

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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Indiana's appellate courts tackled a variety of significant issues during the survey period October 1, 2006, to September 30, 2007. As in recent years, sentencing issues dominated the dockets of both courts,¹ although a wide range of other topics also got some play, including jury selection and deliberation, exclusion of late-disclosed witnesses, trials in absentia, and insufficient evidence to uphold unseemly behavior that did not fall within the language of the charged criminal statutes.² The General Assembly also adopted legislation that largely returned matters to the status quo on issues related to sentencing and late amendments to the charging information, while breaking new ground in creating a violent offender registry and revising several statutes related to sex crimes. This Article seeks not only to summarize the significant legislation and opinions of the past year, but also to offer some perspective on their likely future impact.

I. LEGISLATIVE DEVELOPMENTS

Several bills affecting criminal law and procedure were adopted by the General Assembly during the 2007 session. Many of these were in response to recent cases that had changed the prevailing interpretation or understanding of a statute, although the legislature also created a violent offender registry and revised statutes related to sex crimes.

A. *Late Amendments to Charging Information*

Indiana Code section 35-34-1-5(b) has long distinguished between amendments of "substance" and those correcting immaterial defects. The former were allowed if made at least thirty days before the omnibus date in felony prosecutions, while the latter were allowed at any time as long as they do not prejudice the substantial rights of the defendant.³ In *Fajardo v. State*,⁴ the Indiana Supreme Court acknowledged that its precedent and that of the court of appeals had deviated at times from this clear statutory language. Specifically, "[s]everal cases have permitted amendments related to matters of substance

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1. See generally Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 40 IND. L. REV. 789 (2007).

2. The appellate courts also addressed important issues related to search and seizure under article I, section 11 and Indiana's double jeopardy clause, IND. CONST. art. I, § 14, many of which are summarized in the survey of Indiana constitutional law. Jon Laramore, *Indiana Constitutional Developments: Incremental Change*, 41 IND. L. REV. 923, 934-42 (2008).

3. IND. CODE § 35-34-1-5(b) (2004 & Supp. 2007).

4. 859 N.E.2d 1201 (Ind. 2007), *superceded by statute*, IND. CODE § 35-34-1-5 (Supp. 2007).

simply on [the] grounds that the changes did not prejudice the substantial rights of the defendant, without regard to whether or not the amendments were untimely.”⁵ Others

have not focused upon whether the challenged amendment was one of form or substance, but have employed components of the substance/form test (whether defense equally available and evidence equally applicable, and whether amendment not essential to making a valid charge) to assess whether the defendant’s substantial rights were prejudiced, which is not a controlling factor for permitting substantive amendments.⁶

The court forthrightly concluded that these approaches do not comply with the plain language of the statute.⁷ The amendment to the charging information in *Fajardo* was one of substance and was not sought until seven days after the omnibus date.⁸ Therefore, the amendment did not comply with the statute, and the resulting conviction and sentence were ordered vacated.⁹

The relief for defendants was short-lived, however. *Fajardo* was legislatively overruled, effective May 8, 2007, when the Governor signed Senate Bill 45, amending the statute as follows:

(b) The indictment or information may be amended in matters of substance ~~or form~~, and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant at any time:

(1) up to:

(+) (A) thirty (30) days if the defendant is charged with a felony;

or

(2) (B) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors;

before the omnibus date; or

(2) **before the commencement of trial;**

if the amendment does not prejudice the substantial rights of the defendant. When the information or indictment is amended, it shall be signed by the prosecuting attorney **or a deputy prosecuting attorney.**¹⁰

B. Limitations on Consecutive Sentences

In January, the court of appeals in *Robertson v. State*¹¹ took an exceedingly literal approach in construing one provision of the 2005 “*Blakely* fix”

5. *Id.* at 1206.

6. *Id.*

7. *Id.* at 1207.

8. *Id.* at 1208.

9. *Id.*

10. IND. CODE § 35-34-1-5(b) (2004 & Supp. 2007).

11. 860 N.E.2d 621 (Ind. Ct. App.), *aff'd*, 871 N.E.2d 280 (Ind. 2007).

amendments to the sentencing statute, which replaced the fixed “presumptive” term for each offense with a sentencing range and an “advisory” term within that range.¹² At the time, Indiana Code section 35-50-2-1.3(c) provided that “a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional term.”¹³ Disagreeing with a decision of another panel in *White v. State*,¹⁴ the court concluded that this language was “clear and unambiguous and imposes a separate and distinct limitation on a trial court’s ability to deviate from the advisory sentence for any sentence running consecutively.”¹⁵

Both the General Assembly and the Indiana Supreme Court quickly and strongly disagreed. The Indiana Supreme Court found that the language was not clear and unambiguous.¹⁶ The court noted that section 1.3 “taken as a whole, underscores that there is no requirement to impose the advisory sentences.”¹⁷ Although subsection 1.3(b) provides a “general grant of unfettered discretion,” subsection 1.3(c) “identifies three circumstances in which the advisory sentence is required to be used.”¹⁸ These include certain offenses that are part of a single episode of criminal conduct and sentences for certain repeat offenders.¹⁹ In each of these, “the function of the advisory sentence is qualitatively different from its function in most sentencing statutes.”²⁰ The court concluded that the 2005 amendments “did no more than retain the fixed maximum sentences permissible under the episode and repeat offender provisions.”²¹ The amendments did not impose additional restrictions on the trial court’s ability to impose consecutive sentences.²²

Although legislative intent is often difficult, if not impossible, to divine in Indiana, few would dispute that the 2005 amendments were intended simply to rectify *Blakely* concerns.²³ There is no suggestion the amendments were intended to limit the long-standing ability of trial courts to impose aggravated and consecutive sentences in most circumstances. Indeed, Senate Bill 45, which passed during the 2007 session, included the following provision that legislatively overruled the court of appeals decision in *Robertson*:

12. See generally *Smylie v. State*, 823 N.E.2d 679, 685 (Ind. 2005) (explaining previous version of the statute and holding that it did not comply with the Sixth Amendment).

13. *Robertson*, 860 N.E.2d at 624.

14. 849 N.E.2d 735 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 595 (Ind. 2006).

15. *Robertson*, 860 N.E.2d at 625.

16. *Robertson v. State*, 871 N.E.2d 280, 285 (Ind. 2007).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 285-86.

23. See generally Michael Limrick, *Senate Bill 96: How General Assembly Returned Problem of Uniform Sentencing to Indiana’s Appellate Courts*, RES GESTAE, Jan./Feb. 2006, at 18.

(b) Except as provided in subsection (c), a court is not required to use an advisory sentence.

(c) In imposing:

(1) consecutive sentences **for felony convictions that are not crimes of violence (as defined in [Indiana Code section] 35-50-1-2(a)) arising out of an episode of criminal conduct**, in accordance with [Indiana Code] 35-50-1-2;

(2) an additional fixed term to an habitual offender under section 8 of this chapter; or

(3) an additional fixed term to a repeat sexual offender under section 14 of this chapter;

a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense.

(d) This section does not require a court to use an advisory sentence in imposing consecutive sentences for felony convictions that do not arise out of an episode of criminal conduct.²⁴

C. Sentencing Statements Required in All Felony Cases

The same piece of legislation that legislatively overruled *Fajardo* and the court of appeals's opinion in *Robertson* also included a provision favorable to criminal defendants and arguably all those involved in the criminal justice system. Requiring judges to explain their reasons for imposing a specific sentence within the fairly broad statutory range for an offense increases confidence and respect for the criminal justice system.²⁵ The new provision pointedly requires: "After a court has pronounced a sentence for a felony conviction, the court shall issue a statement of the court's reasons for selecting the sentence that it imposes."²⁶

This language appears to require sentencing statements in every felony case, even if the trial court imposes the advisory sentence. As explained in Part II.A, this is consistent with the Indiana Supreme Court's interpretation of the pre-2007 version of the statute.²⁷ The statute does not resolve all issues, however. First, the remedy for the trial court's failure to make a sentencing statement is not mentioned in the statute. The supreme court has held that appellate courts may remand the case, reduce the sentence pursuant to the review and revise power of Appellate Rule 7(B), or affirm the sentence as appropriate under Rule 7(B).²⁸ Second, the precise wording of this new section is a bit awkward. Generally, a

24. IND. CODE §§ 35-50-2-1.3(b)-(d) (Supp. 2007).

25. Schumm, *supra* note 1, at 808.

26. IND. CODE § 35-38-1-1.3 (Supp. 2007).

27. *See infra* Part II.A.

28. *See infra* notes 56-71 and accompanying text.

trial court will make findings of aggravating and mitigating circumstances and then pronounce a sentence of a specific number of years. Read literally, the new subsection seems to suggest that trial courts should select a sentence—and then state the reasons for it. Recent practice suggests that trial judges are continuing their practice of explaining reasons before imposing a sentence, which is preferable to a post-hoc justification for the number of years imposed.

D. New Defense to Sexual Misconduct with a Minor

Previously, Indiana Code section 35-42-4-9 imposed criminal liability whenever a person had sex with a child who was fourteen or fifteen years old.²⁹ The person charged could be of a similar age and have been dating the “victim” of the offense. In 2007 a new defense was added to this offense.³⁰ This defense applies only when several conditions are met, including that the accused is not more than four years older than the victim, was engaged in a dating or ongoing personal relationship with the victim, which does not include a family relationship, and had not previously committed another sex offense.³¹ This defense seems especially important with the expanded and harsher requirements of sex offender registries. A young person who has sex with another young person in a dating relationship is less deserving of the prolonged labeling as a “sex offender,” “violent sexual predator,” and so on. This defense not only prevents registration, but also prevents a felony conviction, which can have

29. IND. CODE § 35-42-4-9 (2004).

30. *See* IND. CODE § 35-42-4-9(e) (Supp. 2007).

31. *Id.* The exact requirements are quoted below:

(e) It is a defense to a prosecution under this section if all the following apply:

(1) The person is not more than four (4) years older than the victim.

(2) The relationship between the person and the victim was a dating relationship or an ongoing personal relationship. The term “ongoing personal relationship” does not include a family relationship.

(3) The crime:

(A) was not committed by a person who is at least twenty-one (21) years of age;

(B) was not committed by using or threatening the use of deadly force;

(C) was not committed while armed with a deadly weapon;

(D) did not result in serious bodily injury;

(E) was not facilitated by furnishing the victim, without the victim’s knowledge, with a drug (as defined in [Indiana Code section] 16-42-19-2(1)) or a controlled substance (as defined in [Indiana Code section] 35-48-1-9) or knowing that the victim was furnished with the drug or controlled substance without the victim’s knowledge; and

(F) was not committed by a person having a position of authority or substantial influence over the victim.

(4) The person has not committed another sex offense (as defined in [Indiana Code section] 11-8-8-5.2) (including a delinquent act that would be a sex offense if committed by an adult) against any other person.

deleterious effects on a person's future.

E. Sex and Violent Offender Registry

Several changes were made to Indiana's offender registry. Most notably, it now requires the registration not only of sex offenders but also of some "violent" offenders, such as those who commit murder or voluntary manslaughter.³² The sex offender registry was expanded to require registration for additional offenses including promoting prostitution as a Class B felony, human or sexual trafficking of minors, and first-time possession of child pornography.³³ The registry was also curtailed in one important respect. Persons convicted of sexual misconduct with a minor as a Class C felony may now be excluded from the registry if they were not more than four or five years older than the victim and "the sentencing court finds that the person should not be required to register as a sex offender."³⁴

F. No More Polygraphs for Victims of Sex Offenses

A new statutory provision was added to prohibit law enforcement officers from requiring alleged victims of sexual offenses to submit to a polygraph or other truth-telling device.³⁵ This provision further provides that law enforcement officers may not refuse to investigate, charge, or prosecute a sex crime "solely" because the alleged victim has refused to submit to a polygraph.³⁶ Although such legislation arguably has some symbolic value, law enforcement officers were never likely to ask a victim to submit to a polygraph unless they had serious concerns about his or her veracity. The reliability of polygraphs has been repeatedly criticized by Indiana courts,³⁷ and curtailing their use is difficult to criticize. However, the practical effect of this legislation seems minimal. If a law enforcement officer did not believe a victim or had serious qualms about the ability to make a case, charges were unlikely to be pursued before the new statute was passed. The same will hold true now, especially in the absence of a polygraph.

II. SENTENCING: STILL THE MAIN EVENT

Of the hundreds of published opinions in criminal cases decided during the survey period, more than half addressed some type of sentencing claim. Many cases addressed only sentencing claims, because the defendant pleaded guilty and forfeited any right to challenge conviction-related issues.³⁸ In the farthest

32. *Id.* §§ 11-8-8-5; IND. CODE § 36-2-13-5.5 (2004).

33. IND. CODE § 11-8-8-4.5 (Supp. 2007).

34. *Id.* § 11-8-8-5(a)(8). Exceptions were also made for parents or guardians convicted of kidnapping or confining their own children. *Id.* § 11-8-8-5(a)(11)-(12).

35. *Id.* § 35-37-4.5-2.

36. *Id.* § 35-37-4.5-3.

37. *See, e.g.,* Willey v. State, 712 N.E.2d 434, 441 (Ind. 1999).

38. *See generally* Childress v. State, 848 N.E.2d 1073 (Ind. 2006); Tumulty v. State, 666

reaching sentencing opinion, *Anglemyer v. State*,³⁹ the supreme court held that trial courts are required to make “reasonably detailed” sentencing statements in all felony cases despite recent statutory amendments that the court of appeals had suggested eliminated this requirement.⁴⁰ Beyond *Anglemyer*, decisions also addressed important issues regarding the scope of belated appeals, limitations on allocution and evidence presented at sentencing, review of the appropriateness of sentences under Rule 7(B), and the propriety of probation conditions. Finally, the courts began to wrestle with plea agreement provisions that could significantly reduce the number of sentencing appeals through waivers of the right to appeal a sentence.

A. Sentence Statements (Still) Required

As discussed in detail in last year’s survey, considerable confusion arose when the General Assembly amended Indiana’s sentencing statutes, effective April 25, 2005, to replace the “presumptive” sentence with a range and “advisory” term in response to the Indiana Supreme Court’s holding that *Blakely v. Washington*⁴¹ rendered Indiana’s sentencing statutes unconstitutional.⁴² The legislation also added the following language that has led to further confusion: “A court may impose any sentence that is: (1) authorized by statute; and (2) permissible under the Constitution of the State of Indiana; regardless of the presence or absence of aggravating circumstances or mitigating circumstances.”⁴³

In Indiana, “the sentencing statute in effect at the time a crime is committed governs the sentence for that crime.”⁴⁴ In several cases, the court of appeals has explicitly held that the date of the offense controls which version of the statute applies.⁴⁵ Therefore, a threshold question in any case is which version of the statute applies. If a crime was committed before April 25, 2005, defendants may avail themselves of the protections of *Blakely* and *Smylie*, which require proof beyond a reasonable doubt to a jury of any facts that enhance the sentence

N.E.2d 394 (Ind. 1996).

39. 868 N.E.2d 482 (Ind.), *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007).

40. *Id.* at 491.

41. 542 U.S. 296 (2004).

42. Schumm, *supra* note 1, at 801-03.

43. IND. CODE § 35-38-1-7.1(d) (Supp. 2007).

44. *Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007).

45. *See Weaver v. State*, 845 N.E.2d 1066, 1070-71 (Ind. Ct. App. 2006) (discussing the ex post facto implications of a contrary holding), *trans. denied*, 855 N.E.2d 1011 (Ind. 2007); *see also* *Primmer v. State*, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 447 (Ind. 2007); *Walsman v. State*, 855 N.E.2d 645, 650 (Ind. Ct. App. 2006); *Creekmore v. State*, 853 N.E.2d 523, 528 (Ind. Ct. App.), *clarified on denial of reh’g*, 858 N.E.2d 230 (Ind. Ct. App. 2006); *Patterson v. State*, 846 N.E.2d 723, 727 (Ind. Ct. App. 2006); *Henderson v. State*, 848 N.E.2d 341, 344 (Ind. Ct. App. 2006). The only apparent outlier is *Samaniego-Hernandez v. State*, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (citing *Ritchie v. State*, 809 N.E.2d 258, 264 (Ind. 2004)), where a panel simply noted “this change in the statute is procedural rather than substantive.”

beyond the presumptive term.⁴⁶ If the crime was committed after April 25, however, the new sentencing scheme applies.

In May 2006 the court of appeals began to grapple with the new statutory language in *Anglemyer v. State*.⁴⁷ There, the court held that the finding of aggravators and mitigators as part of a sentencing statement was no longer required and the failure to do so was unavailable as an appellate claim.⁴⁸ Transfer was granted in that case,⁴⁹ and other panels took different views.⁵⁰

In *Anglemyer v. State*,⁵¹ Justice Rucker, writing for a unanimous Indiana Supreme Court, provided a comprehensive overview of the events relating to the statutory amendments and the resulting divisions in the court of appeals. The court correctly acknowledged the new statutory language “suggests a legislative acknowledgement that a sentencing statement identifying aggravators and mitigators retains its status as an integral part of the trial court’s sentencing procedure.”⁵² In order to facilitate the important goals of fair and consistent sentencing, the court concluded that trial courts must “enter sentencing statements whenever imposing sentence for a felony offense [T]he statement must include a reasonably detailed recitation of the trial court’s reasons for imposing a particular sentence.”⁵³ Such sentencing statements will be reviewed on appeal for an abuse of discretion.⁵⁴ Trial courts may abuse their discretion by “failing to enter a sentencing statement at all,”⁵⁵ citing reasons that are not supported by the record, omitting reasons clearly supported by the record, or citing reasons that are improper as a matter of law.⁵⁶ Finally, although defendants cannot challenge the weight or value assigned to the reasons cited at sentencing under the abuse of discretion standard, they may continue to challenge “the merits of a sentence” under the inappropriateness standard of Appellate Rule 7(B).⁵⁷

Applying this new framework to the facts in *Anglemyer*, the court first reviewed those mitigating circumstances that were argued to the trial court: the

46. See *Smylie v. State*, 823 N.E.2d 679, 683 (Ind. 2005) (applying *Blakely v. Washington*, 542 U.S. 296 (2004)).

47. 845 N.E.2d 1087 (Ind. Ct. App. 2006), *vacated on trans.*, 868 N.E.2d 482 (Ind. 2007), and *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007).

48. *Id.* at 1091.

49. 855 N.E.2d 1012 (Ind. 2006).

50. See, e.g., *Gibson v. State*, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). The *Gibson* court concluded that the appellate court must “assess the trial court’s recognition or nonrecognition of aggravators and mitigators” whenever a trial court issues a sentencing statement. *Id.*

51. 868 N.E.2d 482 (Ind.), *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007). This Author represented Mr. Anglemyer pro bono in transfer proceedings before the Indiana Supreme Court.

52. *Id.* at 490.

53. *Id.*

54. *Id.* at 491.

55. *Id.* at 490.

56. *Id.* at 490-91.

57. *Id.* at 491.

defendant's youthful age and his purported mental illness.⁵⁸ The trial court cited his age as a mitigating circumstance, but did not mention his mental illness.⁵⁹ After reviewing the evidence presented at sentencing regarding mental illness, the Indiana Supreme Court concluded "that rather than overlooking Anglemyer's mental illness, the trial court determined [that] it was not significant and thus would not be a factor influencing the trial court's sentencing decision. This was the trial court's call."⁶⁰ Regarding the appropriateness of the sentence under Rule 7(B), the court noted the nature of the offense was "unnecessarily brutal."⁶¹ Regarding the defendant's character, the court cited his modest criminal history and status on bond at the time of the offense.⁶² The court also relied on the facts of the crime, as it related to the defendant's character, noting that the crime "was carried out through subterfuge, deceit, and careful planning."⁶³ The court concluded that neither the nature of the offense nor the defendant's character justified a revision of the sentence.⁶⁴

Although *Anglemyer* lays down clear rules and guidelines, the extent to which it has teeth remains to be seen. On the same day *Anglemyer* was issued, the court also decided *Windhorst v. State*.⁶⁵ There, the court acknowledged that the trial court had made no sentencing statement, despite the defense arguing several mitigating circumstances including the ones typically found weighty, such as a lack of criminal history and guilty plea.⁶⁶ Although the court reiterated that a trial court may abuse its discretion by failing to enter a sentencing statement, it nevertheless affirmed based on its "authority to review and revise the sentence."⁶⁷ Specifically, the court noted that the court of appeals had reviewed the sentence under Rule 7(B) and declined to revise it.⁶⁸ The Indiana Supreme Court summarily affirmed that portion of the court of appeals's opinion.⁶⁹

Windhorst suggests a new approach to the interplay between review of aggravators and mitigators in contrast to review under Rule 7(B). Numerous opinions have differentiated between "procedural" claims regarding aggravators

58. *Id.* at 492.

59. *Id.*

60. *Id.* at 493.

61. *Id.* at 494.

62. *Id.*

63. *Id.*

64. *Id.* The court later granted a petition for rehearing to clarify that defendants who plead guilty do not forfeit the opportunity to claim on appeal that a trial court should have considered their guilty plea as a mitigating circumstance even when the claim was not asserted in the trial court. 875 N.E.2d 218, 219-20 (Ind. 2007) (citing *Francis v. State*, 817 N.E.2d 235, 237 n.2 (Ind. 2004)).

65. 868 N.E.2d 504 (Ind. 2007). This Author represented Mr. Windhorst on appeal.

66. *Id.* at 505.

67. *Id.* at 507.

68. *Id.*

69. *Id.*

and mitigators and substantive claims under Appellate Rule 7(B).⁷⁰ The separate inquiries previously gave defendants two different ways to win. Now it appears that Rule 7(B) can be used as a means to defeat an otherwise valid claim of improper aggravators and mitigators.⁷¹

The aftermath of *Anglemyer* and *Windhorst* has been mixed, although the overriding principle seems to be that the appellate court has discretion in fashioning a remedy for a sentencing irregularity. For example, less than a month after *Anglemyer*, the court of appeals acknowledged *Windhorst* in a footnote, but remanded a case for resentencing when the trial court imposed the advisory term of ten years for a B felony but failed to enter a sentencing statement “setting forth its reasons.”⁷² The court simply noted it had the option to remand for a clarification or new sentencing determination, affirm the sentence if the error was harmless, or reweigh the proper aggravators and mitigators independently at the appellate level—then the court selected the first option with no explanation as to why it was the appropriate one.⁷³ Days later, however, another panel opted to review a sentence under Rule 7(B) after finding that the trial court abused its discretion in not identifying the defendant’s decision to plead guilty as a substantial mitigating factor.⁷⁴ The court upheld the ten-year sentence for B felony robbery based largely on the defendant’s “extensive juvenile and adult criminal history,” which was not offset by the mitigating weight of his early guilty plea.⁷⁵

Nevertheless, *Anglemyer* is a welcome decision in many respects; it lays down fairly clear guidelines for both trial and appellate courts and the lawyers who practice in them. Its scope is broad and inclusive; sentencing statements are required in all felony cases. Prior case law regarding improper aggravators and mitigators appears to remain intact under the abuse of discretion standard, and meaningful substantive review will seemingly continue under Rule 7(B).

B. Keeping the Floodgates Closed: Blakely Claims Cannot Be Raised on Belated Appeal

Although sentencing claims are typically raised in a timely direct appeal, sometimes this does not occur. Indiana offers two avenues to challenge a conviction or sentence not raised on direct appeal: (1) a petition for post-conviction relief or (2) a belated appeal.⁷⁶ The combination of many recent sentencing developments led to a flood of petitions to pursue belated sentencing

70. See, e.g., *McCann v. State*, 749 N.E.2d 1116, 1119 (Ind. 2001); *Noojin v. State*, 730 N.E.2d 672, 678 (Ind. 2000); *Hope v. State*, 834 N.E.2d 713, 717-18 (Ind. Ct. App. 2005); *Anderson v. State*, 743 N.E.2d 1273, 1279 (Ind. Ct. App. 2001).

71. See *Windhorst*, 868 N.E.2d at 507.

72. *Ramos v. State*, 869 N.E.2d 1262, 1264 (Ind. Ct. App. 2007).

73. *Id.*

74. *Felder v. State*, 870 N.E.2d 554, 559 (Ind. Ct. App. 2007).

75. *Id.*

76. IND. R. POST-CONVICTION RELIEF 1, 2.

appeals by incarcerated defendants who had pleaded guilty years earlier but had never appealed their sentence.⁷⁷ Specifically, defendants sought to take advantage of the invalidation of Indiana's sentencing statutes and the requirement that a sentence could not exceed the presumptive term unless based on facts proved to a jury beyond a reasonable doubt under *Blakely* and *Smylie*.⁷⁸

In *Gutermuth v. State*,⁷⁹ the Indiana Supreme Court firmly closed the door on such claims. The court reasoned that if Gutermuth had filed his appeal within the prescribed period he would not have been able to raise a challenge under *Blakely* and *Smylie*.⁸⁰ The court held that finality, as the term is used in *Griffith v. Kentucky*,⁸¹ occurs "when the time for filing a timely direct appeal has expired."⁸² The court reasoned that treating belated appeals like timely direct appeals would allow the belated ones to "remain perpetually 'not yet final' for purposes of *Griffith*."⁸³ Therefore, defendants cannot raise a *Blakely* claim in a belated appeal.⁸⁴

C. Conflicts in Oral and Written Sentencing Orders

An overarching concern in appellate review of sentences is the contours of the record to be reviewed and any conflicts within it. In *McElroy v. State*,⁸⁵ the Indiana Supreme Court addressed the situation in which the trial court's oral sentencing statement conflicts with its written judgment order.

Rather than presuming the superior accuracy of the oral statement, we examine it alongside the written sentencing statement to assess the conclusions of the trial court. This Court has the option of crediting the statement that accurately pronounces the sentence or remanding for resentencing. This is different from pronouncing a bright line rule that an oral sentencing statement trumps a written one.⁸⁶

This appears to be a departure from other cases, which emphasized the controlling nature of the oral statement.⁸⁷ Nevertheless, although it does not

77. See generally Schumm, *supra* note 1, at 790-94 (discussing significant cases concerning belated appeals).

78. See *Smylie v. State*, 823 N.E.2d 679, 683 (Ind. 2005) (applying *Blakely v. Washington*, 542 U.S. 296 (2004)).

79. 868 N.E.2d 427 (Ind. 2007).

80. *Id.* at 434.

81. 479 U.S. 314 (1987).

82. *Gutermuth*, 868 N.E.2d at 434.

83. *Id.* at 435.

84. *Id.* *Gutermuth* and its companion cases are thoughtfully discussed in a recent article in the Indiana State Bar Association's journal. See Michael R. Limrick, *Belated Appeals and Blakely (or is it Apprendi?) Retroactivity*, RES GESTAE, July/Aug. 2007, at 28.

85. 865 N.E.2d 584 (Ind. 2007).

86. *Id.* at 589 (citation omitted).

87. See, e.g., *Whatley v. State*, 685 N.E.2d 48, 50 (Ind. 1997); *Marshall v. State*, 621 N.E.2d

offer the predictability and ease of a bright line, the flexibility of the *McElroy* approach is likely to ensure that the trial court's intent is carried out.

D. Limitations on Evidence and Allocution at Sentencing

During the survey period, the appellate courts clarified important procedures regarding the evidence that may be admitted at sentencing hearings and defendants' allocution rights.

1. *Restrictions on Evidence.*—In *Wilson v. State*,⁸⁸ the trial court refused to allow the defendant to submit evidence of his family history, employment history, and mental health history at his sentencing hearing because he did not cooperate with the probation officer who prepared his pre-sentence investigation report.⁸⁹ Relying on federal due process and the state statute that provides defendants are “entitled to subpoena and call witnesses and to present information [on their] own behalf,”⁹⁰ the appellate court concluded the trial court erred in “refusing to admit evidence presented on Wilson’s behalf through the testimony of others at the sentencing hearing.”⁹¹ Finding the State had failed to prove the harmlessness of the error beyond a reasonable doubt, the court vacated the sentence and remanded to the trial court “to hold another sentencing hearing, during which Wilson may present witnesses on his behalf.”⁹²

2. *Allocution.*—The appellate courts also issued opinions further clarifying the right to allocution at sentencing. In *Biddinger v. State*,⁹³ Justice Rucker provided a comprehensive and thoughtful review of this important “opportunity at sentencing for criminal defendants to offer statements in their own behalf before the trial judge pronounces sentence.”⁹⁴ According to statute, criminal defendants who appear for sentencing after a trial may “make a statement personally in the defendant’s own behalf and, before pronouncing sentence, the [trial] court shall ask the defendant whether the defendant wishes to make such a statement.”⁹⁵ That statute does not apply to sentencing hearings held after a guilty plea or probation revocation hearing, but defendants are not wholly without protection.

In *Vicory v. State*,⁹⁶ the Indiana Supreme Court held that a defendant who specifically requests to make a statement at a probation revocation hearing should be allowed to do so.⁹⁷ The court’s decision was grounded at least in part

308, 323 (Ind. 1993).

88. 865 N.E.2d 1024 (Ind. Ct. App. 2007).

89. *Id.* at 1028-29.

90. *Id.* at 1029 (quoting IND. CODE § 35-38-1-3 (2004)).

91. *Id.*

92. *Id.* at 1030.

93. 868 N.E.2d 407 (Ind. 2007).

94. *Id.* at 410.

95. IND. CODE § 35-38-1-5(a) (2004).

96. 802 N.E.2d 426 (Ind. 2004).

97. *Id.* at 429. If a defendant does not speak or object to the lack of an opportunity to speak,

in article I, section 13 of the Indiana Constitution, which “places a unique value upon the desire of an individual accused of a crime to speak out personally in the courtroom and state what in his mind constitutes a predicate for his innocence of the charges.”⁹⁸

In *Biddinger*, the court extended this reasoning to cases in which the defendant pleaded guilty.⁹⁹ Because there is no statutory right to allocution in such cases, the trial court need not ask the defendant if the defendant would like to make a statement.¹⁰⁰ “But when a defendant specifically makes a request of the court for the opportunity to give a statement, as the defendant did in this case, then the request should be granted.”¹⁰¹ Because such statements are not evidence but “more in the nature of closing argument,” defendants are not subject to cross-examination.¹⁰²

There are boundaries to such statements, however. They may not be “platform speeches on either philosophical, religious or political issues.”¹⁰³ Rather, “[t]he defendant only has a right to express his views of the facts and circumstances surrounding his case and to articulate reasons as to why judgment should not be imposed at that time.”¹⁰⁴

Although the right of allocution is certainly an important one, the failure to allow such a statement is subject to harmless error analysis. Indeed, in *Biddinger* the supreme court reviewed the full statement the defendant wanted to read at sentencing and found it largely cumulative of other evidence presented at trial and sentencing.¹⁰⁵ Because the defendant failed “to establish how the excluded portion of his statement would have made a difference in the sentence the trial court imposed,” the sentence was affirmed.¹⁰⁶

Allowing a defendant an opportunity to address the court before sentence is imposed is a minimal burden that serves an important function. It takes at most a few minutes but will likely give defendants a sense they are being treated more fairly. Furthermore, it allows all those in the courtroom—most importantly the trial court, which must impose sentence—an opportunity to understand, for better or worse, the defendant’s view of events.

E. Appellate Rule 7(B)

Yet again this year, Indiana’s appellate courts engaged in thoughtful

the right to allocution is waived. *Hull v. State*, 868 N.E.2d 901, 902 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 213 (Ind. 2007).

98. *Vicory*, 802 N.E.2d at 429 (quoting *Sanchez v. State*, 749 N.E.2d 509, 520 (Ind. 2001)).

99. *Biddinger v. State*, 868 N.E.2d 407, 412 (Ind. 2007).

100. *Id.*

101. *Id.*

102. *Id.* at 413.

103. *Id.* at 413 n.9 (quoting *Ross v. State*, 676 N.E.2d 339, 344 (Ind. 1996)).

104. *Id.* (quoting *Ross*, 676 N.E.2d at 344).

105. *Id.* at 412-13.

106. *Id.* at 413.

substantive review of sentences in many cases pursuant to the constitutional power to review and revise sentences¹⁰⁷ as implemented through Appellate Rule 7(B). Since a rule amendment in 2003, Rule 7(B) allows for a sentence revision if the sentence is “inappropriate in light of the nature of the offense and the character of the offender.”¹⁰⁸ The extent to which this power is used and results in a reduction in a term of years since the adoption of the new rule was well explained in *Stewart v. State*.¹⁰⁹ There, Judge Barnes noted that the Indiana Supreme Court “has now decided a total of twenty-two cases under the ‘inappropriate’ standard in place since January 2003 and revised the sentence in eleven of those cases.”¹¹⁰ In addition to this impressive inventory, the *Stewart* opinion also pointedly and appropriately “urge[d] the State to discontinue citing earlier cases from this court stating that our review of sentences under Rule 7(B) is ‘very deferential’ to the trial court and that we exercise our authority to revise sentences ‘with great restraint.’”¹¹¹ Those cases suggest “excessive deference to the trial court under Rule 7(B), which clearly conflicts with the current, more vigorous approach to revising sentences that a majority of our supreme court has adopted.”¹¹²

Although *Stewart* predated *Anglemyer*, there is little reason to think that *Anglemyer* altered or reduced the chances of a reduction under Rule 7(B), although the terminology has changed a bit. Rather than aggravating and mitigating circumstances, the trial court must now make a “reasonably detailed recitation of the trial court’s reasons” that then form the basis of sentence review in light of the nature of the offense and character of the offender.¹¹³

Sentences above the presumptive consecutive terms, and now sentences at or near the top of the advisory range, have always been and remain the best candidates for a reduction. For example, in *Prickett v. State*,¹¹⁴ the trial court found four aggravating circumstances, no mitigating circumstances, and imposed an enhanced forty-year sentence for Class A felony child molesting.¹¹⁵ The Indiana Supreme Court reduced the sentence to thirty years, reasoning that “[u]pon review of the aggravating factors considered by the trial court, we find none of them sufficiently weighty to justify a ten-year sentence enhancement.”¹¹⁶ Although the court found one of the aggravators improper,¹¹⁷ it did not expressly find the other three (criminal history, use of force, and probation status)

107. IND. CONST. art. VII, §§ 4, 6.

108. *Neale v. State*, 826 N.E.2d 635, 639 (Ind. 2005) (observing that Rule 7(B) provides relief “when certain broad conditions are satisfied”).

109. 866 N.E.2d 858 (Ind. Ct. App. 2007).

110. *Id.* at 865-86.

111. *Id.* at 865.

112. *Id.* at 866.

113. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007); *see also supra* Part II.A.

114. 856 N.E.2d 1203 (Ind. 2006).

115. *Id.* at 1205-06.

116. *Id.* at 1209.

117. *Id.* at 1208.

improper.¹¹⁸ It simply held that each was given “too much weight” by the trial court.¹¹⁹ Although the presumptive sentence is generally proper when aggravating and mitigating circumstances are in balance, the Indiana Supreme Court ordered imposition of the presumptive sentence in light of three aggravators (of minimal weight) and no mitigators.¹²⁰

The nature of the offense may sometimes justify a reduction of a sentence. In *Duncan v. State*,¹²¹ a grandmother who gave her two-year-old grandson part of a methadone tablet that killed him was charged with felony murder (for causing death while dealing a controlled substance) and other offenses.¹²² She was sentenced to sixty-two years with ten of those years suspended. The Indiana Supreme Court reduced the sentence to the minimum term of forty-five years.¹²³ The court observed that the defendant’s conduct qualified as murder “only through a series of stretches” and that her “prior convictions and charges were neither sufficiently weighty [n]or similar to the current offense to justify enhancing the sentence.”¹²⁴

Rather than focusing on the nature of the offense, however, most requests for reduction are grounded in the character of the offender. As summarized in previous survey articles, factors such as an absence of criminal history, an early guilty plea coupled with acceptance of responsibility, and a longstanding mental illness are frequently invoked by defendants and appellate courts in the sentence reduction calculus.¹²⁵ A defendant’s youthful age is another factor that sometimes helps contribute to a reduction.¹²⁶ For example, in *James v. State*,¹²⁷ the court of appeals found the maximum-consecutive sentences totaling twenty-eight years inappropriate for a non-violent sixteen-year-old.¹²⁸ The defendant committed several offenses that impacted the property of individuals and businesses and had a history of delinquent behavior dating back to shortly after his ninth birthday.¹²⁹ Nevertheless, the court was impressed with the defendant’s plea of guilty, his “tough childhood that exposed him to harsh circumstances and left him diagnosed with several psychological issues and an addiction to drugs and alcohol,” and most importantly his young age of sixteen at the time of the non-violent offenses.¹³⁰ The court ordered the twenty-eight year sentence

118. *Id.* at 1208-09.

119. *Id.* at 1209.

120. *Id.*

121. 857 N.E.2d 955 (Ind. 2006).

122. *Id.* at 956.

123. *Id.* at 960.

124. *Id.*

125. See generally Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 37 IND. L. REV. 1003, 1019-23 (2004).

126. *Id.*

127. 868 N.E.2d 543 (Ind. Ct. App. 2007).

128. *Id.* at 549.

129. *Id.*

130. *Id.*

reduced to presumptive concurrent terms (four years).¹³¹

Although many advisory or presumptive sentences are challenged as inappropriate, few result in reductions. *Duncan and Biehl v. State*¹³² appear to be the only two. Extraordinary circumstances must exist, such as the combination of powerful mitigation regarding both the nature of the offense and character of the offender. For example, the advisory sentence of thirty years for voluntary manslaughter was not reduced in *Eversole v. State*,¹³³ even though the defendant had pleaded guilty, had no criminal history, and “was generally known for being a hard-working family man.”¹³⁴ Although the court of appeals acknowledged this mitigation, it found it “difficult to ignore the serious nature of Eversole’s offense—specifically, that his actions resulted in the death of another human being.”¹³⁵ The death of a human being is part of every voluntary manslaughter case, however, and seems inappropriate to count against a defendant in assessing the nature of the offense.¹³⁶ Even more troubling is the appellate court’s statement that “the trial court followed the recommendation of Eversole’s Probation Officer in sentencing him.”¹³⁷ Although trial courts are required to review a pre-sentence investigation report before sentencing a defendant for a felony,¹³⁸ nothing in the statute or case law suggests that a probation officer’s opinion of an appropriate sentence should dictate the sentence imposed by the trial court or the amount of deference given to that sentence on appeal. Rather, Rule 7(B) review focuses on the nature of the offense and character of the offender, cognizant that “a respectable legal system attempts to impose similar sentences on perpetrators committing the same acts who have the same backgrounds.”¹³⁹

G. Probation Conditions

The Indiana Court of Appeals has generally given trial courts wide discretion in imposing probation conditions. For example, in *Taylor v. State*,¹⁴⁰ the court of appeals upheld the imposition of a condition of probation requiring a

131. *Id.*

132. 738 N.E.2d 337 (Ind. Ct. App. 2000).

133. 873 N.E.2d 1111 (Ind. Ct. App. 2007), *trans. denied*, No. 39A04-0701-CR-29, 2008 Ind. LEXIS 85, at *1 (Ind. Jan. 17, 2008).

134. *Id.* at 1114.

135. *Id.*

136. *See generally* West v. State, 755 N.E.2d 173, 186 (Ind. 2001) (“[A] presumptive sentence already assumes the underlying elements and that it is therefore improper to enhance a sentence based on an act for which the defendant is already presumed to be punished.”); *see also* Biehl, 738 N.E.2d at 340-41 (reducing thirty-year sentence for voluntary manslaughter to minimum term of twenty years in light of the defendant’s lack of criminal history and longstanding mental illness).

137. *Eversole*, 873 N.E.2d at 1114.

138. IND. CODE § 35-38-1-8 (2004).

139. *Serino v. State*, 798 N.E.2d 852, 854 (Ind. 2003).

140. 820 N.E.2d 756 (Ind. Ct. App. 2005).

defendant convicted of operating a vehicle while intoxicated to establish paternity for a child he always supported financially and who was not on public assistance.¹⁴¹ Although trial courts certainly have discretion to establish conditions “to create law-abiding citizens and to protect the community,” those conditions must “have a reasonable relationship to the treatment of the accused and the protection of the public.”¹⁴² It is difficult to find a reasonable relationship between drunk driving and paternity.¹⁴³

The tide could be turning, albeit it slightly. In *McVey v. State*,¹⁴⁴ the court struck down four conditions of probation for a man convicted of child molesting. Specifically, the court followed its precedent in finding a prohibition on pornographic or other material related to “deviant interests or behaviors” to be unconstitutionally vague.¹⁴⁵ It provided specific guidance from *Smith v. State*¹⁴⁶ for the trial court to consider to ensure that the condition is “narrowly tailored to the goals of protecting the public and promoting [McVey’s] rehabilitation.”¹⁴⁷ Next, the court found fault with the requirement that McVey notify his probation officer of the establishment of a “dating” relationship. The State argued that a date is a “pre-arranged social activity with another individual whether innocuous or sexually related.”¹⁴⁸ The court found that it would impose an “unreasonable burden” on McVey to require him “to report the most mundane activities, like going out for coffee with a friend.”¹⁴⁹ Third, the court struck down the requirement that McVey “must report any incidental contact with persons under age 18 to your probation officer within 24 hours of the contact.”¹⁵⁰ Finally, the court adhered to *Fitzgerald v. State*¹⁵¹ and held that a restriction on being present at “other specific locations where children are known to congregate in your community” was unconstitutionally vague.¹⁵² Although the first and fourth of the conditions had been previously invalidated, the court broke new ground and seemingly engaged in a more exacting review in striking the second and third.

141. *Id.* at 758.

142. *Id.* at 760 (quoting *Jones v. State*, 789 N.E.2d 1008, 1010 (Ind. Ct. App. 2003)).

143. *Taylor* and other cases are discussed in a 2006 survey article, which explores the lack of a consistent and appropriate framework for reviewing such claims. See Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 39 IND. L. REV. 893, 919-21 (2006).

144. 863 N.E.2d 434 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 206 (Ind. 2007). This Author represented Mr. McVey on appeal.

145. *Id.* at 447.

146. 779 N.E.2d 111 (Ind. Ct. App. 2002).

147. *McVey*, 863 N.E.2d at 448.

148. *Id.*

149. *Id.* at 448-49.

150. *Id.* at 449.

151. 805 N.E.2d 857 (Ind. Ct. App. 2004).

152. *McVey*, 863 N.E.2d at 449.

H. The Future of Sentencing Appeals: Waiver of the Right to Appeal a Sentence?

Finally, as discussed in last year's survey, the Indiana Supreme Court's opinion in *Childress v. State*¹⁵³ was not greeted enthusiastically by some trial judges and prosecutors.¹⁵⁴ There, the court held that defendants who plead guilty have a right to appeal the sentence if the trial court exercised any discretion at sentencing, even if the discretion involved the place where the sentence would be served.¹⁵⁵ That article noted that some prosecutors had

already responded to *Childress* by including a provision in plea agreements stating that defendants are forfeiting their right to appeal the sentence. Although defendants have a constitutional right to appeal their sentence, this right—like almost all others in the criminal realm—could seemingly be waived if the waiver is knowing, intelligent, and voluntary.¹⁵⁶

It did not take long for one of these plea provisions to make its way to the Indiana Court of Appeals and the Indiana Supreme Court. In *Perez v. State*,¹⁵⁷ the court of appeals was confronted with the following plea provision: "Defendant waives any right to appeal his conviction and sentence in this cause either by direct appeal or by post conviction relief."¹⁵⁸ The trial court engaged in a colloquy with the defendant to ensure that he understood he was waiving his right to appeal the sentence if he was sentenced within the parameters of the plea agreement.¹⁵⁹ Although no prior Indiana decision had addressed whether the right to direct appeal could be expressly waived in a plea agreement, the court noted that such agreements are contractual in nature and permissible in federal court.¹⁶⁰ The court held the waiver was valid.¹⁶¹

Weeks later, another panel confronted a similar issue but with a slight twist. In *Creech v. State*,¹⁶² the plea agreement included the following provision: "I hereby waive my right to appeal my sentence so long as the Judge sentences me within the terms of my plea agreement."¹⁶³ Even though "the trial court did not engage Creech in a colloquy at the guilty plea hearing regarding the effect of this

153. 848 N.E.2d 1073 (Ind. 2006).

154. Schumm, *supra* note 1, at 799-801.

155. *Id.* at 801 (citing *Hole v. State*, 851 N.E.2d 302 (Ind. 2006); *Davis v. State*, 851 N.E.2d 1264 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 594 (Ind. 2006)).

156. Schumm, *supra* note 1, at 800 (footnotes omitted).

157. 866 N.E.2d 817 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 206 (Ind. 2007).

158. *Id.* at 819.

159. *Id.* at 819-20.

160. *Id.*

161. *Id.* at 820.

162. No. 35A02-0612-CR-1140, 2007 WL 2230775, at *1 (Ind. Ct. App. Aug. 6, 2007), *trans. granted*, 878 N.E.2d 214 (Ind. 2007).

163. *Id.* at *1.

waiver provision,” the court of appeals found the mere inclusion of the term sufficient to constitute a waiver of the defendant’s right to a direct appeal of his sentence.¹⁶⁴

The Indiana Supreme Court granted transfer in *Creech*¹⁶⁵ and heard oral argument in November 2007. A decision is pending but will likely address the propriety of such plea provisions, as well as whether a colloquy is required to establish that they were knowingly, voluntarily, and intelligently made. Such a colloquy seems like a minimal burden in light of the many other rights addressed during a guilty plea hearing.

More significantly, although such provisions have not become customary in many counties, especially the ones with a high appellate caseload such as Marion and Lake, they could become more common if the Indiana Supreme Court gives its imprimatur to such plea provisions as it is expected to do when it decides *Creech*. The extent to which this will reduce appeals to the court of appeals, however, remains to be seen. As suggested in last year’s survey, “if prosecutors require a plea to the lead or only charge, some defendants may decide not to sign the agreement and instead plead guilty without an agreement or go to trial.”¹⁶⁶ A waiver provision is arguably an important bargaining chip for defendants in at least some cases. Of course, such provisions are not necessary when the parties truly negotiate and include a term that allows the trial court no sentencing discretion.

III. DEVELOPMENTS OUTSIDE THE SENTENCING REALM

In addition to sentencing, scores of published opinions addressed other issues relating to Indiana criminal law and procedure during the survey period. This brief survey seeks to explore those issues that have had or are likely to have a significant impact on criminal cases from beginning to end.

A. *Timely Filing of Warrants*

An old adage equates timeliness to Godliness. That might overstate things a bit, but a lack of timeliness by police and prosecutors can lead to serious consequences.

Indiana Code section 35-33-5-2(a) requires that search or arrest warrants not be issued until the person seeking the warrant has filed an affidavit with the judge describing the place to be searched or person to be arrested.¹⁶⁷ In *State v. Rucker*,¹⁶⁸ an Indiana State Police officer presented an affidavit for a search

164. *Id.* at *2.

165. *Creech v. State*, 878 N.E.2d 214 (Ind. 2007).

166. Schumm, *supra* note 1, at 800.

167. IND. CODE § 35-33-5-2(a) (2004).

168. 861 N.E.2d 1240 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 462 (Ind. 2007). The Indiana Supreme Court heard oral argument on June 21, 2007, after which it denied the State’s petition to transfer. The denial of transfer does not technically enhance the pedigree of a case. See IND. R. APP. P. 58(B) (“The denial of a Petition to Transfer shall have no legal effect other than to terminate

warrant to a judge, secured the judge's approval, conducted a search the same day, but did not file the warrant and supporting affidavit with the clerk of court until fifteen days later.¹⁶⁹

The court of appeals had cautioned law enforcement officers and prosecutors to comply with the statute two years ago in *Bowles v. State*,¹⁷⁰ where the detective failed to file his affidavit in support of a search warrant until the day after the search.¹⁷¹ Although the court did not invalidate the search in *Bowles*, finding the detective had "substantially complied" with the statute, it gave notice that "other circumstances" could lead to a different result.¹⁷²

The fifteen-day delay in *Rucker* was such a situation. In upholding the trial court's grant of the defendant's motion to suppress, the court of appeals found "irrelevant" the State's arguments that the untimely filing "did not affect any important function of the warrant requirement" and the failure of the defendant to argue or show prejudice.¹⁷³ The court simply quoted the language of the statute in support of this view. However, many statutory violations do not lead to reversal. Appellate Rule 66, which mirrors the language of Trial Rule 61, provides that

[n]o error or defect in any ruling or order or in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.¹⁷⁴

Because the alleged error is a statutory violation, this standard—and not the much more difficult one for the State of proving harmlessness beyond a reasonable doubt—would apply.¹⁷⁵

B. Jurors and Jury Trials

Several cases explored the proprieties and nuances of jury selection and conduct. Errors in either jury selection or the handling of juror requests were fairly common and may require reversal.

1. *Anonymous Juries*.—As a general rule, the names of jurors are disclosed to the trial court and parties during selection unless "the jury needs protection

the litigation between the parties in the Supreme Court."). It does suggest something about the court's thinking—and the likelihood the court will take a case involving the same issue in the near future.

169. *Rucker*, 861 N.E.2d at 1240-41.

170. 820 N.E.2d 739 (Ind. Ct. App. 2005).

171. *Id.* at 746.

172. *Id.*

173. *Rucker*, 861 N.E.2d at 1241-42.

174. IND. APP. R. 66(A).

175. See generally *Fleener v. State*, 656 N.E.2d 1140, 1142 (Ind. 1995); cf. *Chapman v. California*, 386 U.S. 18, 23 (1967).

from external sources.”¹⁷⁶ There are not many big mafia-type trials in Indiana, and state statutes previously made explicit that juror names had to be disclosed “long enough before the trial . . . to permit counsel to study their backgrounds.”¹⁷⁷ This suggested that juror names be disclosed to counsel in just about every trial.

In *Major v. State*,¹⁷⁸ the defendant challenged the use of an anonymous jury based on a Lake County local rule. The State conceded and the court of appeals held that “a determination as to the propriety of an anonymous jury requires judicial consideration on a case-by-case basis and is not justifiable based solely upon a local rule authorizing the wholesale use of anonymous juries.”¹⁷⁹ Nevertheless, the court found the error subject to federal harmless error analysis.¹⁸⁰ Because the defendant had confessed, the parties were given “substantial biographical and background information regarding each juror to provide for a thorough voir dire,” and the jury was instructed that the defendant was presumed innocent, the court of appeals found the error of using an anonymous jury harmless.¹⁸¹

Majors invalidated the Lake County local rule authorizing anonymous juries. It is not clear how many other counties have similar rules, but they are all seemingly invalidated as well. This is significant in itself but also as part of trend of invalidating local rules that are inconsistent with constitutional rights, statutes, or the Indiana Trial Rules.¹⁸²

2. *Peremptory Challenges*.—In *Highler v. State*,¹⁸³ the Indiana Supreme Court provided a comprehensive discussion of the use of peremptory challenges based on race, religious affiliation, religious beliefs, and occupation. There, the State used a peremptory challenge to strike an African-American pastor who had expressed concerns about the fairness of the legal system.¹⁸⁴ The State further justified the challenge on the basis that pastors were more inclined to be lenient and forgiving.¹⁸⁵

The supreme court observed that “religious affiliation, like race and gender, is an impermissible basis for striking a prospective juror.”¹⁸⁶ However, the State’s justification for the strike was the juror’s occupation, and challenges based on occupation have generally been found constitutional.¹⁸⁷ This includes

176. William D. Bremer, *Propriety of Using Anonymous Juries in State Criminal Cases*, 60 A.L.R.5TH 39 (1998).

177. IND. CODE § 33-28-4-9(b) (2004) (repealed 2007).

178. 873 N.E.2d 1120 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 220 (Ind. 2007).

179. *Id.* at 1127.

180. *Id.* at 1128-29.

181. *Id.* at 1130.

182. *See, e.g.*, *Snell v. State*, 866 N.E.2d 392, 400-01 (Ind. Ct. App. 2007) (invalidating Allen County local rule on jury instruction because it conflicted with Trial Rule 51).

183. 854 N.E.2d 823 (Ind. 2006).

184. *Id.* at 827.

185. *Id.*

186. *Id.* at 829.

187. *Id.* at 830.

“peremptorily striking religious leaders from juries because they may be sympathetic to defendants.”¹⁸⁸

Although the defendant did not prevail in *Highler*, Indiana law remains fairly pro-defendant in the context of peremptory challenges. *Highler* relied on *McCormick v. State*,¹⁸⁹ which held that when a prosecutor cites multiple reasons, some of which are permissible and some that are not, a *Batson* violation is established.¹⁹⁰ The *Highler* case also repeated the principles that the removal of the only African-American juror that could have served on the jury raises “an inference that the juror was excluded on the basis of race,” necessary to establish a *prima facie* case and shift the burden to the State to present a race-neutral explanation for striking the juror.¹⁹¹

Scholars and even judges have criticized *Batson* as a fairly empty guarantee because nearly any explanation will be accepted as race neutral.¹⁹² As Judge Kirsch put it in a recent dissenting opinion: “[F]ew prosecutors or other trial counsel are so inept that, when faced with a *Batson* challenge, they are unable to utter an explanation that is facially racially neutral for striking all members of a cognizable racial group from a prospective jury panel.”¹⁹³ Contrary to the majority, he opined that “only the trial judge can determine whether the peremptory challenge is racially motivated,” unlike the majority, which made the assessment on appeal when the trial court failed to do so.¹⁹⁴ More broadly, Judge Kirsch expressed the view that he

would like to see our jurisprudence move to the point that to use a peremptory challenge to strike the only prospective members of a cognizable racial group from a prospective jury requires more than a showing of racial neutrality. I would like to see such challenges treated as challenges for cause. Finally, I would like to see the burden placed on the party who exercises peremptory challenges to strike all members of a racial group to show an absence of racial motivation, not on the party who opposes the challenges.¹⁹⁵

Although *Batson*'s goal of ensuring that “‘no citizen is disqualified from jury service because of his race’ remains elusive,”¹⁹⁶ a recent infraction trial highlights the easy road for reversal when a trial court and prosecutor do not

188. *Id.*

189. 803 N.E.2d 1108 (Ind. 2004).

190. *Id.* at 1112-13.

191. *Highler*, 854 N.E.2d at 827 (quoting *McCormick*, 803 N.E.2d at 1111).

192. See generally Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 168, 179-80 (2005).

193. *Jones v. State*, 859 N.E.2d 1219, 1226 (Ind. Ct. App.) (Kirsch, C.J., dissenting), *trans. denied*, 869 N.E.2d 455 (Ind. 2007).

194. *Id.*

195. *Id.*

196. *Id.* (quoting *Batson v. Kentucky*, 476 U.S. 79, 99 (1986)).

understand the decisional law surrounding the case. In *Schumm v. State*,¹⁹⁷ the defendant raised a *Batson* challenge when the State sought to peremptorily strike the only African-American juror. The trial court and prosecutor believed the Caucasian defendant could not raise a *Batson* challenge, and the trial court further found that striking only one juror is “not a pattern.”¹⁹⁸ The court of appeals recited the established principles that “a party may raise a *Batson* claim regardless of his or her race”¹⁹⁹ and that striking the sole African-American juror puts forth prima facie evidence of racial discrimination.²⁰⁰ It did not suggest the possibility of finding a race neutral reason on its own, as the majority had done in *Jones*.²⁰¹ Rather, because the State did not provide a race-neutral explanation, the trial court’s rejection of the *Batson* claim was clearly erroneous and a new trial was ordered.²⁰²

3. *Juror Deliberations*.—In *Ronco v. State*,²⁰³ the Indiana Supreme Court addressed the interplay of the relatively new Jury Rules and a longstanding statute and case law as they apply to a jury’s question during deliberations. Decisional law has long held that trial courts confronted with a question from a deliberating jury should “reply by rereading all instructions, to avoid improper influence.”²⁰⁴ Much more recently, the court adopted Jury Rule 28, which provides:

“If the jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, and, in a criminal case the parties, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the jurors’ response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate.”²⁰⁵

The supreme court found Rule 28 inapplicable because it “confers discretionary authority for ‘further proceedings’ only at moments of ‘impasse,’ by which is meant something far closer to a deadlocked jury than occurred here.”²⁰⁶ Specifically, Ronco’s jury simply asked a question about the findings necessary to convict him of resisting law enforcement. “A question is not an

197. 866 N.E.2d 781 (Ind. Ct. App.), *reh’g granted*, 868 N.E.2d 1202 (Ind. Ct. App. 2007). In the spirit of full disclosure, the defendant in the case is the Author of this Article.

198. *Id.* at 788.

199. *Id.* at 789 (citing *Powers v. Ohio*, 499 U.S. 400, 415 (1991)).

200. *Id.* (citing *McCants v. State*, 686 N.E.2d 1281, 1284 (Ind. 1997)).

201. *Id.* at 790; *cf.* *Jones v. State*, 859 N.E.2d 1219 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 455 (Ind. 2007).

202. *Schumm*, 866 N.E.2d at 790.

203. 862 N.E.2d 257 (Ind. 2007).

204. *Id.* at 259 (citing *Lewis v. State*, 424 N.E.2d 107, 111 (Ind. 1981)).

205. *Id.* (quoting IND. JURY R. 28).

206. *Id.* at 260.

impasse.”²⁰⁷ Moreover, “indication of an impasse must come from the jury’s leader or from the jury as a whole.”²⁰⁸

Nevertheless, the court held it was proper under Indiana Code section 34-36-1-6 for the trial court to respond to the question. That statute “empowers a court to respond to either juror disagreement over testimony or the jury’s desire ‘to be informed as to any point of law arising in the case.’”²⁰⁹

Following *Ronco*, the court of appeals determined in *Perry v. State*,²¹⁰ that a note that simply asked what would happen if the jurors could not arrive at a unanimous verdict did not evince an “impasse” under Jury Rule 28.²¹¹ There, however, the majority reversed a murder conviction based on a scrivener’s error in responding to another note from the deliberating jurors.²¹² The note included four questions, one of which was whether a witness had made a specific statement about seeing the defendant shoot a gun.²¹³ The trial court referenced the defendant’s first name instead of the witness’s name in its typed response to the question.²¹⁴ The defendant argued this suggested that he—and not the person named in the note—must have fired shots, and the resulting prejudice was “incalculable.”²¹⁵ Agreeing that it was “impossible” to assess “what effect the scrivener’s error had on the jury” and that the evidence was “not overwhelming” in the case, the court of appeals reversed.²¹⁶

4. *Discussing Evidence During Recesses.*—Finally, in *Buckner v. State*,²¹⁷ the court of appeals addressed the proper contours of instructing jurors on their ability to discuss the trial during recesses. The trial court gave the pattern jury instruction, which provided in relevant part:

“[Y]ou may discuss the evidence with your fellow jurors in the jury room during recesses from trial when all are present as long as you reserve judgment about the outcome of the case until the deliberations begin.

• • • •

. . . You should not form or express an opinion or reach any conclusion in this case until you have heard all of the evidence, the

207. *Id.*

208. *Id.*

209. *Id.* (quoting IND. CODE § 34-36-1-6 (2004)).

210. 867 N.E.2d 638 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 210 (Ind. 2007).

211. *Id.* at 643.

212. *Id.* at 639.

213. *Id.* at 640-41.

214. *Id.* at 644.

215. *Id.*

216. *Id.* Judge Crone dissented, reasoning that the defendant had failed to object to the typographical error and it was “extremely unlikely” that the jury was misled by the typographical error. *Id.* at 644-45 (Crone, J., dissenting).

217. 857 N.E.2d 1011 (Ind. Ct. App. 2006).

arguments of counsel and the final instructions as to the law.”²¹⁸

This language is based on the Indiana Jury Rules, which allow “trial courts to facilitate and assist jurors in the deliberative process . . . in order to avoid mistrials.”²¹⁹ The defendant challenged the instruction on the basis that the words “discussion” and “deliberation” have the same meaning, and juror separation is not permitted once “deliberation” has begun according to statute.²²⁰

The court of appeals upheld the instruction, reasoning that it properly told the jurors they should “reserve judgment,” that is, they could discuss the evidence without forming opinions or reaching a conclusion.²²¹ It rejected the defendant’s suggestion that jurors cannot be impartial when they discuss a case prior to deliberations. Specifically, the defendant “pointed to no evidence suggesting that jurors can no longer remain impartial when they discuss the evidence prior to the actual deliberative process.”²²² It is unclear how a defendant could make such a showing when Indiana Rule of Evidence 606(b) precludes juror testimony about their “mental processes.”²²³ Moreover, general evidence that at least some jurors do make up their mind in the course of these early discussions would seemingly not suffice. Finally, it may well vary from trial to trial which side benefits from allowing these mid-trial “discussions.” If the State calls a witness who is decimated during cross-examination, the juror discussion may well reinforce the weakness of that testimony and push some jurors forcefully toward an acquittal.

C. Trials In Absentia: Waiver of Right to be Present and Right to Counsel by Conduct

Both the Indiana Court of Appeals and Indiana Supreme Court upheld convictions entered against defendants who had failed to appear at their respective trials. Although defendants have a federal and state constitutional right to be present at trial,²²⁴ trial courts may find a knowing and voluntary relinquishment of that right when a defendant fails to appear at trial and fails to notify the court with an explanation of the absence.²²⁵ In *Holtz v. State*, the trial court informed the defendant on at least two occasions of the scheduled court date.²²⁶ Because the defendant did not notify the court that he would be absent or provide an explanation for his absence, the court upheld the trial court’s

218. *Id.* at 1015-16 (omission of emphasis) (quoting IND. PATTERN JURY INSTRUCTION 1.01).

219. *Id.* at 1016 (alteration in original) (quoting *Litherland v. McDonnell*, 796 N.E.2d 1237, 1241 (Ind. Ct. App. 2003)).

220. *Id.* (citing IND. CODE § 35-37-2-6(a)(1) (2004)).

221. *Id.*

222. *Id.*

223. IND. R. EVID. 606(b).

224. U.S. CONST. amend. VI; IND. CONST. art. I, § 13.

225. *Holtz v. State*, 858 N.E.2d 1059, 1062 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 452 (Ind. 2007).

226. *Id.*

decision to try him in absentia.²²⁷ As a final point, the court made clear that defendants must be given an opportunity to explain their absence, but the trial court does not need to make a sua sponte inquiry.²²⁸ The appellate court found no error because the trial court gave the defendant an opportunity to speak at sentencing.²²⁹

Similarly, in *Jackson v. State*,²³⁰ the Indiana Supreme Court held that a defendant's intentional and inexcusable absence from trial can serve as a knowing, voluntary, and intelligent waiver of both his right to be present and his right to counsel.²³¹ First, the majority found the defendant had been informed of his trial date at a pretrial conference, both orally and in writing, and never contacted the court regarding any confusion or inability to hire counsel or attend.²³² This was sufficient to constitute a voluntary and knowing waiver of the right to be present.²³³

Next, the majority also concluded that the defendant waived his right to counsel.²³⁴ The record showed that he had "repeatedly disregarded scheduled events" and been through multiple lawyers before the trial court issued "an order setting a third and final trial date and directing Jackson to retain new counsel as he had said he would."²³⁵ Under these circumstances, the majority found no need to warn the defendant of the perils of self-representation when he never indicated a desire to proceed pro se: "We cannot expect a trial court to hunt down a defendant to admonish him about the dangers and disadvantages of self-representation if the defendant has made no indication to the trial court that he intends to proceed pro se and then subsequently does not show up for trial."²³⁶

Justice Rucker, joined by Justice Sullivan, dissented as to the waiver of counsel, reasoning that "the import of the advisement is not only to ensure that a defendant is making a conscious choice about self-representation, but also that the defendant's decision to forgo representation is knowing and voluntary."²³⁷

Although defendants who fail to appear for a trial after being advised of the date are not likely to receive much sympathy from the appellate courts, those who appear but without a lawyer have an easier road to success. For example, in *Hofferth v. State*,²³⁸ the defendant was charged with some drug-related felony offenses, but his lawyer was given permission to withdraw less than a month

227. *Id.*

228. *Id.* at 1062-63.

229. *Id.* at 1063.

230. 868 N.E.2d 494 (Ind. 2007).

231. *Id.* at 496.

232. *Id.* at 499.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 501.

237. *Id.* at 502 (Rucker, J., dissenting).

238. 856 N.E.2d 137 (Ind. Ct. App. 2006).

before his scheduled jury trial.²³⁹ Reiterating that the right to counsel is ““by far the most pervasive”” of all the rights of criminal defendants, the court of appeals chastised the trial court for “blatantly” ignoring the defendant’s repeated requests for counsel on the day of his trial.²⁴⁰ The case was remanded for a new trial in which the defendant’s “right to counsel is the subject of greater concern and less disdain.”²⁴¹

D. Creepy Not Criminal.²⁴² The Primacy of Language in Criminal Statutes

The Indiana Supreme Court and court of appeals both reviewed cases in which the defendant’s conduct seemed inappropriate, if not creepy, but was ultimately found not to be criminal. As the supreme court reiterated, “[a] long-cherished principle of the American justice system is that a citizen may not be prosecuted for a crime without clearly falling within the statutory language defining the crime.”²⁴³ Two cases authored by Justice Dickson applied this principle in a particularly straightforward and no-nonsense manner.

In *Smith v. State*, the court confronted the prosecution of a school bus driver who allegedly rubbed his hand up the slit of the dress of a seventeen-year-old student on the bus he was driving.²⁴⁴ The bus driver was charged with child seduction because he was at least eighteen years old and was purportedly a “child care worker” who had engaged in touching with the intent to arouse sexual desires.²⁴⁵ However, “child care worker” is defined by statute as a person who is “employed by” the school corporation attended by the child.²⁴⁶ The undisputed evidence showed that Smith worked for an independent contractor who provided bus services to the school and was paid by the independent contractor—not the school.²⁴⁷ Observing that penal statutes must be strictly construed against the State, the majority reversed the denial of Smith’s motion to dismiss because he was not a “child care worker” as defined by statute.²⁴⁸

Chief Justice Shepard, joined by Justice Boehm, wrote a concurring opinion in which he explained,

[d]istasteful as it may be given the facts of the present case, I think the Court does the right thing to use the regular, garden-variety definition of

239. *Id.* at 139.

240. *Id.* at 141 (quoting *United States v. Cronin*, 466 U.S. 648, 654 (1984)).

241. *Id.*

242. Unfortunately, this Author cannot take credit for the catchy title of this section. These words were used at trial in defending Mr. Brown, whose case is summarized below. *See Brown v. State*, 868 N.E.2d 464 (Ind. 2007). This Author had the good fortune of representing Mr. Brown on appeal, a case with particularly colorful facts and interesting legal arguments.

243. *Smith v. State*, 867 N.E.2d 1286, 1287 (Ind. 2007).

244. *Id.* at 1287.

245. *Id.* (citing IND. CODE § 35-42-4-7(h) (2004)).

246. *Id.* at 1288 (citing IND. CODE § 35-42-4-7(c) (2004)).

247. *Id.*

248. *Id.* at 1289.

“employed,” with the understanding that the General Assembly has the power to broaden the class of persons covered by the statute should it choose to do so.²⁴⁹

Many of the same principles were applied weeks later in *Brown v. State*,²⁵⁰ where the court reversed convictions for criminal confinement and identity deception entered against a man who had pretended to be a radio DJ.²⁵¹ Specifically, the man

telephoned at least three adult men and falsely informed them of a radio contest in which they could each win a new car or cash if they would drive from their places of employment to a particular address (which happened to be the defendant’s residence), enter and remove all of their clothes, and exchange them for a T-shirt.²⁵²

In regards to identity deception, the court found the State had failed to prove the necessary element that the defendant used “the identifying information” of another person, which is defined by statute as “information that identifies an individual, including an individual’s . . . name, address, date of birth, place of employment, employer identification number, mother’s maiden name, Social Security number, or any identification number issued by a governmental entity.”²⁵³ The court reasoned that the term “individual” is commonly understood to refer to a single human being in contrast to “person,” which might mean an individual human being or a corporate or other legal entity.²⁵⁴ Although there was evidence that Brown used the identifying information of a real radio station, there was no evidence that he used the name or other identifying information of any existing human being.²⁵⁵ Therefore, the identity deception convictions were vacated based on insufficient evidence.²⁵⁶

The court also reversed the convictions for criminal confinement, albeit for different reasons. Although criminal confinement typically involves removing or restraining another person by force, a seldom-used part of the statute also applies when a person removes another by fraud or enticement from one place to another.²⁵⁷ The court found the terms fraud and enticement, neither of which is defined in the statute, to be unconstitutionally vague.²⁵⁸ Because ordinary people understand fraud to mean trickery, deception, or deceit, the statute could apply to “a vast assortment of very acceptable and even salutary conduct that is

249. *Id.* (Shepard, C.J., concurring).

250. 868 N.E.2d 464 (Ind. 2007).

251. *Id.* at 466.

252. *Id.*

253. *Id.* at 469 (quoting IND. CODE § 35-43-5-1(h) (2004)).

254. *Id.* at 469-70.

255. *Id.* at 470.

256. *Id.*

257. *Id.* at 467 (citing IND. CODE § 35-42-3-3(a)(2) (2004)).

258. *Id.*

clearly not criminal in nature,” such as “using misleading reasons to secure a person’s attendance for their surprise birthday celebration [or] evoking Santa Claus’s watchful eye to induce a child to go to bed.”²⁵⁹ Similarly, because enticement “is commonly understood to mean the act of attracting, luring, or tempting another by arousing hope or desire,” a criminal confinement conviction could result from a “broad array of quite acceptable human behavior,” such as “commercial advertising to entice travel or visits to stores or events [or] religious appeals to foster church attendance.”²⁶⁰ The court found such examples “persuasive evidence” that the statute fails to “indicate where the line is to be drawn between trivial and substantial things so that erratic arrests and convictions for trivial acts and omissions will not occur[,]” as is necessary to survive a vagueness challenge.²⁶¹ Moreover, the statute is “vulnerable because it authorizes or encourages arbitrary or discriminatory enforcement.”²⁶²

Not only were the convictions in *Brown* reversed, but the court also made clear that future prosecutions could not continue based on removals by fraud or enticement.²⁶³ Prosecutions may continue, however, for removals by force or threat of force.²⁶⁴

Although not as sweeping as declaring a statute unconstitutionally vague, the court of appeals found insufficient evidence to support a conviction for attempted obstruction of justice in a case also captioned *Brown v. State*.²⁶⁵ Brown was charged with battery against his fiancée and later called her to ask that she change her version of events and not participate in his prosecution.²⁶⁶ Although there was no dispute that Brown intended to induce his fiancée, a witness in an official proceeding, to withhold testimony, obstruction of justice also requires coercion.²⁶⁷ Coercion is some form of pressure or influence that includes a consequence for failure to comply.²⁶⁸ Brown merely stated his opinion that their relationship would improve if his fiancée did not testify.²⁶⁹ Even his statement that he would “lick that **** every night” did not qualify as coercion because it was a statement of what would happen if his fiancée did comply with his request; it gave no indication of what would happen if she did not comply.²⁷⁰ Because the State failed to prove coercion, the conviction was reversed for insufficient evidence.²⁷¹

259. *Id.* at 468.

260. *Id.*

261. *Id.* (quoting *State v. Downey*, 476 N.E.2d 121, 123 (Ind. 1985)).

262. *Id.* at 469.

263. *Id.*

264. *Id.*

265. 859 N.E.2d 1269 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 455 (Ind. 2007).

266. *Id.* at 1270.

267. *Id.* at 1270-71.

268. *Id.* at 1271.

269. *Id.*

270. *Id.*

271. *Id.*

E. Exclusion of Witnesses

Exclusion of witnesses raises fundamental concerns for anyone who views a trial as a search for the truth—or at least an opportunity for both sides to make their case. During the survey period, the Indiana Supreme Court built on existing case law regarding the extreme nature of excluding defense witnesses, finding exclusion improper in three different cases.

The first came in the self-defense context. After Philip Littler was charged with the murder of his twin brother, Neal, he raised a claim of self-defense asserting that Neal had threatened and attacked him with a knife.²⁷² Philip sought to call their mother to corroborate his testimony about past events and specific actions by Neal that formed the basis of his reasonable belief that Neal posed a threat of serious bodily injury or death.²⁷³ The trial court granted the State's motion in limine to exclude the mother's testimony.²⁷⁴

On appeal, however, the Attorney General conceded that the exclusion was erroneous.²⁷⁵ The supreme court agreed, citing *Brand v. State*,²⁷⁶ for the proposition that “witnesses other than the defendant should be allowed to provide testimony to corroborate the specific prior acts by the victim that a defendant uses to support a claim of self-defense on the grounds of reasonable fear.”²⁷⁷ These prior acts included Neal's prior stabbing of Philip and others as well as Neal's diagnosis and treatment for bipolar disorder, including that he had quit seeking treatment or taking his medication.²⁷⁸

Next, the court rejected the State's argument that the exclusion of the mother's testimony was harmless error.²⁷⁹ The court emphasized that “self-defense includes both subjective and objective components” because the defendant “must have actually believed deadly force was necessary to protect himself, and his belief must be one that a reasonable person would have held under the circumstances.”²⁸⁰ Although Philip was allowed to testify about his actual fear of Neal, he was severely limited in his ability to present evidence of the reasonableness of his fear.

The mother's testimony confirming Neal's numerous prior stabbings, his mental condition, and his history of violent behavior would be very probative and relevant to the jury's evaluation of the objective reasonableness of Philip's belief that he needed to use force against Neal

272. *Littler v. State*, 871 N.E.2d 276, 277 (Ind. 2007).

273. *Id.*

274. *Id.* at 277-78.

275. *Id.* at 278.

276. 766 N.E.2d 772, 782 (Ind. Ct. App. 2002).

277. *Littler*, 871 N.E.2d at 278.

278. *Id.*

279. *Id.* at 279-80.

280. *Id.* at 279 (quoting *Weston v. State*, 682 P.2d 1119, 1121 (Alaska 1984)).

and would also lend substantial credibility to Philip's assertions.²⁸¹

Therefore, the exclusion of evidence was not harmless, and the case was remanded for a new trial.²⁸²

Beyond the self-defense context, the Indiana Supreme Court also reversed convictions in a pair of cases obtained after trials in which defense witnesses were excluded because of their late disclosure.²⁸³ Although trial courts have discretion to exclude belatedly disclosed witnesses when the late disclosure was based on bad faith of defense counsel or would substantially prejudice the State, "[t]he most extreme sanction of witness exclusion should not be employed unless the defendant's breach has been purposeful or intentional or unless substantial or irreparable prejudice would result to the State."²⁸⁴ In deciding whether to exclude a witness, Indiana courts consider the following factors:

(1) the point in time when the parties first knew of the witness; (2) the importance of the witness's testimony; (3) the prejudice resulting to the opposing party; (4) the appropriateness of instead granting a continuance or some other remedy; and (5) whether the opposing party would be unduly surprised and prejudiced by the inclusion of the witness's testimony.²⁸⁵

In *Rohr v. State*, the trial court excluded defense witnesses disclosed four days before trial.²⁸⁶ The supreme court emphasized that the State made no assertion of bad faith on the part of the defense in the late disclosure, and the witnesses' names came from information provided by the State.²⁸⁷ The court found no evidence that the State had been unable to speak with the witnesses in the month after it disclosed the witnesses or the four days after they were added to the defendant's witness list.²⁸⁸ Moreover, "[i]f the four days before trial were truly insufficient for reasonable investigation by the State, a short continuance would have been the appropriate remedy."²⁸⁹ The court found the exclusion improper and reversed the conviction.²⁹⁰

Although a closer call, the supreme court reversed a burglary conviction in

281. *Id.*

282. *Id.* at 280.

283. *See Rohr v. State*, 866 N.E.2d 242 (Ind. 2007); *Vasquez v. State*, 868 N.E.2d 473 (Ind. 2007).

284. *Rohr*, 866 N.E.2d at 245 (alteration in original) (quoting *Williams v. State*, 714 N.E.2d 644, 651 (Ind. 1999)).

285. *Id.*

286. *Id.* at 246.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at 247. The court proceeded to reject the State's harmless error argument. *Id.* at 246-47.

another case involving a late-disclosed witness. In *Vasquez v. State*,²⁹¹ the Spanish-speaking defendant did not advise his attorney of a witness until the first day of his jury trial.²⁹² Although the court noted it was not known when the defendant first learned of the potential witness, it focused instead on when defense counsel learned of the witness, finding “no intentional concealment, improper strategic manipulation, or bad faith” on his part.²⁹³ The supreme court acknowledged allowing the testimony of the late-disclosed witness “undoubtedly presented a substantial challenge to the State’s trial strategy[,]” but nevertheless concluded that “the proper exercise of discretion favored a brief continuance instead of witness exclusion.”²⁹⁴

The upshot of all three cases is the “immense importance” of an accused’s “rights to present evidence and to have a fair trial.”²⁹⁵ Although trial courts have discretion to exclude witnesses, exclusion should occur only in cases of bad faith on the part of counsel in the late disclosure. Moreover, rather than seeking exclusion, which many trial courts may grant in cases of belatedly disclosed witnesses, prosecutors who do not want to retry a case should consider requesting a short continuance. Although continuances are widely viewed as discretionary in the criminal justice system, these opinions appear to make them mandatory in such cases, although the length of the continuance would certainly be discretionary.

F. Right to Counsel in Probation Proceedings

Two cases decided near the end of the survey period offer insight into the right to counsel in probation proceedings. In *Bumbalough v. State*,²⁹⁶ the court of appeals reversed a defendant’s revocation of probation because his decision to proceed without counsel at the probation hearing was not voluntary, knowing, and intelligent.²⁹⁷ The defendant watched a videotape that informed him of his right to counsel, including “[i]f you want a lawyer and are unable to afford one, the Court will appoint a lawyer to represent you at no costs, if, after a hearing, you are determined to be financially unable to hire a lawyer.”²⁹⁸ The trial court did not, however, engage in a colloquy with the defendant regarding this right, simply telling him that he had “the right to either admit or deny those allegations at this [t]ime.”²⁹⁹ The court of appeals recited the general principle that defendants in probation proceedings are entitled to representation by counsel, and the record “must reflect that the right to counsel was voluntarily, knowingly, and

291. 868 N.E.2d 473 (Ind. 2007).

292. *Id.* at 474.

293. *Id.* at 477.

294. *Id.*

295. *Id.*

296. 873 N.E.2d 1099 (Ind. Ct. App. 2007).

297. *Id.* at 1102.

298. *Id.* at 1101.

299. *Id.*

intelligent waived” whenever a defendant proceeds without counsel.³⁰⁰ The record must demonstrate an awareness of the “nature, extent, and importance” of the right to counsel and the consequences of waiving that important right.³⁰¹ Although the videotape provided the requisite advisement, the trial court did nothing to determine that the waiver was voluntary, knowing, and intelligent.³⁰² Finding that invalid waivers of counsel are not subject to harmless error analysis, the court of appeals reversed.³⁰³

In *Gosha v. State*,³⁰⁴ the court of appeals held “that a probationer is not entitled to pauper counsel for purposes of appeal when he admits to the violations” of probation.³⁰⁵ The court relied heavily on Indiana Rule of Criminal Procedure 11, which requires an advisement of the right to appeal and right to appointment of counsel if indigent.³⁰⁶ It also found no federal due process requirement of counsel in such circumstances.³⁰⁷

IV. DEATH PENALTY DEVELOPMENTS

Although Indiana has a relatively small death row of fewer than twenty inmates and there is seldom more than one or two new cases filed each year,³⁰⁸ issues surrounding the death penalty generated considerable attention during the survey period. Issues that arise in capital cases often have broader impact to non-capital cases, and thus advance important concerns of the broader criminal justice system.

A. ABA Death Penalty Assessment

In February 2007, the Indiana Assessment Team of the American Bar Association’s Death Penalty Implementation Project released a nearly 400-page report that examined Indiana’s death penalty laws and procedures in the following twelve areas:

- (1) collection, preservation, and testing of DNA and other types of evidence;
- (2) law enforcement identifications and interrogations;
- (3) crime laboratories and medical examiner offices;
- (4) prosecutorial professionalism;
- (5) defense services;
- (6) the direct appeal process;
- (7) state post-conviction proceedings;
- (8) clemency;
- (9) jury instructions;
- (10) judicial independence;
- (11) the treatment of racial and ethnic

300. *Id.* at 1102.

301. *Id.* (quoting *Bell v. State*, 695 N.E.2d 997, 999 (Ind. Ct. App. 1998)).

302. *Id.*

303. *Id.*

304. 873 N.E.2d 660 (Ind. Ct. App. 2007).

305. *Id.* at 663.

306. *Id.* at 662-63.

307. *Id.* at 663 (citing *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)).

308. Clark County Prosecuting Attorney’s Office, Indiana Death Row, <http://www.clark-prosecutor.org/html/death/rownew.htm> (last visited Feb. 3, 2008).

minorities; and (12) mental retardation and mental illness.³⁰⁹

The ABA project examined the death penalty in eight states, including Indiana.³¹⁰ This author chaired the Indiana assessment team, which included former Governor Joseph Kernan, State Senator John Broden, and distinguished lawyers James Bell, Robert Gevers II, Marce Gonzales, and Paula Sites.³¹¹ The report's executive summary concluded:

Despite the best efforts of a multitude of principled and thoughtful actors who play roles in the criminal justice process in the State of Indiana, our research establishes that at this point in time, the state cannot ensure that fairness and accuracy are the hallmark of every case in which the death penalty is sought or imposed. Basic notions of fairness require that all participants in the criminal justice system ensure that the ultimate penalty of death is reserved for only the very worst offenses and defendants. Unfortunately, hundreds of Hoosiers are murdered under a variety of heinous circumstances every year. Despite this, only a few of these cases result in a prosecutor seeking a death sentence[], fewer still result in the imposition [of] a death sentence by a jury or judges, and only a handful over the past three decades have resulted in the execution of a defendant.³¹²

The assessment team unanimously recommended a moratorium on executions in Indiana until the State was able to address the many problem areas identified in the report.³¹³ A few of the specific areas of concern include qualification standards for defense counsel, lack of an independent appointing authority, lack of meaningful proportionality review of sentences, capital juror confusion, racial disparity in sentencing, and the imposition of death sentences on those suffering from severe mental illness.³¹⁴

B. An Exemption for Severe Mental Illness?: The Bowser Commission

Although the ABA report received considerable media attention,³¹⁵ its release near the end of the 2007 legislative session meant that immediate change was

309. AM. BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE INDIANA DEATH PENALTY ASSESSMENT REPORT, at iii (2007), available at <http://www.abanet.org/moratorium/assessmentproject/indiana/report.pdf>.

310. American Bar Association, Death Penalty Moratorium Implementation Project, <http://www.abanet.org/moratorium/> (last visited Feb. 3, 2008).

311. AM. BAR ASS'N, *supra* note 309, at 3-4.

312. *Id.* at vii.

313. *Id.* at viii.

314. *Id.* at iv-v.

315. See Jon Murray, *Reformers Urge State to Freeze Executions: Death Penalty Isn't Evenly Applied, Says a Report by Politicians, Indiana Law Experts*, INDIANAPOLIS STAR, Feb. 20, 2007, at A1.

unlikely to occur.³¹⁶ The General Assembly did, however, review the procedures surrounding executing the severely mentally ill in the summer of 2007. This review was conducted through a summer study commission named after the late State Senator Anita Bowser, who “had a long-time interest in studying whether the death penalty was suitable in any case, but particularly in cases when the defendants were afflicted with either mental illness or mental retardation.”³¹⁷ The Commission held three public hearings during which it heard testimony from mental health professionals, law professors, lawyers, and lay people.³¹⁸ It ultimately recommended, by a 7-2 vote,³¹⁹ legislation that would exempt from the death penalty those suffering from a severe mental illness, narrowly defined as an:

individual who, at the time of the offense, had active symptoms of a severe mental illness that substantially impaired the individual’s capacity to:

- (1) appreciate the nature, consequences, or wrongfulness of the individual’s conduct;
- (2) exercise rational judgment in relation to the individual’s conduct; or
- (3) conform the individual’s conduct to the requirements of the law.

Sec. 5. As used in this chapter, “severe mental illness” means one (1) or more of the following mental disorders or disabilities as diagnosed by psychiatrists or psychologists using their current professional standards:

- (1) Schizophrenia.
- (2) Schizoaffective disorder.
- (3) Bipolar disorder.
- (4) Major depression.
- (5) Delusional disorder.

The term “severe mental illness” does not include a mental disorder or disability manifested primarily by repeated criminal conduct or attributable solely to the acute effects of alcohol or other drugs.³²⁰

The determination would be made by the trial court through pretrial proceeding similar to the exemption for defendants alleged to be mentally retarded.³²¹ However, unlike that statute, which places few restrictions on the procedures by which experts are appointed to examine the defendant or their qualifications, the proposed legislation for the severely mentally ill included detailed requirements and procedures for qualification, selection of the experts, and the type of testing

316. See generally Michael W. Hoskins, *Execution Overshadows Moratorium*, IND. LAW., May 16, 2007, at 1.

317. IND. LEGISLATIVE SERVS. AGENCY, FINAL REPORT OF THE BOWSER COMMISSION 1 (2007), available at <http://www.in.gov/legislative/interim/committee/reports/BCOMAB1.pdf>.

318. *Id.* at 2-3.

319. *Id.* at 1.

320. Proposed IND. CODE § 35-36-10-4-5, <http://www.in.gov/legislative/interim/committee/prelim/BCOM04.pdf> (last visited Feb. 2, 2008).

321. IND. CODE § 35-36-9-2 (2004).

employed.

The evaluation shall include psychological and forensic testing and shall be conducted by a panel of three (3) disinterested psychiatrists or psychologists endorsed by the state psychology board as health service providers in psychology. Each member of the panel shall have formal training in forensic psychiatry or forensic psychology and shall have experience in evaluating the mental status of defendants at the time of their alleged offense. At least one (1) member of the panel must be a psychiatrist. The panel shall be selected as follows:

(1) The defendant shall submit a list of at least five (5) psychiatrists or psychologists qualified under this subsection.

(2) The prosecuting attorney shall submit a list of at least five (5) psychiatrists or psychologists qualified under this subsection.

(3) The court shall select one (1) psychologist or psychiatrist from each list submitted by the defendant and the prosecuting attorney.

(4) The two (2) psychologists, two (2) psychiatrists, or the psychologist and psychiatrist selected by the court from the lists submitted by the defendant and the prosecuting attorney shall select a third psychologist or psychiatrist. The third psychiatrist or psychologist is not required to be a psychiatrist or psychologist named on a list submitted by the defendant or the prosecuting attorney.³²²

Allowing the defense and prosecution to have a say in selecting the experts may reduce the need for each to hire several experts of their own. Moreover, allowing each of the experts selected from the defense and prosecution's lists to select the third expert, which is similar to the procedure used for medical malpractice review panels,³²³ should provide additional legitimacy to the conclusions reached by the experts.

C. Competence to be Executed: Still No Standard/Procedures in Indiana

The work of the Bowser Commission should be commended for taking a forward-looking view and attempting to resolve issues of severe mental illness early in a proceeding rather than allowing a case to proceed for decades when there was no dispute that the defendant was suffering from a severe mental illness.³²⁴ However, it does not address the prospect of a defendant who was not suffering from a severe mental illness at the time of the offense, but later develops one on death row. Since the United States Supreme Court's opinion in

322. Proposed IND. CODE § 35-36-10-6, <http://www.in.gov/legislative/interim/committee/prelim/BCOM04.pdf> (last visited Feb. 2, 2008).

323. IND. CODE § 34-18-10-6 (2004).

324. See Exec. Order No. 05-23 (Ind. 2005), available at http://www.in.gov/gov/files/EO_05-23_Clemency_Arthur_Baird_II.pdf; see also Kevin Corcoran, *Governor Spares Life of Convicted Killer*, INDIANAPOLIS STAR, Aug. 29, 2005.

Ford v. Wainwright,³²⁵ it is clear that the Eighth Amendment prohibits the execution of those insane at the time of their execution, although the standard for assessing competence to be executed remains somewhat of a mystery.³²⁶

Just days before his scheduled execution in January 2007, Norman Timberlake was granted a rare stay of execution in a 3-2 order from the Indiana Supreme Court.³²⁷ At issue was his competence to be executed, which has been difficult to establish under the prevailing *Ford* standard that a person is “unaware of the punishment they are about to suffer and why they are to suffer it.”³²⁸ An independent psychiatrist found that Timberlake suffered from “multiple paranoid delusional beliefs, centered on his conviction that he was being tortured by a computer-driven machine at the behest of prison officials[,]” but nevertheless understood that he was going to be executed and why.³²⁹

In granting a stay, the majority noted that Justice Powell’s formulation of the *Ford* standard has never been squarely adopted by the Supreme Court and that Court would soon revisit the issue with the grant of certiorari in *Panetti v. Quarterman*.³³⁰ Noting the severe restrictions on habeas relief, the court emphasized that it was free to revisit its decisions and decided a stay was appropriate pending a decision in *Panetti*.³³¹

If there is doubt as to the applicable legal precedent, we should be cautious in carrying out the death penalty The potential harm in granting Timberlake a stay of execution and later finding out that the Supreme Court’s decision in *Panetti* was inapplicable to Timberlake is minimal compared to the irreparable harm in denying the stay of execution, allowing Timberlake to be executed, and possibly learning a few months later that Timberlake’s execution may have violated a new Supreme Court interpretation of the Eighth Amendment to prohibit execution of a class of mentally ill persons that included Timberlake.³³²

Chief Justice Shepard dissented, noting that *Panetti*’s petition for certiorari alleged that the Fifth Circuit had failed to follow *Ford* and thus a change in the law “in any way favorable to death row murderers . . . seems so implausible that granting a stay is unjustifiable.”³³³ Similarly, Justice Sullivan dissented because

325. 477 U.S. 399 (1986).

326. Most lower courts have looked to the standard espoused in Justice Powell’s concurring opinion, i.e., whether the person was “unaware of the punishment they are about to suffer and why they are to suffer it.” *Id.* at 422 (Powell, J., concurring); see *Baird v. State*, 833 N.E.2d 28, 32 (Ind. 2005) (Boehm, J., dissenting); Joel Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 39 IND. L. REV. 893, 922-94 (2006).

327. *Timberlake v. State*, 859 N.E.2d 1209, 1213 (Ind. 2007).

328. *Ford*, 477 U.S. at 422 (Powell, J., concurring).

329. *Timberlake*, 859 N.E.2d at 1211.

330. 127 S. Ct. 852 (2007).

331. *Timberlake*, 859 N.E.2d at 1212.

332. *Id.* at 1213.

333. *Id.* at 1214 (Shepard, C.J., dissenting).

he believed the outcome of *Panetti* would not “affect this case because Timberlake rationally understands the reason he is being executed and so would not be entitled to relief even if the proposition advanced by Panetti prevails.”³³⁴

In June, the Supreme Court held in *Panetti* that after a death row prisoner makes a threshold showing, the Eighth Amendment requires “an opportunity to submit psychiatric evidence as a counterweight to the report filed by the court-appointed experts.”³³⁵ The Court further explained that “[e]xpert evidence may clarify the extent to which severe delusions may render a subject’s perception of reality so distorted that he should be deemed incompetent.”³³⁶ The application of *Panetti* to Indiana remains unresolved, however, because Mr. Timberlake died in prison, rendering his case moot.³³⁷ Regardless of what the Supreme Court does in the future with *Ford* and *Panetti*, “nothing prohibits a state from acting more cautiously in applying the death penalty if there is genuine doubt as to the long term viability of the dominant understanding of current precedent from that Court.”³³⁸ However, such a “more cautious approach” seems more likely to come from legislative action than from the Indiana Supreme Court, as suggested by the work of the Bowser Commission when contrasted with the recent decisions of the court, summarized below.

D. Significant Cases

The Indiana Supreme Court, which has mandatory jurisdiction over all capital appeals,³³⁹ issued several opinions in death penalty cases during the survey period.

1. *Change of Judge*.—In *Voss v. State*,³⁴⁰ the Marion County prosecutor sought a change of judge based on the trial court’s prior decisions that had ruled certain aspects of the death penalty statute unconstitutional, media quotations of remarks alleged to be “critical of the death penalty,” and the judge’s previous work as a defense lawyer in death penalty cases where he testified that his representation had been ineffective.³⁴¹ The supreme court rejected each as a basis requiring a change of judge. First, it noted that prior adverse rulings generally do not support an inference of prejudice, and the trial court’s rulings, although later reversed on appeal, “were supported by reasonable legal argument and the applicable law was subject to a good faith difference of opinion at the

334. *Id.* (Sullivan, J., dissenting).

335. *Panetti*, 127 S. Ct. at 2858.

336. *Id.* at 2863.

337. *Timberlake v. State*, 49S00-0606-SD-0023S (November 30, 2007 order finding “the appeal has abated and is now at an end”), available through the clerk of court’s online docket at <http://hats.courts.state.in.us/ISC3RUS/ISC2menu.jsp> (last visited Feb. 3, 2008).

338. *Timberlake*, 858 N.E.2d at 631 (Boehm, J., dissenting).

339. IND. CONST. art. VII, § 4; IND. R. APP. P. 4(A).

340. 856 N.E.2d 1211 (Ind. 2006).

341. *Id.* at 1217-18.

time.”³⁴² Next, the court emphasized that judges will often have personal opinions on an issue but are presumed to set aside those opinions and “impartially follow the law.”³⁴³ The trial court’s comments to the media about the death penalty reflected “concern regarding the necessity for extreme care in judicial administration of death penalty cases, but they do not indicate or suggest that he would hesitate to fully follow the law and impose a sentence of death where appropriate.”³⁴⁴ Finally, the court easily dispatched the suggestion that prior representation of capitally charged defendants provides a rational inference that a judge would be biased and prejudiced in cases involving the death penalty, citing a case that found no bias or prejudice on the basis of a judge’s prior service as the county prosecutor.³⁴⁵

2. *How Long Is Too Long to Try Death Penalty Case?*—In *State v. Azania*,³⁴⁶ the supreme court grappled with a lengthy delay in a capital case involving a 1981 murder of a police officer. The court had twice set aside jury recommendations that the defendant receive the death penalty, and a trial court determined in 2005 that the quarter of a century delay would violate the defendant’s right to a speedy trial and due process if the State continued to pursue a death sentence.³⁴⁷

In a 3-2 decision, the Indiana Supreme Court reversed and held that the State could continue to pursue the death penalty.³⁴⁸ The court began by discussing the many types of delay that may exist in cases generally and capital cases in particular, observing that delay may sometimes “work to the accused’s advantage.”³⁴⁹ It found it unnecessary to determine whether the Speedy Trial Clause of the Sixth Amendment applies to delay after a trial, because such post-trial delay “clearly does implicate the Due Process Clause” of the Fourteenth Amendment, which is assessed by applying the same factors that apply to a speedy trial claim.³⁵⁰ Those factors are “the (1) length of delay, (2) reason for the delay, (3) defendant’s assertion of the speedy trial right, and (4) prejudice to the defendant.”³⁵¹ The court examined the first three of these together and concluded that Azania was responsible for most of the delay that occurred after his trial

342. *Id.* at 1217.

343. *Id.* at 1218.

344. *Id.*

345. *Id.* at 1218-19 (citing *Broome v. State*, 687 N.E.2d 590, 596-97 (Ind. Ct. App. 1997)). *Voss* also found improper the trial court’s appointment of a special judge to decide whether recusal was required and held “[t]he determination of whether disqualification is necessary under Canon 3 [of the Code of Judicial Conduct] must be made by the sitting judge.” *Id.* at 1219-21.

346. 865 N.E.2d 994 (Ind.), *clarified on reh’g*, 875 N.E.2d 701 (Ind. 2007). On rehearing the court clarified that “Azania should be re-sentenced under the post-2002 death penalty statute, but without the availability of [life without parole].” 875 N.E.2d at 705.

347. *Azania*, 865 N.E.2d at 996-97.

348. *Id.* at 1010.

349. *Id.* at 999 (quoting *Barker v. Wingo*, 407 U.S. 514, 521 (1972)).

350. *Id.* at 1000-01 (citing *Barker*, 407 U.S. at 514).

351. *Id.* at 1000 n.15.

because he—not the State—had the burden of going forward in either an appeal or petition for collateral review.³⁵² As to the fourth factor, prejudice, the court reasoned that a jury “will make an appropriate allowance” for the unavailability of mitigating witnesses who had died in the twenty-five years since his first trial.³⁵³ As to the aggravating factors, the State would again have the burden of proving them beyond a reasonable doubt; therefore, the court concluded any difficulty for the defense created by the death of witnesses would pale in comparison to the “far greater difficulty for the State to meet its burden of proof.”³⁵⁴

Justice Boehm and Justice Rucker each wrote dissenting opinions. Justice Boehm acknowledged that the supreme court had not yet entertained a claim that passage of time alone was “sufficient to question whether either retribution or deterrence continues to justify an execution” under *Lackey v. Texas*.³⁵⁵ He therefore grounded his dissent in the Indiana Constitution’s prohibition on cruel and unusual punishment, finding the State should no longer be able to pursue a death sentence when at least fifteen of the twenty-five years of delay “was due to mistakes of others.”³⁵⁶ Justice Rucker focused instead on the trial court’s finding that Azania’s right to present mitigating evidence “would be severely prejudiced” by the lengthy delay.³⁵⁷ Specifically, he observed that “[m]ultiple mitigation witnesses are now deceased,” and it was for a jury—not an appellate court—to determine the importance of their testimony.³⁵⁸

3. *Reviewing Trial Court Findings Against the State.*—Azania was not the only case in which a trial court ruled in favor of a capital charged defendant. In *State v. McManus*,³⁵⁹ the State appealed a post-conviction court’s finding that the defendant was mentally retarded and the imposition of a sentence of life without parole in the place of a death sentence.³⁶⁰ The post-conviction court found by a preponderance of the evidence that McManus met the statutory definition of a “mentally retarded individual,” which is “one who manifests (1) significantly subaverage intellectual functioning, and (2) substantial impairment of adaptive behavior before the age of twenty-two.”³⁶¹ Although the court noted that each of these prongs is a factual determination subject to review under a “clearly erroneous” standard,³⁶² the majority proceeded to review the findings with little deference to the post-conviction court. As to intellectual functioning, the majority parsed the expert testimony, concluding that “[a] careful review of

352. *Id.* at 1003.

353. *Id.* at 1009.

354. *Id.*

355. *Id.* at 1012 (Boehm, J., dissenting) (citing *Lackey v. Texas*, 514 U.S. 1045 (1995)).

356. *Id.* at 1012-13.

357. *Id.* at 1015 (Rucker, J., dissenting).

358. *Id.*

359. 868 N.E.2d 778 (Ind. 2007), *cert. denied*, 128 S. Ct. 1739 (2008).

360. *Id.* at 781.

361. *Id.* at 785 (quoting IND. CODE § 35-36-9-2 (2004)).

362. *Id.*

McManus'[s] testing history alone demonstrates McManus is *not* significantly subaverage as to intellectual functioning. McManus'[s] school history, work history, and life functioning only strengthen this conclusion."³⁶³ Most puzzling, however, the majority concluded, "[p]erhaps most indicative of his functioning and mental capacity, McManus was known by all as an excellent father who ably cared for his two daughters."³⁶⁴ It is unclear how one's parenting ability relates to intellectual functioning. Anyone who has observed a child caring for another child knows they are quite capable, more so than many otherwise high-functioning adults. Moreover, as to adaptive behavior, the majority also undertook an exacting review focusing on McManus's "work history and day-to-day life, both of which illustrate his abilities—not deficits."³⁶⁵ Finding that "McManus does not satisfy the intellectual functioning or adaptive behavior prongs"—which sounds a lot like *de novo* review—the court concluded execution was not prohibited.³⁶⁶

Justice Boehm, joined by Justice Rucker, dissented on the basis that "the majority's review of the evidence does not give sufficient deference to the trial court's finding of mental retardation."³⁶⁷ Specifically, the short but potent dissent noted "the record is replete with conflicts in expert and lay testimony" both to intellectual functioning and adaptive behavior.³⁶⁸ The dissent noted the court had "recently affirmed a finding by a trial court that a defendant was not mentally retarded despite significant evidence suggesting that he was," and concluded that "the clearly erroneous standard of review dictates affirming this trial court's determination as to mental retardation as well."³⁶⁹

CONCLUSION

In short, the survey period was marked largely by stability and consistency. The most significant legislative action was in response to recent judicial opinions and returned matters to the status quo. The vast majority of the judicial opinions applied existing law rather than breaking boldly in new directions. Even the significant reversals were grounded in conservative principles of statutory construction or a defendant's right to a fair trial. Finally, Indiana's death penalty jurisprudence continued to be made in largely 3-2 decisions, although the prospect for significant legislative change, occasioned either by the ABA death penalty assessment or the Bowser Commission, appears plausible in the coming months and years.

363. *Id.* at 787.

364. *Id.*

365. *Id.* at 789.

366. *Id.*

367. *Id.* at 792 (Boehm, J., dissenting).

368. *Id.* at 792-93 (citing *Pruitt v. State*, 834 N.E.2d 90, 104 (Ind. 2005)).

369. *Id.* at 793.

