextual stops by a certain officer, which might be difficult to establish depending on the specificity

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39. *Id.* at 793.

40. *Compare Lockett*, 747 N.E.2d at 541-43, *with Wilson*, 745 N.E.2d at 793-94. Nevertheless, Justice Rucker's concurring opinion in *Lockett* draws upon *Terry* and other U.S. Supreme Court authority to support his view that a weapon's inquiry should be based on some sort of particularized (and reasonable) suspicion. *See Lockett*, 747 N.E.2d at 544-45 (Rucker, J., concurring).

41. 745 N.E.2d 775, 789 (Ind. 2001).

42. *Id.* at 787.

43. *See generally* Wesley MacNeil Oliver, *With an Evil Eye and Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1416-22 (2000) (reviewing the federal constitutional implications of pretextual stops).

44. *See generally id.* at 1422-25.

of police records and the demographics of an officer's given patrol area.

In *Wilkinson v. State*,[45] the court of appeals held that a random computer check of license plate numbers was not a search under the Indiana Constitution. In that case, the officer ran a random check on the license plate of a truck parked in a convenience store lot and learned that the truck was registered to Wilkinson, who was a habitual traffic violator. Because the driver of the truck matched the physical description provided from the license plate check, the officer stopped the truck as it departed the store lot, and upon confirming the identity of the driver, arrested him.[46] Relying on cases from other states, the court noted that "[a] search connotes prying into hidden places to observe items which are concealed; there is no search attendant to viewing an object which is open to view."[47] Although it affirmed the conviction that resulted from the random license plate check, the court nevertheless noted that it shared the defendant's concern that this procedure "could lead to pretextual stops" and in an unusual display of candor "question[ed] whether random checks of license plates in convenience store parking lots represent[ed] an efficient use of the limited resources of law enforcement agencies."[48]

2. Execution of Warrants and Stale Probable Cause.—In *Huffines v. State*,[49] the court of appeals addressed the interplay of Indiana Code section 35-33-5-7(b), which requires search warrants to be executed within ten days of issuance, with the Fourth Amendment and article I, section 11 of the Indiana Constitution. Adopting the "totality of the circumstances" approach used by federal courts, the court held that the State must demonstrate that the warrant was supported by probable cause at the time of execution.[50] In that case, eight days lapsed between the time the warrant, which sought cocaine evidence and was based on a single observation and purchase, was issued and executed. Additionally, no criminal activity was suspected or corroborated during this time. Therefore, the court held that the search was improper under the Fourth Amendment.[51] After considering Indiana cases of both pre-issuance and pre-execution delay, the court reached the same conclusion under the state constitution, seemingly applying the same requirement that probable cause continue to exist at the time of execution.[52] The court did not specifically address the usual line of inquiry under article I, section 11, i.e., whether the "police behavior was reasonable."[53]

Six months after *Huffines*, the court of appeals in *Caudle v. State*[54] addressed another claim of stale probable cause in a case in which the warrant was executed

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45. 743 N.E.2d 1267 (Ind. Ct. App. 2001).
46. *Id.* at 1269.
47. *Id.* at 1270 (quoting People v. Bland, 390 N.E.2d 65, 67 (Ill. App. Ct. 1979)).
48. *Id.*
49. 739 N.E.2d 1093 (Ind. Ct. App. 2000).
50. *Id.* at 1097.
51. *Id.* at 1097-98.
52. *See id.* at 1098-99.
53. *See generally* Brown v. State, 653 N.E.2d 77, 79 (Ind. 1995).
54. 749 N.E.2d 616 (Ind. Ct. App. 2001).

seven hours before the ten-day statutory period would have expired. Assuming arguendo that the probable cause was stale, the court nevertheless affirmed the trial court's admission of evidence based on the good faith exception to the exclusionary rule.[55] Noting that the search preceded the issuance of the *Huffines* opinion by eighteen months, the court found that the detective was acting in good faith in delaying the execution of the warrant for nine days while he waited to catch the defendant at home.[56] The court acknowledged, however, that after *Huffines* "a question exists about whether or not a police officer can in good faith execute a warrant under circumstances similar to those in *Huffines* because that decision should cause an officer to no longer 'reasonably believe' that such a warrant would be valid" under the constitutional provisions.[57]

On rehearing Caudle argued that federal circuit courts have held that the good faith exception does not apply to errors in the execution of warrants and should not have been applied in his case.[58] Nevertheless, the court of appeals affirmed its earlier opinion, reiterating that the detective was permitted to rely on the ten-day statutory period when executing the warrant "unless the statute was 'clearly unconstitutional.'"[59] Although many circuit courts have held that probable cause must exist at the time of execution of a warrant regardless of a statutory outer limit, some state courts have held that the execution of a warrant within the statutory period is per se timely.[60] Because execution within the statutory period was not "clearly unconstitutional" in the absence of any Indiana authority and conflicting authority from other jurisdictions, the court affirmed the application of the good faith exception and the admission of the evidence seized during execution of the warrant.[61]

In light of *Huffines* and *Caudle*, one would expect that, in the future, law enforcement officers will execute warrants as soon as feasible and well before the ten-day statutory period. If they do not, however, and probable cause has dissipated in the interim, it would appear unlikely that an Indiana court will allow them to seek refuge in the good faith exception. The law is now both clear and simple: the statute sets an outer limit of ten days, but the relevant inquiry is whether probable cause continues to exist at the time of issuance.

B. Confessions

The Indiana Supreme Court addressed several challenges to the admissibility of confessions during the survey period; most of these were resolved in the State's favor in the trial court and affirmed on appeal by application of existing precedent and a highly deferential standard of review. Two opinions stand

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55. *Id.* at 620-22.
56. *Id.* at 622.
57. *Id.*
58. Caudle v. State, 754 N.E.2d 33, 34 (Ind. Ct. App. 2001).
59. *Id.* at 35 (quoting Illinois v. Krull, 480 U.S. 340, 349-50 (1987)).
60. *Id.*
61. *Id.* at 36.

out—one for its holding that significantly clarified the law relating to juvenile confessions and the other for its refusal to modify or reconsider existing law in an area where reconsideration seems appropriate.

In *Stewart v. State*,[62] the supreme court addressed the admissibility of a juvenile's murder confession in the face of a waiver signed by his biological non-custodial father. According to statute, the constitutional rights of an unemancipated person under eighteen may be waived only "by the child's custodial parent, guardian, custodian, or guardian ad litem" if four conditions are met.[63] In relatively short order, the court held that Stewart's biological father was not a custodial parent.

The undisputed facts were that Stewart was born out of wedlock, no court order of custody was admitted at trial or otherwise claimed to exist, and Stewart did not live with his biological father.[64] The court considered a number of statutory provisions that did not provide "a direct answer" to the issue, but which all pointed to the conclusion that the term "custodial parent" applied to "either a person who has been adjudicated by a court to have legal custody of the child, or a parent who actually resides with the unemancipated juvenile."[65] Finally, the court rejected the State's contention, that because of the biological relationship, Stewart's father satisfied the statutory mandate that requires the juvenile's "parent" join in the waiver: "This contention plainly reads 'custodial' out of the statute. It seems clear that the statute contemplates consultation and waiver by a person in the close relationship afforded by either formal custody or actual residence in addition to a biological or adoptive relationship."[66] Because Stewart's father met neither test, the court held that admission of his confession was error.[67] Moreover, because the State's remaining evidence did not directly place Stewart at the scene of the murder, the court was unwilling to find that the error was harmless, that is, that it did not affect Stewart's substantial rights.[68]

Stewart represents an important victory for juvenile defendants by ensuring the voluntariness of their confessions through a requirement that the parent with whom they consult is one that is likely to make the consultation a meaningful one. *Henry v. State*,[69] on the other hand, rejects a requirement that could bolster the reliability of adult confessions.

In *Henry*, the defendant confessed to the murder of an antique storeowner after being told by police that his fingerprints were found at the scene of the

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62. 754 N.E.2d 492 (Ind. 2001).

63. *Id.* at 494 (citing IND. CODE § 31-32-5-1(2) (1998)).

64. *Id.* at 495.

65. *Id.* at 495 & n.2.

66. *Id.* at 496.

67. *Id.*

68. *Id.*; *see also* Fleener v. State, 656 N.E.2d 1140, 1141 (Ind. 1995) (discussing harmless error under Indiana law, which differs from federal constitutional harmless error as explained in *Chapman v. California*, 386 U.S. 18 (1967)).

69. 738 N.E.2d 663 (Ind. 2000).

crime and a person in the store had identified him as the killer.[70] However, "[n]either statement was true";[71] the police had lied to Henry.

Henry challenged the admissibility of his confession in the trial court, but his motion to suppress was denied.[72] On appeal he acknowledged the supreme court precedent of *Light v. State*,[73] which had upheld the admissibility of a confession following a four-hour interrogation punctuated by police conduct involving cursing, lying, and smacking the defendant on the arm,[74] but urged the court to revisit the issue and "announce a bright line rule which would render inadmissible[] a confession obtained solely by deceitful police activity."[75]

The court declined the invitation to revisit *Light*, preferring instead to continue to review each confession based on the "totality of the circumstances" test.[76] Although the court stated that it "continue[s] to disapprove of deceptive police interrogation tactics," it nevertheless upheld the admissibility of Henry's confession because he was a man of average intelligence; the interrogation was brief (one hour); he was Mirandized three times; the police made no threats or promises to him; and he did not ask for an attorney.[77] "Balanced against the officer's obvious deception, these facts tip the scales in favor of the conclusion that Henry's statement was not involuntary."[78]

The court's reasoning is less than compelling. Had Henry asked for an attorney or not been Mirandized, his confession would have been inadmissible as a matter of well-settled federal constitutional law.[79] What remains to support admissibility is Henry's "average intelligence" and the absence of any "threats or promises." If police deception truly "weighs heavily against the voluntariness of the defendant's confession,"[80] it is difficult to understand why police telling two separate lies during a short confession should be disregarded to support admissibility. As the court reiterated in *Henry*, the State must prove beyond a reasonable doubt that a confession was voluntarily given.[81] This differs from the federal constitutional requirement of voluntariness merely by a preponderance of the evidence.[82] If the supreme court is serious about this heightened burden, one might suspect it to find the scales tipped in favor of inadmissibility in some, if not most, cases of police deception. Although the court relied on its opinion in *Light*, *Light* does not discuss the "beyond a reasonable doubt" standard and

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70. *Id.* at 664.
71. *Id.*
72. *Id.*
73. 547 N.E.2d 1073 (Ind. 1989).
74. *Henry*, 738 N.E.2d at 664 (citing *Light*, 547 N.E.2d at 1079).
75. *Id.* (citing Brief of Appellant at 9) (omission in original).
76. *Id.*
77. *Id.* at 665.
78. *Id.*
79. *See, e.g.*, Edwards v. Arizona, 451 U.S. 477 (1981).
80. *Henry*, 738 N.E.2d at 665 (citing Heavrin v. State, 675 N.E.2d 1075, 1080 (Ind. 1996)).
81. *Id.* at 664.
82. *Id.* at 664 n.1; *see also* Schumm, *supra* note 22, at 648-51.

was decided well before the court had adopted a consistent view on this heightened requirement.

C. Waiver of the Right to Counsel

In *Poynter v. State*,[83] the supreme court granted transfer to address inconsistencies in its prior opinions and those of the court of appeals regarding the requirements for a valid waiver of the right to counsel before a defendant elects self-representation. The defendant asserted, and the State agreed, that the record must reflect that such a waiver is knowing, intelligent, and voluntary.[84] However, the court in *Poynter* set out to define just what that standard means in practice.

The court began by acknowledging the importance of the right at issue: "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."[85] To protect this important right, the U.S. Supreme Court has long held that a defendant who asserts his right to self-representation must be told of the "dangers and disadvantages of self-representation,"[86] although there are no prescribed "talking points" that the trial court must include in its advisement.[87] The trial court must make a "considered determination" that the waiver is voluntary, knowing, and intelligent, a determination that is made "with the awareness that the law indulges every reasonable presumption against a waiver of this fundamental right."[88]

At issue in *Poynter* was whether a defendant's conduct in failing to hire counsel, despite warnings and advisements by the trial court, constituted a valid waiver. The court acknowledged that two of its prior cases had reached opposite results, although the latter case did not overrule or even discuss the former one.[89] Seizing the opportunity to clarify this "inconsistent precedent," the court considered the general standards from Supreme Court cases but then seemingly adopted[90] the more specific approach of the Seventh Circuit, which considers four factors: "(1) the extent of the court's inquiry into the defendant's decision, (2) other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation, (3) the background and experience of the defendant, and (4) the context of the

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83. 749 N.E.2d 1122 (Ind. 2001).

84. *Id.* at 1123.

85. *Id.* at 1125-26 (quoting United States v. Cronic, 466 U.S. 648, 654 (1984)).

86. *Id.* at 1126 (quoting Faretta v. California, 422 U.S. 806, 835 (1975)).

87. *Id.*

88. *Id.* (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

89. *Id.* (citing Houston v. State, 553 N.E.2d 117 (Ind. 1990); Fitzgerald v. State, 257 N.E.2d 305 (Ind. 1970)).

90. The court never explicitly adopts the test but states that it "find[s] this approach helpful in analyzing waiver of the Sixth Amendment right to counsel under the facts and circumstances of waiver by conduct cases." *Id.* at 1128.

defendant's decision to proceed *pro se*."[91]

Applying the factors to Poynter's case, the court noted that the trial court had advised him of his trial rights and the procedural outcome of failing to secure counsel but did not advise him of the "dangers and disadvantages of self-representation," a factor that "weighs heavily against finding a knowing and intelligent waiver."[92] The defendant's background and unknown experience with the criminal justice system pointed in neither direction, and his conduct of choosing to go to work instead of hiring an attorney did not result in delays or appear to manipulate the process.[93] Weighing these factors, the court concluded that the record did not support a finding of a knowing and intelligent waiver.[94]

Poynter is significant not only because it clarified contradictory precedent but it also took a seemingly clear path that should be relatively easy to apply in future cases. Indeed, less than three months after *Poynter* was decided, the court of appeals applied it in *Slayton v. State*,[95] a case in which the trial court "made mention of counsel" at three pretrial hearings but never advised the defendant of disadvantages of self-representation. Because the other factors did not weigh in either direction, the court in *Slayton* similarly concluded that there had not been a knowing and intelligent waiver of counsel.[96]

In both *Poynter* and *Slayton*, the trial court failed to advise the defendant of the dangers and disadvantages of self-representation, which proved to be the dispositive factor in finding the purported waivers of counsel invalid. Therefore, the lingering question for future cases is what form that advisement should take and whether a cursory advisement will be assailable on appeal.

D. Statute of Limitations

In *Wallace v. State*,[97] the supreme court granted transfer to address the applicability of the statute of limitations in a child molestation case. The defendant's two daughters testified that he had molested them during a sixteen-month period beginning in the summer of 1988.[98] However, for reasons undisclosed in the record, the State did not file charges—four C felony counts of child molestation—until March of 1998.[99] Although at the time of the offense the applicable statute of limitations for a Class C felony was five years, Wallace did not object to the charges on the basis that the statute of limitations had expired, but rather proceeded to trial by jury and was convicted of three of the

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91. *Id.* at 1127-28 (quoting United States v. Hoskins, 243 F.3d 407, 410 (7th Cir. 2001)).
92. *Id.* at 1128.
93. *Id.*
94. *Id.*
95. 755 N.E.2d 232, 236 (Ind. Ct. App. 2001).
96. *Id.* at 237.
97. 753 N.E.2d 568 (Ind. 2001).
98. *Id.* at 569.
99. *Id.*

counts.[100]

Repeating well-established legal precepts, Justice Rucker, writing for the three-justice majority, observed that the applicable statute of limitations is "that which was in effect at the time the prosecution was initiated,"[101] and "the statute to be applied when arriving at a proper criminal penalty is that which was in effect at the time the crime was committed."[102] Because a "statute of limitations might be construed narrowly and in a light most favorable to the accused," the court rejected the State's argument that the extended statute of limitations from another subsection of the statute should apply to Wallace's crimes.[103] Reiterating the primary purpose of the statute of limitation as ensuring against the "inevitable prejudice and injustice to a defendant that a delay in prosecution creates,"[104] the supreme court reversed Wallace's convictions because the State had not filed charges within the applicable five-year limitation period.[105]

Justice Boehm, joined by Justice Dickson in dissent, did not disagree with anything in the majority's opinion, save its conclusion. Relying on Indiana Trial Rule 8(c) and federal precedent, the dissent opined that defendants should be required to raise a statute of limitations defense in a pretrial motion or forfeit the claim on appeal.[106] It reasoned that this view was also consistent with policy considerations: "A criminal defendant, like a civil defendant, should not be able to sit on a statute of limitations defense until long after trial is completed. The result is a waste of taxpayer funds and court time."[107] Moreover, because many other "more fundamental" constitutional and statutory rights may be waived by criminal defendants either affirmatively or by failure to assert them, the dissent found no reason to accord more favorable treatment to a statute of limitations defense.[108]

Although the dissent's view is arguably the better reasoned one, it correctly recognized its practical limitations. "In this case, affirming the conviction obviously sets the defendant up for an ineffective assistance of counsel claim, and the end result of my view may be the same as the majority's."[109] Moreover, it is questionable whether the dissent's approach would actually save judicial resources. It is unlikely that competent defense counsel, who realizes that raising a statute of limitations defense in a pretrial motion would lead to immediate dismissal of the charges, would nevertheless choose to proceed to trial to attempt to secure an acquittal with the knowledge that, should this effort fail, a guilty verdict would be set aside on appeal when the statute of limitations issue was

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100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 570.
104. *Id.* (quoting Kifer v. State, 740 N.E.2d 586, 587 (Ind. Ct. App. 2000)).
105. *Id.* at 570-71.
106. *Id.* at 571-72 (Boehm, J., dissenting).
107. *Id.* at 572 (Boehm, J., dissenting).
108. *Id.*
109. *Id.*

raised. A defendant charged with any crime—most of all child molesting as in *Wallace*—would certainly prefer the quickest resolution of the case; lingering charges and an eventual trial are likely to take a serious toll on the defendant and his reputation in the community. It is hard to imagine a scenario where failing to raise the defense would be tactical, but rather, it would seem to be a classic example of deficient performance, which, when coupled with the obvious prejudice, constitutes an archetypical case of ineffective assistance.

E. Voluntary Intoxication

In 1996, the U.S. Supreme Court held in *Montana v. Egelhoff*[110] that, consistent with the Due Process Clause, a state could prohibit a defendant from offering evidence of voluntary intoxication to negate the requisite mens rea of a criminal offense. Although the Indiana Supreme Court had struck down a legislative attempt to limit the use of voluntary intoxication as a defense in *Terry v. State*[111] in 1984, after *Egelhoff* the court noted that the *Terry* doctrine was "no longer good law"[112] insofar as it was grounded in the federal constitutional guarantee of due process. In response to *Egelhoff*, the General Assembly in 1997 enacted Indiana Code section 35-41-2-5, which provides: "Intoxication is not a defense in a prosecution for an offense and may not be taken into consideration in determining the existence of a mental state that is an element of the offense . . . ."[113]

In *Sanchez v. State*,[114] the Indiana Supreme Court granted transfer to address whether the 1997 statute violated various provisions of the Indiana Constitution. In addressing the claimed violation of article I, section 12 (the due course of law provision), the court reiterated that the first sentence of that provision applies only in the civil context,[115] but held that the second sentence, although not identical with the federal right to due process, included the "basic concepts of fairness that are frequently identified with 'due process' in the federal constitution."[116] However, recognizing that the General Assembly "redefined the mens rea element in Indiana to render irrelevant" evidence of voluntary intoxication, the court found no due course of law violation.[117] The court also held that the statute did not violate article I, section 13 because that provision "does not require that any specific claim of a defense be recognized by Indiana law," and "[i]f the substantive law renders the evidence irrelevant . . . there is no

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110. 518 U.S. 37 (1996).

111. 465 N.E.2d 1085 (Ind. 1984).

112. State v. Van Cleave, 674 N.E.2d 1293, 1302 n.15 (Ind. 1996).

113. IND. CODE § 35-41-2-5 (1998).

114. 749 N.E.2d 509 (Ind. 2001).

115. *Id.* at 514.

116. *Id.* at 515. The second sentence provides: "Justice shall be administered freely and without purchase; completely, and without denial; speedily, and without delay." IND. CONST. art. 1, § 12.

117. *Sanchez*, 749 N.E.2d at 515.

right under Article I, Section 13 to present it."[118] In addition, the court found no violation of the jury's right to determine the law and facts under article I, section 19 because "[t]he voluntary intoxication instruction does not unconstitutionally compel the jury to make a finding of intent."[119] Finally, the court found no violation of the equal privileges and immunities clause of article I, section 23 because the statute makes distinctions that are rationally related to legislative goals and a permissible balancing of the competing interests involved.[120]

Justice Sullivan, joined by Justice Rucker, concurred in the result, reasoning that the "principles underlying *Terry* remain sufficiently viable that we must *adhere* to this well-settled precedent," but nevertheless reached the same result because the erroneous refusal of the intoxication instruction was harmless beyond a reasonable doubt.[121]

F. Jury Instructions on Flight from Crime Scene

Sorting though a decade of wishy-washy pronouncements on flight instructions, the supreme court in *Dill v. State*[122] finally resolved long-standing confusion by holding that it is per se erroneous for trial courts to give an instruction that "flight and other actions calculated to hide a crime, though not proof of guilt, are evidence of consciousness of guilt and are circumstances which may be considered by [the jury] along with other evidence."[123]

The confusion began with *Bellmore v. State*,[124] in which the supreme court found that the standard flight instruction did not violate the defendant's right to due process. However, the court recommended against future use of the instruction without articulating the reasons for its recommendation or otherwise providing guidance for alternative instructions.[125] Post-*Bellmore* cases found no error in the giving of flight instructions but repeated the cautionary warning against such instructions.[126] "Since *Bellmore*, we have repeatedly noted this recommendation [for disuse] but have not actually applied it to find error."[127]

In *Dill*, the defendant objected to the instruction on several grounds, including the recommendation from *Bellmore* and its progeny, as well as its engendering of confusion and focusing of excessive attention on evidence of flight.[128] "Implementing [its] directive in *Bellmore*," the *Dill* court found that the trial court erred in giving the flight instruction because it was confusing; it

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118. *Id.* at 520-21.
119. *Id.* at 521.
120. *Id.* at 522.
121. *Id.* at 527 (Sullivan, J., concurring) (emphasis in original).
122. 741 N.E.2d 1230 (Ind. 2001).
123. *Id.* at 1231.
124. 602 N.E.2d 111 (Ind. 1992).
125. *Dill*, 741 N.E.2d at 1231.
126. *Id.* at 1231-32.
127. *Id.* at 1231.
128. *Id.* at 1232.

unnecessarily emphasized certain evidence; and it had great potential to mislead the jury.[129] Nevertheless, because the conviction was clearly sustained by the evidence and the jury could not properly have found otherwise, the court found the erroneous instruction to be harmless error.[130]

Chief Justice Shepard dissented, reasoning that putting flight instructions on "the extremely short list" of completely prohibited instructions runs counter to Indiana's trial practice, which includes "scores of instructions about particular aspects of various causes of action, given regularly by trial judges and regularly approved on appeal."[131] In addition, the dissent made clear that the majority's new rule was a minority view, citing numerous state supreme court and federal circuit court opinions that have upheld properly worded flight instructions supported by sufficient evidence.[132] Chief Justice Shepard concluded his dissent by noting that in the future he "would not be surprised to see defense counsel now begin to tender their own instructions on flight as a way to safeguard their clients against the possibility that the prosecutor might oversell the matter during final argument."[133]

The majority's opinion in *Dill*, although likely foreclosing the State from tendering or trial courts from giving flight instructions in the future, seems to give the green light to the State admitting evidence of flight at trial and arguing its significance in closing argument.[134] Without an instruction that places this evidence in some perspective, it seems entirely possible that a jury of laypersons untrained in the law will attach greater weight to the defendant's flight than it would if a proper, carefully-worded instruction had been given. Thus, as the dissent noted, defense counsel likely will want to craft an instruction that limits the significance of flight evidence in those cases where the trial court deems it admissible. Trial judges would seemingly be willing to give such an instruction when supported by the evidence, in part, because if tendered by the defendant, it would foreclose any claim of error on appeal. Refusing such an instruction, however, could present a viable issue for appeal, especially if the defendant could show that the prosecutor was overzealous in arguing the significance of flight in closing argument or that the evidence of flight admitted at trial was not relevant—issues that are likely to be fleshed out in future cases, the sorting out of which "should prove challenging."[135]

G. Limits on Retrials After Hung Juries

In *Sivels v. State*,[136] the supreme court addressed limitations on retrials after

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129. *Id.*
130. *Id.* at 1233.
131. *Id.* at 1234 (Shepard, C.J., dissenting).
132. *Id.* at 1234-35 (Shepard, C.J., dissenting).
133. *Id.* at 1235 (Shepard, C.J., dissenting).
134. *See id.* at 1232.
135. *Id.* at 1235 (Shepard, C.J., dissenting).
136. 741 N.E.2d 1197 (Ind. 2001).

repeated hung juries. In that case, the defendant was charged with murder, felony murder, and robbery. He was acquitted of the felony murder and robbery charges in his first trial, but the jury could not reach a unanimous verdict on the murder charge.[137] A second trial also resulted in a mistrial due to a hung jury, and the defendant then filed a motion to dismiss, alleging that the multiple prosecutions violated his right to due process.[138] The trial court agreed with Sivels that it had the inherent authority to dismiss the case on this basis, but denied the motion on its merits.[139]

On direct appeal the supreme court agreed that the trial court possessed this authority to dismiss the case. After reviewing cases from several other jurisdictions, the court noted that "[w]hile different jurisdictions refer to different sources of the trial court's authority to dismiss after multiple mistrials, the majority of the appellate courts rely on precepts of fundamental fairness and notions of fair play and substantial justice."[140]

The supreme court proceeded to adopt guidelines for future use when trial courts are confronted with such a challenge. These include:

> (1) the seriousness and circumstances of the charged offense; (2) the extent of harm resulting from the offense; (3) the evidence of guilt and its admissibility at trial; (4) the likelihood of new or additional evidence at trial or retrial; (5) the defendant's history, character, and condition; (6) the length of any pretrial incarceration or any incarceration for related or similar offenses; (7) the purpose and effect of imposing a sentence authorized by the offense; (8) the impact of dismissal on public confidence in the judicial system or on the safety and welfare of the community in the event the defendant is guilty; (9) the existence of any misconduct by law enforcement personnel in the investigation, arrest, or prosecution of the defendant; (10) the existence of any prejudice to defendant as the result of passage of time; (11) the attitude of the complainant or victim with respect to dismissal of the case; and (12) any other relevant fact indicating that judgment of conviction would serve no useful purpose.[141]

In addition, the court should consider "the number of prior mistrials and the outcome of the juries' deliberations, as known" and "the trial court's own evaluation of the relative strength of each party's case . . . ."[142] The court declined to adopt a categorical rule limiting retrials to a specific number but instead held that trial courts are in the best position to weigh the relevant factors and that abuse of discretion is the appropriate standard for appellate review of the

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137. *Id.* at 1198-99. Several months earlier, a jury was selected and dismissed (before being sworn) because of a continuance. *Id.* at 1198.

138. *Id.*

139. *Id.* at 1202.

140. *Id.* at 1201.

141. *Id.* (quoting State v. Sauve, 666 A.2d 1164, 1168 (Vt. 1995) (citations omitted)).

142. *Id.* (quoting State v. Abbati, 493 A.2d 513, 521-22 (N.J. 1985)).

trial court's decision.[143]

In reviewing the relevant factors in *Sivels*, the supreme court noted that the charged offense involved the beating and shooting of an unarmed man during the commission of a robbery.[144] The first two trials ended in juries that voted 7-5 and 9-3 in favor of acquittal, and the defendant had been incarcerated without bond for two and a half years.[145] Perhaps most significantly, however, the trial court had indicated its own evaluation of the strength of the State's case and its belief that Sivels had committed the charged offense.[146] Based on these considerations, the supreme court found no abuse of discretion in allowing the State to retry its case for a third time.[147]

Although a fifteen-factor test may appear at first blush to be inadvisable, the test adopted by the supreme court in *Sivels* will likely be easily applied in future cases because, although it includes all the relevant considerations, generally only few will apply in a given case. More importantly, the supreme court properly gives the authority to dismiss charges to the trial court, whose time and docket is at the mercy of the State's repeated retrials in such cases. If repeated retrials result in hung juries and the trial court finds the State's evidence less than compelling, one would expect most trial judges to exercise the authority to dismiss a case. However, if the trial court declines to do so, the issue is now one that can be easily and meaningfully raised and reviewed on appeal.

H. Appellate Review of Sentences

This year's survey concludes, as did last year's, with a review of the morass of appellate sentence review. As predicted, the constitutional amendment that eliminated the mandatory jurisdiction of the supreme court in all but death penalty and life without parole cases[148] has, when combined with the court of appeals' new membership, led to the court of appeals' newfound role as the primary arbiter of appellate sentence review.[149]

Although several court of appeals opinions during the survey period reduced sentences as being manifestly unreasonable, the supreme court's newly-discretionary docket not surprisingly led to only two sentence reductions: one on direct appeal and one on transfer. On direct appeal, the supreme court, in *Winn v. State*,[150] took the unusual action of finding that a thirty-year habitual offender enhancement added to a fifty-year sentence for rape was manifestly

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143. *Id.* at 1202.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. The constitutional amendment limited mandatory jurisdiction to death penalty cases but the supreme court retained jurisdiction for life without parole cases by rule. *See* IND. APPELLATE RULE 4(A)(1)(a).

149. Schumm, *supra* note 22, at 669.

150. 748 N.E.2d 352, 360 (Ind. 2001).

unreasonable. *Winn* is unusual because the defendant did not challenge, and the court did not evaluate, the *aggregate sentence* as being manifestly unreasonable, as in most previous cases addressing such claims. Rather, the defendant requested that the habitual offender enhancement be attached to a crime other than the rape count and that his enhancement therefore be reduced from thirty to ten years because the two prior felony convictions that formed the basis for the enhancement were non-violent Class D felonies.[151] In addressing this claim, the court summarized the relevant factors of the nature of the offense (the defendant confronted the victim with a deadly weapon, struck her, threatened her, and required her to submit to more than one sexual act) and the character of the offender (an Operation Desert Storm veteran with a non-violent criminal history of misdemeanor or D felony offenses).[152] In light of these considerations and the trial court's imposition of the maximum sentences for rape and criminal deviate conduct, the court concluded that imposing the maximum habitual enhancement by attaching it to the rape conviction was manifestly unreasonable and therefore ordered that the enhancement be reduced to ten years and attached to one of the class B or C felony counts, thereby reducing the aggregate sentence by twenty years.[153]

In *Walker v. State*,[154] the supreme court granted transfer to address a claim that the "aggregate sentence" of eighty years for two counts of A felony child molesting was manifestly unreasonable.[155] The court began by tracing the origins of article VII, section 4 of the Indiana Constitution, noting that the framers "had in mind the sort of sentencing revision conducted by the Court of Criminal Appeals in England."[156] In England, the appellate court

> shall, if they think a different sentence should have been passed, quash the sentence passed at trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefore as they think ought to have been passed, and in any other case shall dismiss the appeal.[157]

Despite having its origins in such a liberal standard, Indiana appellate courts have exercised their responsibility "with great restraint, recognizing the special expertise of the trial bench in making sentencing decisions."[158] Although the deferential standard of review "means that trial court decisions will be affirmed on the great majority of occasions," the appellate courts should revise sentences when they are "manifestly unreasonable in light of the nature of the offense and

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151. *Id.*
152. *Id.* at 361.
153. *Id.*
154. 747 N.E.2d 536 (Ind. 2001).
155. *Id.* at 538.
156. *Id.* at 537-38.
157. *Id.* at 538 (quoting Criminal Appeal Act, 1907, 7 Edw. 7, ch. 23 § 4(3) (Eng.)).
158. *Id.*

the character of the offender."[159]

In applying the standard to Walker's case, the supreme court noted that although he did not have a history of criminal behavior, he had molested the same child twice without physical injury, was on probation, and had fled the jurisdiction.[160] Weighing these considerations the court found that "this is some distance from being a worst offense or the most culpable offender" and ordered Walker's two forty-year sentences to be served concurrently.[161]

Following *Walker* or other precedent, the court of appeals reduced sentences as being manifestly unreasonable in five cases during the survey period.[162] Relying heavily on *Walker*, the court of appeals in *Perry v. State*[163] held that consecutive sentences for dealing and conspiracy to deal cocaine were manifestly unreasonable because Perry's prior felony convictions were used as the aggravating circumstance to justify consecutive sentences and formed the basis of the habitual offender charge.[164] Accordingly, the case was remanded for the imposition of concurrent sentences.[165] In a similar vein, in *Simmons v. State*[166] the court ordered a reduction of the defendant's maximum fifty-year sentence for Class A felony child molesting to forty years because the defendant's "criminal history was not lengthy, did not demonstrate a tendency toward violence or a propensity to commit sexual acts, and was the only proper aggravating factor considered by the trial court . . . ."[167]

In *Love v. State*,[168] the court of appeals reduced the defendant's maximum sentence of fifty years for possession with intent to deliver cocaine to the presumptive term of thirty years. The court based its decision on the defendant's lack of a violent criminal history and his youthful age of nineteen: "In sentencing Love to fifty years' imprisonment, the trial court has effectively determined that Love is beyond rehabilitation at age nineteen."[169]

In contrast, in *Peckinpaugh v. State*[170] the court reduced a sentence for

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159. *Id.*

160. *Id.*

161. *Id.*

162. This number does not include *Mann v. State*, 742 N.E.2d 1025 (Ind. Ct. App.), *trans. denied*, 753 N.E.2d 13 (Ind. 2001), cited in *Walker* as an example of a sentence properly reduced as manifestly unreasonable. Although Judge Baker noted in his dissent that he would have reduced the sentence under the manifestly unreasonable doctrine, *id.* at 1028-29 (Baker, J., dissenting), the majority relied on procedural sentencing doctrine in remanding "to the sentencing court with instructions to impose the forty-five year sentence it deemed appropriate after identifying and balancing the aggravating and mitigating circumstances." *Id.* at 1028.

163. 751 N.E.2d 306 (Ind. Ct. App. 2001).

164. *Id.* at 311.

165. *Id.*

166. 746 N.E.2d 81 (Ind. Ct. App.), *trans. denied*, 761 N.E.2d (Ind. 2001).

167. *Id.* at 93.

168. 741 N.E.2d 789 (Ind. Ct. App. 2001).

169. *Id.* at 795.

170. 743 N.E.2d 1238 (Ind. Ct. App. 2001).

burglary from the maximum of twenty years to the presumptive sentence of ten because of the nature of the offense. The court found the crime not to be a "particularly egregious example" of burglary and noted that no injury was attempted against the occupant and no damage was caused to the dwelling.[171] The court, however, upheld the maximum sentence of eight years for stalking because it was based on repeated harassment in the face of several warnings by law enforcement.[172] The court also affirmed the decision to order the sentences served consecutively because of the defendant's need for an extended incarceration in a penal facility.[173]

Finally, in *Biehl v. State*[174] the court of appeals broke new ground in finding a presumptive sentence to be manifestly unreasonable. *Biehl*, unlike the previously-discussed cases, presented both a mitigated nature of the offense and a sympathetic character of the offender. As to the nature of the offense, the court noted that the victims had to some extent sought out the defendant when they entered the barn where he was living, threw bricks and boards at him, and refused to leave when asked.[175] As to the character of the offender, the court noted that the defendant, who was thirty-five years old, had no criminal history and had been suffering from a longstanding and severe mental illness.[176] Weighing these considerations, the court found that the presumptive sentence of thirty years for voluntary manslaughter was manifestly unreasonable and ordered the sentence to be reduced to the minimum of twenty years.[177] Not only did the supreme court deny the State's petition for transfer in *Biehl*; it also cited the case with approval several months later in *Walker*.[178]

Although substantive sentence review in Indiana continues to challenge the appellate courts in large part because the unique nature of sentencing decisions which defy easy quantification, these opinions suggest a recognition of the important goal of consistency that has not been a constant feature in prior years. As highlighted in many of these opinions, the appellate courts seem especially concerned by consecutive sentences and appear more inclined to reduce a sentence when a defendant is given enhanced sentences for more than one offense and ordered to serve the counts consecutively, as in *Walker* and *Perry*. The *Winn* opinion also suggests that the same principle may begin to be applied to habitual offender cases; although the habitual offender enhancement is not a separate charge, it nevertheless represents the same sort of "piling on" as in consecutive sentencing cases. *Winn* also suggests somewhat of a departure from the usual considerations by looking at the predicate offenses that formed the basis of the habitual offender charge instead of the aggregate sentence.

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171. *Id.* at 1243.
172. *Id.* at 1243-44.
173. *Id.* at 1244.
174. 738 N.E.2d 337 (Ind. Ct. App. 2000), *trans. denied*, 753 N.E.2d 3 (Ind. 2001).
175. *Id.* at 339.
176. *Id.* at 339-40.
177. *Id.* at 341.
178. *See* Walker v. State, 747 N.E.2d 536, 538 (Ind. 2001).

Beyond these limitations, the remaining cases suggest a greater appreciation and depth of review for the relevant calculus of the "nature of the offense" and "character of the offender." In *Peckinpaugh* the court considered the specifics of the burglary offense and found that it did not call for a sentence beyond the presumptive. However, analysis of "nature of the offense" represents only half of the equation, and most cases have turned in larger part on the "character of the offender." The most salient attributes, as evidenced by the cases decided during the survey period, appear to be a lack of or minimal criminal history, a defendant's youthful age, and long-standing mental illness.

Biehl is perhaps the most significant of these opinions because it represents the first successful challenge to a presumptive sentence. Previously, most successful challenges have been to sentences at or near the maximum and have led to reductions to the presumptive sentence (or above). The court of appeals' opinion in *Biehl*, and the supreme court's later approval of it, makes clear that any sentence may be successfully challenged under the manifestly unreasonable doctrine. Although many, if not most, challenges to the presumptive sentence will likely prove unfruitful, a particularly mitigated nature of the offense or sympathetic character of the offender could lead to a reduction. However, reduction to the minimum sentence as in *Biehl* would appear unlikely unless both factors are particularly strong.

In short, both the supreme court and court of appeals issued opinions that have begun to shape a landscape for consistency in substantive sentencing challenges. Many of the court of appeals' opinions relied heavily on and reconciled themselves with existing authority. Although these decisions have not taken the form of explicit sentencing principles, these recent cases represent a useful and large step in the direction of consistency in sentencing.