

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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The legislature and Indiana's appellate courts confronted a variety of significant issues during the survey period from October 1, 2009, to September 30, 2010. The Indiana General Assembly ("General Assembly") created a new procedure to address the removal of defendants from the sex offender registry but was fairly restrained in creating new crimes and altering penalties for existing crimes. The Indiana Supreme Court and Indiana Court of Appeals addressed issues ranging from the traditional fare of sentencing, sufficiency of the evidence, and probation to a variety of more novel issues, including enhancements of school-zone drug convictions, inconsistent jury verdicts, reversal of convictions for judicial misconduct and overreaching, and sorting through the aftermath of the landmark *Wallace* opinion¹ limiting sex offender registration.

I. LEGISLATIVE DEVELOPMENTS

The General Assembly's 2010 short session created new crimes and enhanced penalties for existing crimes. Although it was previously a Class C felony to traffic in a cellular phone with an inmate,² a new statute now also criminalizes the possession of a cellular phone by a person incarcerated in a county jail as a Class A misdemeanor.³ The involuntary manslaughter statute was expanded to include defendants who cause the death of a fetus while operating while intoxicated.⁴ The operating while intoxicated statute was amended to create a D felony offense if the conduct results in the death of a law enforcement animal.⁵ A person who resists law enforcement while operating a motor vehicle in a manner that causes the death of a law enforcement officer commits a Class A felony.⁶

Considerable media attention, though, was generated by one of the least severe offenses: the Class B misdemeanor offense of failing to require proof of age before selling alcohol for carry-out.⁷ Checking identification has long been routine for those who appear to be near the required minimum age of twenty-one,

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1. *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009).

2. IND. CODE § 35-44-3-9(d) (2011).

3. *Id.* § 35-44-3-9.6.

4. *Id.* § 35-42-1-4(d).

5. *Id.* § 9-30-5-5. The legislation was proposed by representatives from St. Joseph County in response to the killing of Mishawaka police officer James Szuba and K9 "Ricky" on January 9, 2010. A YouTube video offers a tribute to both. Time Capsule DVP, *Mishawaka Police Cpl. James Szuba and K9 Ricky Funeral*, YOUTUBE (Jan. 21, 2010), <http://www.youtube.com/watch?v=TTNI5VsVFXo>.

6. IND. CODE § 35-44-3-3 (Version b).

7. *Id.* § 7.1-5-10-23; see, e.g., Richard Gootee, *My ID . . . Really?*, INDIANAPOLIS STAR, July 2, 2010, at A1.

but the new statute requires that employees check identification of all who seek to purchase alcohol, even those decades past the legal drinking age.⁸ The statute includes a defense for those selling to someone who “was or reasonably appeared to be more than fifty (50) years of age.”⁹

Most new misdemeanor offenses, though, generated little media attention and likely remain a mystery to the vast majority of citizens. For example, commercial vehicle operators who provide for intrastate transport of metal coils now commit an A misdemeanor conviction if the operator has not been certified in proper load securement.¹⁰

Finally, the General Assembly created a fourteen-member criminal law and sentencing policy study committee to evaluate criminal and sentencing laws and make recommendations to the General Assembly for changes that relate to the purpose of the criminal justice system, the availability of sentencing options, and the inmate population at the department of correction.¹¹ If the committee is able to make recommendations that muster legislative support, next year’s survey may include more sweeping revisions to the criminal code.

II. SIGNIFICANT CASES

The Indiana Supreme Court and Indiana Court of Appeals addressed a wide range of issues that impact criminal cases from their inception to their conclusion.

A. *Excessive Bail Reduced*

Two years ago, this survey discussed a rare (and successful) challenge to pretrial bail.¹² In *Samm v. State*,¹³ the court of appeals held that the trial court abused its discretion by “failing to acknowledge uncontroverted evidence on several” statutory bail factors.¹⁴ The case was unusual in part because bail challenges seldom make it to the appellate courts; the appellate process generally takes several months, often rendering such challenges moot.¹⁵

During this survey period, a defendant charged with ten counts of securities fraud challenged his \$1.5 million bail as excessive in *Reeves v. State*.¹⁶ The court of appeals denied his motion for expedited preparation of the record and expedited the briefing schedule only by prohibiting extensions beyond the normal deadlines.¹⁷ Briefing was completed in about three months, and the opinion was

8. IND. CODE § 7.1-5-10-23.

9. *Id.*

10. IND. CODE § 9-21-8-58.

11. *Id.* § 2-5.5-5-2, -13.

12. See Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 42 IND. L. REV. 937, 953-55 (2009).

13. 893 N.E.2d 761 (Ind. Ct. App. 2008).

14. *Id.* at 768.

15. Schumm, *supra* note 12, at 954.

16. 923 N.E.2d 418, 420 (Ind. Ct. App. 2010), *trans denied*, 928 N.E.2d 10 (Ind. 2011).

17. The clerk’s online docket may be accessed at hats.courts.state.in.us/ISC3RUS/ISC2menu.

issued about six weeks later.¹⁸ Reiterating that the fundamental purpose of bail is to ensure a defendant's presence in court, the court of appeals reversed, faulting the trial court for making no attempt to apply the statutory factors when determining the bail amount.¹⁹ Rather than reducing the bail, the court remanded for the trial court to set bail "in an amount that takes into account the statutory factors" and "explain its rationale for the bail imposed in relation to those standards."²⁰

Although the exorbitant \$1.5 million bail in *Reeves* seems especially easy to challenge on appeal, bail of much smaller amounts may have the same effect of keeping a defendant in jail—often for several months or longer while awaiting trial. Whether defense counsel will exercise the right to appeal bail more frequently may depend at least in part on whether the court of appeals will allow for more meaningful (expedited) review of those decisions.

B. Reversals for Judicial Misconduct

The Indiana Supreme Court ordered new trials in two cases—an A felony child molesting case and a misdemeanor driving while suspended case—based on misconduct by the trial judge. The court applied somewhat different standards, which could lead to confusion in the future.

In *Everling v. State*,²¹ the supreme court reversed several convictions for child molesting and sexual misconduct with a minor because the cumulative result of the trial court's "comments, exclusions [of evidence], and general demeanor toward the defense was a trial below the standard towards which Indiana strives."²² The court reiterated that judges are presumed "unbiased and unprejudiced" and that appellate courts generally require defendants to "establish from the judge's conduct actual bias or prejudice that places the defendant in jeopardy"²³—a standard not applied in the misdemeanor driving case.

The reach of *Everling* is likely limited, though, because it is grounded in the cumulative effect of the rulings and comments.²⁴ Nevertheless, the individual components warrant consideration because they could resurface in future cases. The supreme court categorized the trial court's assessment of partiality as "comments to counsel, comments in front of the jury, uneven tolerance of late

jsp (search for case no. 77A01-0909-CR-00446).

18. *Id.*

19. *Reeves*, 923 N.E.2d at 422.

20. *Id.* This approach differs from appellate sentence review, for example, where the appellate courts routinely lower sentences to a specific term rather than giving the trial court a do-over, which could presumably lead to another appeal if not done correctly. *See, e.g.*, Schumm, *supra* note 12, at 948-51.

21. 929 N.E.2d 1281 (Ind. 2010).

22. *Id.* at 1291.

23. *Id.* at 1287.

24. *See, e.g., id.* at 1290 (remarking that the cumulative effect could not be ignored "simply because each of them would otherwise not suffice to reverse").

filings, and erroneous rulings.”²⁵ Although appellate scrutiny generally focuses on comments that could influence a jury,²⁶ the supreme court gave weight to the trial court’s comments outside the presence of the jury, including a comment that defense counsel had done “unethical things” in court.²⁷ In remarking on the comments in front of the jury, the court focused not on legal questions, “but the general demeanor taken with defense counsel. These comments were adversarial if not condescending, and they certainly communicated to the jury that . . . [counsel] was a less than competent attorney.”²⁸ The court also found improper the trial court’s assisting of the prosecution “in making and responding to objections” based on “context and one-sidedness.”²⁹ Although addressed as part of the broad claim of partiality,³⁰ the exclusion of a late-disclosed expert witness may present an independent basis for reversal when the testimony was critical to the defense, the late disclosure was explained by defense counsel’s illness, and a continuance could easily have been granted.³¹

In a misdemeanor case decided just weeks before *Everling*, the court focused largely on violations of ethical rules. In *Hollinsworth v. State*,³² a young woman charged with driving with a suspended license informed the trial court that she would like to accept the State’s plea agreement early in her trial.³³ The trial court “exhibited impatience and stated that if . . . [she] were found guilty, ‘she’s going to jail for a year.’”³⁴ The court continued, “I don’t know if I want to take your plea. I’d rather just go to trial, I think. I don’t like being jerked around at all, all right?”³⁵ A trial ensued, and the trial court imposed a one-year jail sentence, which was later reduced.³⁶ During sentencing, the court noted that Hollinsworth had been charged with theft and battery and responded, “Sure they are,” when defense counsel stated, “Those are only alleged charges.”³⁷

The Indiana Supreme Court reversed the conviction and ordered a new trial.³⁸ The short per curiam opinion relied heavily on Judicial Conduct Canon 2, which requires judges to “perform the duties of judicial office impartially, competently,

25. *Id.* at 1289.

26. *Id.* at 1288 (quoting *Kennedy v. State*, 280 N.E.2d 611, 620-21 (Ind. 1972) (noting that jurors’ respect for trial courts “can lead them to accord great and perhaps decisive significance to the judge’s every word and intimation”)).

27. *Id.* at 1290.

28. *Id.*

29. *Id.*

30. *Id.* at 1291.

31. See generally Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 41 IND. L. REV. 955, 984-86 (2008).

32. 928 N.E.2d 201 (Ind. 2010).

33. *Id.* at 201.

34. *Id.* (citation omitted).

35. *Id.* (citation omitted).

36. *Id.*

37. *Id.* at 202 (citation omitted).

38. *Id.*

and diligently.”³⁹ Judges must (1) be “objective and open-minded” under Rule 2.2, comment 1; (2) perform duties “without bias or prejudice” under Rule 2.3(A); (3) be “patient, dignified, and courteous to litigants” under Rule 2.8(B); and (4) disqualify themselves in any proceeding where their impartiality “might reasonably be questioned” under Rule 2.11(A).⁴⁰ The supreme court concluded that Marion County Superior Court Judge William Young’s “behavior in this cases did not meet these standards.”⁴¹ The court did not engage in harmless error analysis or suggest that numerous or particularly egregious violations must occur to warrant a new trial;⁴² therefore, this case will likely be cited in the future by both criminal and civil litigants who seek a new trial based on judicial misconduct. Read with *Everling*, though, reversal may not be required unless there are numerous or particularly egregious violations of the canons.

Beyond the possible reversal of a case, judges who engage in misconduct may also face disciplinary sanctions. A few weeks after the *Hollinsworth* opinion was issued, the Indiana Commission on Judicial Qualifications filed four counts of misconduct against Judge Young, focusing on his actions in that case and the general practice of “imposing substantially higher penalties against traffic court litigants who chose to have trials and lost” and “routinely ma[king] statements implying that litigants should not demand trials and would be penalized for doing so if they lost.”⁴³

Finally, if a judge manages to upset a wide swath of the public, the General Assembly may get involved. In response to Judge Young’s traffic court antics,⁴⁴ the General Assembly significantly amended the penalties for infractions. Instead of the longstanding maximum \$500 fine for any Class C infraction, a person who admits a violation before court or admits the violation on the day of court cannot be fined more than \$35.50.⁴⁵ A person who contests the violation cannot be fined more than \$35.50 either, if facing his or her first moving violation in the county within five years.⁴⁶ Maximum fines increase to \$250 or \$500, however, if a person has one or two prior violations in that same county.⁴⁷

39. *Id.*

40. *Id.* (internal citations omitted).

41. *Id.*

42. *See id.*

43. Notice of the Institution of Formal Proceedings and Statement of Charges at 3-4, *In re* Hon. William E. Young, No. 49500-1007-JD-374 (Ind. July 16, 2010); *see also* Press Release, Indiana Courts, Judicial Qualifications Commission Files Misconduct Charges Against Marion Superior Court Judge (July 16, 2010), *available at* <http://www.in.gov/judiciary/press/2010/0716.html>.

44. *See* Jon Murray, *Law Caps Fines for Traffic Court*, INDIANAPOLIS STAR, Mar. 25, 2010, at A21.

45. IND. CODE § 34-28-5-4 (2011).

46. *Id.*

47. *Id.*

C. Prosecutors Pushing the Envelope

Trial courts have considerable discretion to regulate what lawyers argue throughout a case—from voir dire to closing arguments. Two cases from the survey period demonstrate that this discretion is wide but not without limit.

Prosecutors are free to ask questions during voir dire “designed to disclose the jurors’ attitudes towards the offense charged and to uncover preconceived ideas about defenses the defendant intends to use.”⁴⁸ Although defendants should request an admonishment or move for a mistrial if the prosecutor crosses the line, the court of appeals may nevertheless consider the issue as fundamental error in the absence of such a request.⁴⁹ In *Adcock v. State*, the court of appeals considered the prosecutor’s analogy of “‘reasonable doubt being like a jigsaw puzzle with pieces missing’ during voir dire.”⁵⁰ Although other jurisdictions have sometimes found similar references improper,⁵¹ courts have generally affirmed convictions if the jury was instructed about the proper definition of reasonable doubt.⁵² In *Adcock*, the court of appeals relied on the jury instructions, the prosecutor’s statements and questions “as a whole,” and the defendant’s opportunity to rebut the prosecutor’s comments in finding no fundamental error.⁵³

In *Miller v. State*,⁵⁴ a divided panel reversed a conviction for armed robbery based on the prosecutor’s showing of a YouTube video during closing argument.⁵⁵ The video, which was created in a completely unrelated context for school administrators, showed a person who was able to conceal several guns under his clothing.⁵⁶ The defense at trial was mistaken identity and that the robber had used a shotgun. The prosecutor acknowledged when showing the video that it “has nothing to do with the case” and that “[i]n no way, shape, or form, are we saying that Terrence Miller had a pistol.”⁵⁷ Nevertheless, the court of appeals reversed.⁵⁸ In the lead opinion for the court, Judge May agreed with the defendant that the video “had the effect of bringing alive the passions of the jury . . . and suggested Miller was not only the robber but that he also had multiple firearms on his person and intended to use them to cause injury or death.”⁵⁹ Judge Barnes wrote a separate concurring opinion, finding the video was “the proverbial evidentiary harpoon that skewed the ability of the jury to

48. *Adcock v. State*, 933 N.E.2d 21, 26 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 827 (Ind. 2010).

49. *Id.*

50. *Id.* (citation omitted).

51. *Id.* at 27 (citing *People v. Katzenberger*, 101 Cal. Rptr. 3d 122, 125 (Ct. App. 2009)).

52. *Id.* at 27-28.

53. *Id.* at 28.

54. 916 N.E.2d 193 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 782 (Ind. 2010).

55. *Id.* at 199.

56. *Id.* at 195.

57. *Id.* at 196 (citation omitted).

58. *Id.* at 199.

59. *Id.* at 197 (quoting the appellant’s reply brief).

fairly and impartially decide the case.”⁶⁰ Finally, Chief Judge Baker dissented, concluding that showing the video was error but not reversible because the video was irrelevant to Miller’s mistaken identity defense.⁶¹

D. “Operating” Vehicles While Intoxicated—and the Newfound Importance of “Endangerment”

Although sufficiency of the evidence claims are often viewed as a hopeless cause, defendants convicted of operating a vehicle while intoxicated have prevailed in several cases over the years.⁶² This survey period added a few more.

1. *Endangerment*.—In *Outlaw v. State*,⁶³ the Indiana Supreme Court adopted the appellate court’s opinion in concluding that operating a vehicle while intoxicated “in a manner that endangers a person,” a Class A misdemeanor under Indiana Code section 9-30-5-2(b), requires proof beyond mere evidence of intoxication.⁶⁴ The State conceded that Outlaw had not operated his vehicle in an unsafe manner; therefore, only the C misdemeanor offense of operating a vehicle was intoxicated was proven.⁶⁵

Applying *Outlaw*, the court of appeals also found insufficient evidence of endangerment in *Temperly v. State*,⁶⁶ a case where the defendant was involved in an accident after another driver drove his vehicle into the defendant’s path.⁶⁷ No evidence other than the defendant’s intoxication was offered to support endangerment of the defendant or any other person.⁶⁸ Similarly, *Dorsett v. State*⁶⁹ failed for sufficient evidence of endangerment when the defendant was found intoxicated in his parked vehicle.⁷⁰ However, in *Vanderlinden v. State*,⁷¹ decided the same day as *Outlaw*, the court of appeals concluded that excessive speed (fifty-one in a thirty-five mile per hour zone) was sufficient to prove

60. *Id.* at 199 (Barnes, J., concurring).

61. *Id.* (Baker, C.J., dissenting). Transfer was denied in *Miller* by a 3-2 vote with Chief Justice Shepard and Justice Dickson voting to grant transfer. *Miller v. State*, No. 09A02-0812-CR-1133, 2010 Ind. LEXIS 46 (Ind. Jan. 10, 2010). Regardless of agreement with the outcome of a court of appeals case, the supreme court frequently grants transfer when the court of appeals issues a published decision that includes separate opinions from all three judges. *See, e.g., Lewis v. State*, 931 N.E.2d 875 (Ind. Ct. App. 2010), *vacated on transfer*, 949 N.E.2d 1243 (Ind. 2011).

62. *See, e.g., Flanagan v. State*, 832 N.E.2d 1139 (Ind. Ct. App. 2005); *Nichols v. State*, 783 N.E.2d 1210 (Ind. Ct. App. 2003); *Clark v. State*, 611 N.E.2d 181 (Ind. Ct. App. 1993); *Hiegel v. State*, 538 N.E.2d 265 (Ind. Ct. App. 1989).

63. 929 N.E.2d 196 (Ind. 2010).

64. *Id.* at 196.

65. *Id.*

66. 933 N.E.2d 558 (Ind. Ct. App. 2010), *trans. denied*.

67. *Id.* at 568.

68. *Id.*

69. 921 N.E.2d 529 (Ind. Ct. App. 2010).

70. *Id.* at 533.

71. 918 N.E.2d 642 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 787 (Ind. 2010).

endangerment.⁷² Beyond those facts, however, the court expressly “decline[d] to determine the precise extent of speeding, in the absence of other factors, necessary to show endangerment.”⁷³

2. “*Operating.*”—In *Gatewood v. State*,⁷⁴ a man on a moped stumbled into the emergency room of a hospital at 8:00 p.m. He was found an hour later asleep by his moped with a blood-alcohol content of 0.286.⁷⁵ The defendant testified that he drank a pint of vodka after arriving at the hospital, but no vodka bottle was found. The court rejected the State’s argument that the defendant’s intoxication at 9:00 p.m. allowed the jury to reasonably infer he was intoxicated when he drove his moped at an hour earlier, stating, “Even if we assume that Gatewood drank some alcohol before arriving at the hospital, the State simply presented no evidence that when Gatewood operated his moped around 8:00 p.m., he had an impaired condition of thought and action and the loss of normal control of a person’s faculties.”⁷⁶

Other defendants challenging their “operation” of a vehicle were not successful. In *Dorsett v. State*,⁷⁷ the Indiana Court of Appeals found sufficient circumstantial evidence that the defendant had driven his vehicle found in a parking lot.⁷⁸ The defendant told police that he drove to a McDonald’s after becoming intoxicated at a friend’s party.⁷⁹ Based on the time-stamp on a receipt, the court found it reasonable to infer that he had purchased food in the drive-through before parking in the lot where he was found slumped over in his vehicle, which was running.⁸⁰ Moreover, in *Crawley v. State*,⁸¹ a defendant challenged her conviction for operating a vehicle while her license was forfeited for life on the basis that no one observed her operating a vehicle, which was found backed into a swimming pool.⁸² Applying the same factors used in operating while intoxicated cases, the court of appeals found sufficient evidence of operating when the defendant “possessed the car, was present at the scene, was highly impaired, made statements to . . . [the pool owner] that no one was with her, and made efforts to avoid the police being summoned”⁸³ Judge Riley dissented, concluding that the evidence created “a probability” of operating but not proof beyond a reasonable doubt and that the evidence presented was similar to other cases the court had reversed for insufficient evidence.⁸⁴

72. *Id.* at 646.

73. *Id.* at 646 n.1.

74. 921 N.E.2d 45 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 792 (Ind. 2010).

75. *Id.* at 47.

76. *Id.* at 50.

77. 921 N.E.2d 529 (Ind. Ct. App. 2010).

78. *Id.* at 532.

79. *Id.* at 531.

80. *Id.* at 531-32.

81. 920 N.E.2d 808 (Ind. Ct. App. 2010).

82. *Id.* at 809.

83. *Id.* at 813.

84. *Id.* at 814 (Riley, J., dissenting).

E. Strict Construction of Statutes and Drug Offenses in Particular

A number of cases highlighted the strict construction of penal statutes in a manner that allows some defendants to escape criminal liability.⁸⁵ In *State v. Prater*,⁸⁶ the court of appeals considered the scope of the intent requirement for manufacturing methamphetamine under Indiana Code section 35-48-4-14.5.⁸⁷ Subsection (c) of that statute criminalizes as a D felony the possession of “anhydrous ammonia with intent to manufacture methamphetamine.”⁸⁸ The majority in *Prater* held that the statute does not criminalize the mere possession of anhydrous ammonia; rather, the person in possession must also personally have the intent to use the ammonia to manufacture methamphetamine.⁸⁹ “Otherwise, countless individuals who possess or sell anhydrous ammonia for lawful purposes could be charged with illegal possession, which would yield an absurd result.”⁹⁰ Judge Bradford dissented, noting that manufacturing meth “is a multi-step, multi-ingredient process, often involving multiple parties.”⁹¹ He wrote that the person who secures the ammonia should not be immunized from criminal liability simply by not involving himself personally in the manufacturing process.⁹²

In *Lovitt v. State*,⁹³ the court of appeals shut down the State’s attempt to broaden the maintaining a common nuisance statute to include mere drug possession in a vehicle.⁹⁴ A person maintains a common nuisance by unlawfully “keeping” a controlled substance; the offense is a class D felony.⁹⁵ Although the defendant had marijuana in his pocket while operating a vehicle, the term “keeping” in the statutory context applies only when the substance is “contained within the vehicle itself or that the vehicle is used to store the controlled substance for further manufacturing, sale, delivery or financing the delivery of that or another controlled substance.”⁹⁶ The court concluded that the General Assembly would not have intended the broad interpretation, which would “make every drug arrest after a traffic stop subject to an additional charge of maintaining a common nuisance.”⁹⁷ In another case focused on the “maintaining” language of the common nuisance statute, the court of appeals found insufficient evidence

85. See generally Schumm, *supra* note 31, at 981-83 (summarizing developments under the heading “Creepy Not Criminal: The Primacy of Language in Criminal Statutes”) (internal citation omitted).

86. 922 N.E.2d 746 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 797 (Ind. 2010).

87. *Id.* at 747.

88. *Id.* at 749 (quoting IND. CODE § 35-48-4-14.5(c) (2010)).

89. *Id.* at 749-50.

90. *Id.* at 750.

91. *Id.* (Bradford, J., dissenting).

92. *Id.*

93. 915 N.E.2d 1040 (Ind. Ct. App. 2009).

94. *Id.* at 1045.

95. *Id.* at 1044 (citing IND. CODE § 35-48-4-13(b) (2010)).

96. *Id.* at 1045.

97. *Id.*

when a defendant was part of methamphetamine manufacturing operating in the yard of another person's residence because there was no evidence the defendant "had any control over the premises."⁹⁸

*Hyche v. State*⁹⁹ is another drug possession case aggressively charged into something more severe. There, the court of appeals vacated convictions for felony murder and dealing a controlled substance.¹⁰⁰ Felony murder requires the killing of another person while committing a delineated felony, including dealing a controlled substance.¹⁰¹ Dealing can occur in a number of ways, including the delivery or financing of the delivery of a controlled substance.¹⁰² Because Hyche merely attempted to purchase drugs, "delivery" did not apply.¹⁰³ That Hyche "called another person to request drugs no more makes him a dealer in ecstasy than it would make a customer who calls the florist a dealer in flowers."¹⁰⁴ Nor did he "finance" the delivery of drugs by agreeing to pay \$30 for them when he "acted merely as a purchaser and not as a creditor or an investor."¹⁰⁵ Finally, the court of appeals rejected the State's argument that Hyche was an accomplice in dealing drugs. Although he was present at the scene of the crime with the dealer, the two were not companions.¹⁰⁶ That factor distinguishes the case from those where defendants were active in brokering drug deals and "acting on the distribution side of the transactions."¹⁰⁷

Finally, reckless possession of paraphernalia¹⁰⁸ remains a nearly impossible crime for the State to prove, although some prosecutors continue to file the charge. For several years, the court of appeals has remarked that "a showing of recklessness is impossible without a showing of possible harm," and "it is difficult to imagine a set of facts that would satisfy the elements" of the offense.¹⁰⁹ In the most recent example, an officer discovered a crack pipe behind the driver's door handle.¹¹⁰ Because the State could not show any possible harm from that possession of the crack pipe, the court held that the trial court should have dismissed the charge.¹¹¹

98. *Gaynor v. State*, 914 N.E.2d 815, 816 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 558 (Ind. 2009)

99. 934 N.E.2d 1176 (Ind. Ct. App. 2010), *trans. denied*.

100. *Id.* at 1180.

101. *Id.* at 1178 (citing IND. CODE § 35-42-1-1(3)(C) (2010)).

102. *Id.* (citing IND. CODE § 35-48-4-2(a)).

103. *Id.* at 1179.

104. *Id.*

105. *Id.* at 1180.

106. *Id.*

107. *Id.*

108. IND. CODE § 35-48-4-8.3(c) (2011).

109. *Helms v. State*, 926 N.E.2d 511, 515 (Ind. Ct. App. 2010) (quoting *Castner v. State*, 840 N.E.2d 362, 366-67 (Ind. Ct. App. 2006)).

110. *Id.*

111. *Id.*

F. Receiving Stolen Property Requires More Than Mere Possession

In *Fortson v. State*,¹¹² the Indiana Supreme Court clarified the proof necessary for a conviction for receiving stolen property.¹¹³ Before 1970, Indiana courts could consider the unexplained possession of recently stolen property as a circumstance from which the factfinder could draw an inference of guilt.¹¹⁴ Beginning in 1970, though, the rule changed, and convictions based on the unexplained possession of recently stolen property standing alone were upheld.¹¹⁵ In *Fortson*, the supreme court returned to the pre-1970 approach, holding that

mere unexplained possession of recently stolen property standing alone does not automatically support a conviction for theft. Rather, such possession is to be considered along with the other evidence in a case, such as how recent or distant in time was the possession from the moment the item was stolen, and what are the circumstances of the possession (say, possessing right next door as opposed to many miles away). In essence, the fact of possession and all the surrounding evidence about the possession must be assessed to determine whether any rational juror could find the defendant guilty beyond a reasonable doubt.¹¹⁶

Applying the rule to the facts in *Fortson*, the court found insufficient evidence to support the conviction because there was no evidence that the defendant attempted to conceal a stolen truck from police officer, nor did he physically resist the officers, flee, or provide evasive answers.¹¹⁷ Finally, the court endorsed a jury instruction from Montana and encouraged its use in future cases.¹¹⁸

G. Sufficiency for Other Crimes

The court of appeals addressed the sufficiency of evidence in other contexts, including the frequently litigated realm of resisting law enforcement and the more novel context of parental discipline and jail sex.

1. *Resisting Law Enforcement*.—As summarized in last year's survey,¹¹⁹ resisting law enforcement requires proof that a defendant "forcibly" resisted,¹²⁰ and several cases have reversed convictions because the defendant's resistance was passive or otherwise did not involve force directed to the officer.¹²¹ Building

112. 919 N.E.2d 1136 (Ind. 2010).

113. *Id.* at 1139; IND. CODE § 35-43-4-2(b).

114. *Id.* at 1141.

115. *Id.* at 1142 (citing *Bolton v. State*, 261 N.E.2d 841, 843 (Ind. 1970)).

116. *Id.* at 1143.

117. *Id.* at 1144.

118. *Id.* at 1143 n.5.

119. See generally Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 43 IND. L. REV. 691, 698-700 (2010).

120. IND. CODE § 35-44-3-3(a)(1) (2011).

121. See, e.g., *Spangler v. State*, 607 N.E.2d 720 (Ind. 1993); *Ajabu v. State*, 704 N.E.2d 494,

on last year's supreme court opinion in *Graham v. State*,¹²² the court of appeals in *Colvin v. State*¹²³ found insufficient evidence of forcible resistance when a defendant was "not obeying . . . [officers'] commands" and one officer "had to forcibly take control of the defendant."¹²⁴ The defendant "kept his hands in his pockets during the struggle," and his failure to comply with commands or requiring officers to use force in effectuating an arrest were held insufficient to support the conviction.¹²⁵

Relying on *Colvin*, the court of appeals found insufficient evidence of forcible resistance in *A.C. v. State*.¹²⁶ There, the juvenile respondent did not stand up when asked, leaned away when the officer pulled up his pants, and presented no struggle when the officer handcuffed him.¹²⁷ Even the leaning away from the officer was found insufficient because the officer did not have "to struggle or get physical" with the respondent.¹²⁸ The court of appeals aptly concluded that although A.C.'s conduct "may have justified a physical response from the officer, that does not equate to criminal conduct" under the supreme court's resisting jurisprudence.¹²⁹ The defendant must use force; actions that lead an officer to use force will often not lead to criminal liability.

2. *Failing to Intervene in Parental Discipline.*—In *Lay v. State*,¹³⁰ the court of appeals upheld a conviction for neglect of a dependent resulting in serious bodily injury against a father who had taken no part in disciplining his daughter.¹³¹ The child's mother admitted to causing severe injuries and extensive bruising to her three-year-old daughter.¹³² The father heard the spanking while he was playing video games in another room.¹³³ The court reasoned that the father's failure to act while he was "nearby" and heard the abuse was sufficient to uphold his conviction.¹³⁴ The court did not discuss *Willis v. State*,¹³⁵ where the Indiana Supreme Court reversed a conviction for battery against a single parent who had struck her child with a belt or extension cord, which caused some bruising.¹³⁶ It would seem that a parent who is present in the same home when the other parent is disciplining a child must take an active role to ensure discipline

496 (Ind. Ct. App. 1998); *Braster v. State*, 596 N.E.2d 278, 280 (Ind. Ct. App. 1992).

122. 903 N.E.2d 963 (Ind. 2009).

123. 916 N.E.2d 306 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 783 (Ind. 2010).

124. *Id.* at 308.

125. *Id.* at 309.

126. 929 N.E.2d 907 (Ind. Ct. App. 2010).

127. *Id.* at 911-12.

128. *Id.* at 912.

129. *Id.*

130. 933 N.E.2d 38 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 829 (Ind. 2010).

131. *Id.* at 43.

132. *Id.* at 42.

133. *Id.* at 43.

134. *Id.*

135. 888 N.E.2d 177 (Ind. 2008).

136. *Id.* at 184.

does not cross the line of “excessive force,” which was undoubtedly met in *Lay* but may not be clear in other cases.¹³⁷

3. *Jail Sex Not Necessarily a Crime.*—In *State v. Moore*,¹³⁸ several inmates in the Greene County jail removed ceiling tiles and climbed through the ceiling into a different cell block where they “would hang out, play cards, and have sex with each other.”¹³⁹ They were charged with escape, which occurs when a person “intentionally flees from lawful detention.”¹⁴⁰ Lawful detention includes “detention in a penal facility[.]”¹⁴¹ Because the inmates had no intent to leave the penal facility, the court held that the inmates could not be convicted of escape.¹⁴² The inmates may, however, have violated facility rules for which they could be punished administratively.¹⁴³ Judge Friedlander dissented, concluding that “lawful detention may exist *within* the boundaries of an institution, and such detention is separate and distinct from the detention inherent in being confined to the facility itself.”¹⁴⁴

4. *Explaining Verdict Can Undermine It.*—Although the appellate standard of review for sufficient evidence is usually a very deferential one, greater scrutiny could occur if a trial judge discusses its rationale for the verdict. In *Kribs v. State*,¹⁴⁵ a judge found a man guilty of entering a controlled area of an airport with a weapon, a Class A misdemeanor, at a bench trial.¹⁴⁶ After rendering the verdict, though, the trial judge stated that there was no “malicious intent” and he believed the defendant “didn’t remember” he had the gun in his possession when he entered the airport.¹⁴⁷ Had the judge remained silent, the court of appeals would have looked only to evidence that supported the verdict and “not have second-guessed such an assessment of the evidence.”¹⁴⁸ But based on the trial court’s post-verdict statements, the court of appeals was constrained to defer to the trial court’s express assessment of the witnesses and reverse the conviction.¹⁴⁹ Thus, although in some contexts judges must explain their decisions,¹⁵⁰ when

137. See generally *Matthew v. State*, 892 N.E.2d 695 (Ind. Ct. App. 2008) (affirming battery conviction by 2-1 vote because parental discipline was unreasonable).

138. 914 N.E.2d 304 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 560 (Ind. 2009).

139. *Id.* at 305.

140. IND. CODE § 35-44-3-5(a) (2011).

141. *Id.* § 35-41-1-18(a)(3).

142. *Moore*, 914 N.E.2d at 307.

143. *Id.*

144. *Id.* at 314 (Friedlander, J., dissenting).

145. 917 N.E.2d 1249 (Ind. Ct. App. 2009).

146. *Id.* at 1249.

147. *Id.* at 1250.

148. *Id.*

149. *Id.*

150. See *supra* Part II.A (discussing bail appeals); *accord* *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007) (requiring trial courts to “enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence”); *Brown v. State*, 703 N.E.2d 1010, 1020 (Ind. 1998) (encouraging factual findings regarding serious evidentiary disputes in the jury

rendering a bench verdict, saying less may be better.

H. Transferred Intent Presents No Obstacle in Enhancing Offenses

At first blush, *D.H. v. State*¹⁵¹ seems like a straightforward case of transferred intent. During a verbal exchange between students in a classroom, one student threw a punch toward the other but missed and hit the teacher. Missing the intended victim and hitting someone else is not a defense.¹⁵² But if the student had struck the other student, he would have committed only a misdemeanor; the crime became a felony because he struck a teacher.¹⁵³ The court of appeals nevertheless upheld the felony conviction, reasoning that the State was required only to prove that D.H. “knowingly or intentionally struck *someone*, and then prove beyond a reasonable doubt that the victim happened to be a teacher.”¹⁵⁴ It relied on *Markley v. State*,¹⁵⁵ which held that “the culpability requirement applies only to the conduct of the statute.”¹⁵⁶

This principle from *Markley*, however, is hardly settled law. Indiana Code section 35-41-2-2(d) provides that the culpability required for the commission of an offense is “required with respect to every material element of the prohibited conduct.”¹⁵⁷ Case law interpreting the statute is “riddled with inconsistent interpretation,”¹⁵⁸ such as *Louallen v. State*,¹⁵⁹ which held that the statute “requires that the level of mental culpability required for commission of the offense itself is required with respect to *every element of the offense*—not every element of the *prohibited conduct*, as the statute requires, but every element of the *offense*.”¹⁶⁰ Although transfer was not sought in *D.H.*, the reach of intent to the other statutory elements of offenses is an issue likely to resurface in future appellate cases and cause continued confusion for trial courts when crafting jury instructions.¹⁶¹

I. Enhancing Drug Offenses Within 1,000 Feet of . . . Anything

The Indiana Supreme Court considered three cases involving enhanced crimes for drug offenses. Possessing or dealing cocaine is a felony but may be further enhanced when the defendant is within 1,000 feet of school property,

instruction context).

151. 932 N.E.2d 236 (Ind. Ct. App. 2010).

152. *Id.* at 238.

153. *Id.*

154. *Id.* at 239.

155. 421 N.E.2d 20 (Ind. Ct. App. 1981).

156. *D.H.*, 929 N.E.2d at 238 (citing *Markley*, 421 N.E.2d at 21-22).

157. IND. CODE § 35-41-2-2(d) (2011).

158. Graham C. Polando, *Markley's Forgotten Revolution: Connecting Mental States in Indiana's Criminal Code*, RES GESTAE 24, 24 (Jan./Feb. 2010).

159. 778 N.E.2d 794 (Ind. 2002).

160. Polando, *supra* note 158, at 26 (citation omitted).

161. *See id.*

public parks, family housing complexes, or youth program centers.¹⁶² Another statute provides a “defense” to the enhanced charge when:

- (1) a person was briefly in, on, or within one thousand (1,000) feet of school property, a public park, a family housing complex, or a youth program center; and
- (2) no person under eighteen (18) years of age at least three (3) years junior to the person was in, on, or within one thousand (1,000) feet of the school property, public park, family housing complex, or youth program center at the time of the offense.¹⁶³

In two cases decided on the same day, the Indiana Supreme Court clarified the procedures and burdens for this defense. The court adopted the approach applied in *Harrison v. State*,¹⁶⁴ which drew upon its analysis of the loaded/unloaded distinction in pointing a firearm cases from *Adkins v. State*.¹⁶⁵ Specifically, subsection 16(b) “constitutes a mitigating factor that reduces culpability, and therefore the defendant does not have the burden of proof but ‘only the burden of placing the issue in question where the State’s evidence has not done so.’”¹⁶⁶ Once the defense is put at issue,

the State must rebut the defense by proving beyond a reasonable doubt either that the defendant was within 1000 feet of a public park more than “briefly” *or* persons under the age of eighteen at least three years junior to the defendant were within 1000 feet of the public park¹⁶⁷

The term “briefly” is not defined in the statute, but the court defined it as “a period of time no longer than reasonably necessary for a defendant’s intrusion into the proscribed zone principally for conduct unrelated to unlawful drug activities, provided that the defendant’s activities related to the charged offense are not visible.”¹⁶⁸

In *Griffin v. State*,¹⁶⁹ the defendant was stopped at 2:15 a.m. near a school after being observed pushing his moped for five minutes.¹⁷⁰ The police officer testified that he did not see any children on or near the school property, which was sufficient to raise an issue under the second prong of the defense and require the State to rebut the defense.¹⁷¹ Because the defense could be defeated by the State rebutting either prong, the court then turned to the “briefly” issue of the first prong. The court emphasized the importance of context, reasoning that “the word

162. IND. CODE §§ 35-48-4-2, 35-6(b).

163. *Id.* § 35-48-4-16(b).

164. 901 N.E.2d 635 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 991 (Ind. 2009).

165. 887 N.E.2d 934 (Ind. 2008).

166. *Griffin v. State*, 925 N.E.2d 344, 347 (Ind. 2010) (quoting *Harrison*, 901 N.E.2d at 642).

167. *Id.*

168. *Id.* at 349-50.

169. 925 N.E.2d 344 (Ind. 2010).

170. *Id.* at 347.

171. *Id.* at 347-48.

implies that such duration must be determined in relation to other considerations, not merely an abstract, temporal component.”¹⁷² The term “could encompass a greater duration of time” when a defendant’s purpose in entering the proscribed zone was for a purpose other than illicit drug activities, whereas even a relatively short time period would qualify if the purpose for entering the zone was drug activity, “especially if such activity is visible to any children.”¹⁷³ Because the State proved neither that Griffin’s few minutes within the 1000-foot zone “lasted longer than reasonably necessary to push the moped down the street nor that his criminal activities while there would have been visible to any children if present,” the court reduced his B felony conviction for possession of cocaine to a D felony.¹⁷⁴

The court applied the same analytical framework but reached a different result in *Gallagher v. State*.¹⁷⁵ There, the State agreed that no one under the age of eighteen was present when the drug exchange occurred around 3:00 a.m. However, the defendant was in the proscribed zone for at least thirteen minutes, during which he was “principally engaged in conduct related to unlawful drug activities clearly visible to anyone present,” which the court concluded does not qualify as “briefly.”¹⁷⁶

In another cases, the supreme court considered the meaning of “a youth program center,” which also allows an enhancement under Indiana Code section 35-48-4-6. In *Whatley v. State*,¹⁷⁷ the court rejected vagueness and sufficiency challenges when the defendant was arrested near the Robinson Community Church (RCC).¹⁷⁸ Although the statute requires that youth programs or services be provided on a “regular” basis to qualify for the enhancement, the court found the statute did not fail for vagueness because “Whatley could have objectively discovered RCC’s status as a youth program center by observing young people entering and exiting the building on a regular basis—in fact, his residence faced RCC’s entrance.”¹⁷⁹ As to the sufficiency claim, the court cited several youth programs regularly offered at the church.¹⁸⁰

J. A New Guilty Plea Advisement

Most cases summarized in the survey apply a common law, statutory, or constitutional rule to a set of facts. *Hopper v. State*¹⁸¹ is a rare case, grounded

172. *Id.* at 349.

173. *Id.*

174. *Id.* at 350.

175. 925 N.E.2d 350 (Ind. 2010).

176. *Id.* at 354-55. The court also considered and rejected the defendant’s claim that he was within the proscribed zone “at the request or suggestion of a law enforcement officer or an agent of a law enforcement officer.” *Id.* at 355 (quoting IND. CODE § 35-48-4-16(c) (2010)).

177. 928 N.E.2d 202 (Ind. 2010).

178. *Id.* at 206-07.

179. *Id.* at 206.

180. *Id.* at 207.

181. 934 N.E.2d 1086 (Ind. 2010).

instead in the supreme court's supervisory power over lower courts.

Since 1975, *Faretta v. California*¹⁸² has required advising defendants of the dangers of self-representation at trial, but different considerations are at play when a defendant pleads guilty.¹⁸³ The Sixth Amendment generally does not require advisement of specific risks of waiving counsel before pleading guilty, but state courts are free to adopt guidelines they deem useful.¹⁸⁴ *Hopper* did just that, holding that Indiana affords rights beyond *Faretta*. Defendants must

also be informed that an attorney is usually more experienced in plea negotiations and better able to identify and evaluate any potential defenses and evidentiary or procedural problems in the prosecution's case. Such an advisement will require minimal additional time or effort at the initial hearing, and may encourage defendants to accept counsel.¹⁸⁵

Chief Justice Shepard, joined by Justice Dickson, dissented by posing several pointed questions:

How many innocent people are now pleading guilty without a lawyer because the judge did not tell them they could consult a lawyer? How many guilty people will decide not to plead guilty as the result of the "minimal" judicial intervention the majority says it contemplates? If indeed the advisement is likely to be minimal, does it tell offenders anything they didn't learn from television? How many repeat offenders will avoid the penalties they have otherwise earned because the warning was omitted or was found inadequate with the benefit of hindsight? How many victims will these repeat offenders create?¹⁸⁶

Because the *Hopper* rule applies only to future cases,¹⁸⁷ it would appear unlikely to lead to the wide-scale setting aside of guilty pleas and victimization by "repeat offenders." The *Benchbook*, which is widely used by Indiana trial judges as a guide for legal procedure, can easily be modified to include the advisement, which judges will routinely read to defendants. Rather than dissuading a defendant from pleading guilty, the advisement may encourage a defendant to engage the services of a lawyer, which the majority observed could lead to fewer defendants proceeding pro se and more expeditious proceedings with the assistance of counsel.¹⁸⁸ Finally, although it is difficult to know what the average defendant may have learned from television, most lawyer shows seem to focus on the glamour of trials instead of the "nitty-gritty" of plea negotiations.

182. 422 U.S. 806 (1975).

183. See *Hopper*, 928 N.E.2d at 1087.

184. *Id.* at 1088 (citing *Iowa v. Tovar*, 541 U.S. 77, 81 (2004)).

185. *Id.*

186. *Id.* at 1089 (Shepard, C.J., dissenting).

187. See *id.*

188. *Id.* at 1088 (majority opinion).

K. *Inconsistent Verdicts Unassailable on Appeal*

Although the supreme court went beyond minimum federal constitutional requirements in *Hopper*, it followed the same course as the United States Supreme Court in clarifying Indiana law on inconsistent verdicts. In *Beattie v. State*,¹⁸⁹ a jury found a defendant not guilty of the general offense of dealing cocaine but guilty of the more specific offense of dealing cocaine within 1000 feet of a family housing complex.¹⁹⁰ The court of appeals reversed because “the inconsistency in the jury’s verdict leaves us unable to determine what evidence the jury believed.”¹⁹¹

The United States Supreme Court had long held that inconsistent verdicts could result from “compromise” or “mistake” by the jury but nevertheless “cannot be upset by speculation or inquiry into such matters.”¹⁹² The Indiana Supreme Court had largely followed the same approach in refusing to interfere with inconsistent or irreconcilable jury verdicts.¹⁹³ The one prominent exception was *Marsh v. State*,¹⁹⁴ where the court declared that “perfectly logical” verdicts were not required, but “extremely contradictory and irreconcilable verdicts warrant correction action by this court.”¹⁹⁵

In *Beattie*, the supreme court overruled *Marsh* and returned to the federal rule of unassailability of inconsistent jury verdicts.¹⁹⁶ It aptly noted that such verdicts usually result from juries exercising lenity or as a “compromise among disagreeing jurors.”¹⁹⁷ Although defendants may no longer challenge such verdicts as inconsistent, any guilty verdict may be challenged on sufficiency grounds.¹⁹⁸

L. *Sentencing*

The Indiana Supreme Court resolved a split in appellate court decisions about the scope of appellate review for partially suspended sentences and clarified the use of scoring models in sentencing. The court of appeals increased a sentence for the first time on appeal, an issue certain to require supreme court intervention and clarification in the near future.

1. *Executed or Suspended Time*.—As explained in last year’s survey, a

189. 924 N.E.2d 643 (Ind. 2010).

190. *Id.* at 644.

191. *Id.* (quoting *Beattie v. State*, 903 N.E.2d 1050, 1057 (Ind. Ct. App. 2009), *rev’d*, 924 N.E.2d 643 (Ind. 2010)).

192. *Id.* at 645 (quoting *Dunn v. United States*, 284 U.S. 390, 394 (1932)).

193. *Id.* at 646.

194. 393 N.E.2d 757, 761 (Ind. 1979).

195. *Beattie*, 924 N.E.2d at 646 (quoting *Marsh*, 393 N.E.2d at 761).

196. *Id.* at 648. The court explained that “it is difficult, if not impossible, to give meaning to the *Marsh* requirement that challenged verdicts be ‘extremely’ contradictory and irreconcilable. . . . The modifier ‘extremely’ is surplusage.” *Id.* at 647.

197. *Id.* at 649.

198. *Id.*

significant split in the court of appeals developed in recent years regarding the effect of a suspended sentence on appellate sentence review under Indiana Appellate Rule 7(B).¹⁹⁹ In *Davidson v. State*,²⁰⁰ the Indiana Supreme Court resolved that split. The court observed the “variety of options” beyond the length of a sentence that trial courts may order, including suspension of the sentence, probation, home detention, community corrections, or executed time in a department of correction facility.²⁰¹ Declining to interpret the term “sentence” narrowly, the court held that “appropriateness” review should consider “whether a portion of the sentence is ordered suspended or otherwise crafted using any of the variety of sentencing tools available to the trial judge.”²⁰² Rarely have appellate courts delved into such particulars; instead, they have reduced executed sentences at the department of correction.²⁰³ Nevertheless, the supreme court made clear that a reviewing court could determine a sentence to be inappropriate “due to its overall sentence length despite the suspension of a substantial portion thereof.”²⁰⁴ This is particularly significant because, as explained in last year’s survey, defendants challenging a sentence imposed after probation revocation face a much higher bar than the “appropriateness” standard on direct appeal in securing a reduction.²⁰⁵

2. *Scoring Models*.—Rarely do the Indiana Prosecuting Attorneys Council and Indiana Public Defender Council file amicus briefs on the same side of an issue. But when the Indiana Supreme Court sought amicus briefs in a case involving the use of scoring models by trial courts in sentencing,²⁰⁶ defense lawyers and prosecutors, joined by the state public defender and criminal justice and appellate practice sections of the Indianapolis Bar Association, voiced serious reservations.²⁰⁷ The Indiana Public Defender Council’s concern that such

199. Schumm, *supra* note 119, at 709-11.

200. 926 N.E.2d 1023 (Ind. 2010).

201. *Id.* at 1025.

202. *Id.*

203. See generally Schumm, *supra* note 12, at 948-51. But see *id.* at 951 n.151 (citing *Davis v. State*, 851 N.E.2d 1264, 1269 (Ind. Ct. App. 2006) (“reducing sentence of four years at DOC followed by two years at community corrections to ‘four years with the time remaining on her sentence to be served through Community Corrections so that she may continue to work to provide for her children and to pay restitution to the victims’”).

204. *Davidson*, 926 N.E.2d at 1025.

205. See Schumm, *supra* note 119, at 711.

206. *Malenchik v. State*, 928 N.E.2d 564 (Ind. 2010).

207. All of the amicus briefs in the case are posted on the Indiana Law Blog. See Brief of Amicus Curiae Ind. Prosecuting Attorneys Council, *Malanchik v. State*, No. 79S02-0908-CR-365, 928 N.E.2d 564 (Ind. 2010); Brief of Amicus Curiae Indianapolis Bar Ass’n, Criminal Justice & Appellate Practice Sections in Support of Appellant’s Petition to Transfer, No. 79S02-0908-CR-365, *Malanchik*, 928 N.E.2d 564; Brief of Transfer of Amicus Curiae Ind. Pub. Defender Council, No. 79S02-0908-CR-365, *Malanchik*, 928 N.E.2d 564; Brief of Pub. Defender of Ind. as Amicus Curiae, No. 79S02-0908-CR-365, *Malanchik*, 928 N.E.2d 564.

instruments are “unreliable” because they were not designed for sentencing²⁰⁸ and the Indiana Public Defender’s view that scoring models may infringe on a defendant’s right to confrontation or to present favorable evidence are not surprising.²⁰⁹ The Indiana Prosecuting Attorneys Council, however, expressed serious concern as well: “Most disturbing, the ‘score’ may be based on demographic factors beyond the control of the defendant. This conflicts with our basic principles of justice.”²¹⁰ The Indianapolis Bar Association expressed concern that

the mere recitation by judges of a numeric result from a scoring model, without some understanding of where it came from and what it means, may raise concerns about the fairness of the process and the ability of defendants, victims, and the public to understand and have confidence in the sentencing process and, more broadly, the criminal justice system.²¹¹

In *Malenchik v. State*,²¹² the Indiana Supreme Court acknowledged that scoring models like the Level of Service Inventory-Revised (LSI-R) “can be significant sources of valuable information for judicial consideration in deciding whether to suspend all or part of a sentence, how to design a probation program for the offender, whether to assign an offender to alternative treatment facilities or programs, and other such corollary sentencing matters.”²¹³ The scores do not, however, function as aggravating or mitigating circumstances or “substitute for the judicial function of determining the length of sentence appropriate for each offender.”²¹⁴ Moreover, defendants (and presumably the State) “may seek to diminish the weight to be given such test results by presenting contrary evidence or by challenging the administration or usefulness of the assessment in a particular case.”²¹⁵ The extent to which these scores are challenged at sentencing hearings will likely vary based on lawyers’ assessments of judicial reliance on the instruments and how damaging a particular score is perceived in a given case. Applying *Malenchik* on the same day it was decided, the supreme court in *J.S. v. State*²¹⁶ found no error in the trial court’s refusal to consider a defendant’s low LSI-R score of 13 as a mitigating circumstance.²¹⁷

3. *Increasing Sentences on Appeal*.—As summarized in last year’s survey,

208. Brief of Transfer of Amicus Curiae Ind. Pub. Defender Council, *supra* note 207, at 6-8.

209. Brief of Pub. Defender of Ind. as Amicus Curiae, *supra* note 207, at 7-8.

210. Brief of Amicus Curiae Ind. Prosecuting Attorneys Council, *supra* note 207, at 1-2.

211. Brief of Amicus Curiae Indianapolis Bar Ass’n Criminal Justice and Appellate Practice Sections in Support of Appellant’s Petition to Transfer, *supra* note 207, at 2-3.

212. 928 N.E.2d 564 (Ind. 2010).

213. *Id.* at 573.

214. *Id.*

215. *Id.* at 575.

216. 928 N.E.2d 576 (Ind. 2010).

217. *Id.* at 579. Although an adult defendant’s name is almost always used in criminal appeals, the court used initials in the case to identify the forty-nine-year-old defendant “to enhance the privacy of the child victim, his grandchild.” *Id.* at 577 n.1.

the longstanding understanding that appealing a sentence could not make matters worse changed in 2009 with *McCullough v. State*.²¹⁸ There, the Indiana Supreme Court made clear that “‘revise’ is not synonymous with ‘decrease,’ but rather refers to any change or alteration” and could include increases.²¹⁹ The appellate courts do not have an unfettered right to increase sentences on appeal.²²⁰ Rather, only when a defendant seeks revision of the sentence will the court consider “whether to affirm, reduce, or increase the sentence.”²²¹ In responding to such a challenge, the State may present reasons for an increased sentence.²²² The State may not initiate a sentencing challenge on appeal or cross-appeal, however.²²³

Just over a year after *McCullough* was decided, the court of appeals in *Akard v. State*²²⁴ exercised this power for the first (and, thus far, only) time in increasing a ninety-three-year sentence for several sex and confinement convictions in a graphic assault case to 118 years. The court relied on Justice Boehm’s concurring opinion in *McCullough*, which limited increases under Rule 7(B) to “the most unusual case[s].”²²⁵ The court found the case “most unusual” because of the defendant’s “demented purpose in attempting to satisfy his prurient interests in child bondage-style rape by performing similar acts on a homeless woman who possessed physical characteristics akin to those of a child.”²²⁶ In denying rehearing, the court of appeals found it inconsequential that the prosecutor had requested ninety-three years in the trial court and the attorney general had not requested an increase because the statutory range is the only limitation on the appellate court in reviewing a sentence on appeal.²²⁷ The supreme court granted transfer, vacating the court of appeals’s decision.²²⁸

Although the court of appeals’ opinion has been vacated, it highlights

218. 900 N.E.2d 745 (Ind. 2009).

219. *Id.* at 749-50.

220. The court is free, however, to correct an illegal sentence, as in *Young v. State*, 901 N.E.2d 624 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 552 (Ind. 2009). There, the defendant was convicted of D felony operating a vehicle while intoxicated (OVWI), which was enhanced for being a habitual substance offender (HSO). Most of the OVWI time and all of the HSO time was suspended. The mandatory HSO term is three to eight years, “[a]nd the trial court can only suspend that portion of the sentence in excess of three and a half years.” *Id.* at 626 (citing *Bauer v. State*, 875 N.E.2d 744, 750 (Ind. Ct. App. 2007)). Therefore, the case was remanded with instructions to order three and a half years executed time. *Id.* This meant the defendant, who had completed his 240-day sentence, would have to serve nearly a year and a half additional executed time in prison or community corrections, even with credit for good behavior.

221. *McCullough*, 900 N.E.2d at 750.

222. *Id.* at 751.

223. *Id.* at 750.

224. 924 N.E.2d 202 (Ind. Ct. App.), *vacated*, 937 N.E.2d 811 (Ind. 2010).

225. *Id.* at 211 (quoting *McCullough*, 900 N.E.2d at 751) (Boehm, J., concurring)).

226. *Id.* at 211.

227. *Akard v. State*, 928 N.E.2d 623, 625 (Ind. Ct. App. 2010).

228. The Indiana Supreme Court issued its opinion on December 9, 2010—after the survey period. *Akard v. State*, 937 N.E.2d 811 (Ind. 2010).

significant concerns for future cases and thus is worthy of discussion here. The Indiana Attorney General requested increased sentences on appeal in several cases in the months after *McCullough*.²²⁹ The basis for seeking an increase is not always clear, although a deputy attorney suggested that such requests occur when the trial court imposes a sentence less than the prosecutor's request.²³⁰ Increases would seem especially inappropriate when a party gets what it asks for in the trial court. For example, when a prosecutor asked the trial court to merge a theft conviction into a conviction for burglary, the supreme court refused to consider the State's claim on appeal that merger was inappropriate.²³¹ Parties may not take advantage of an error they commit, invite, "or which is the natural consequence of . . . [their] neglect or misconduct."²³² Thus, if the State does not ask for an increase on appeal but receives one, the result is the same (an increased sentence), if not more troubling. The elected trial judge can impose the lengthy sentence requested by the State and be reversed as too lenient on appeal.

All of this puts appellate counsel in a difficult, if not impossible, position in advising clients who seek to challenge a sentence on appeal because counsel is wholly unable to explain the parameters of when an increase might occur. There is a considerable and understandably gray area in sentencing.²³³ Trial courts are appropriately given latitude to craft a suitable sentence, and appellate courts then address appropriateness deferentially by considering "the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case."²³⁴ For example, although twenty years may not be the only "right" answer in a given case, fifty years may be too long or five years may be too short. Determining those parameters is especially difficult, if not impossible, under *Akard*. The opinion cited no guiding principle

229. See, e.g., *Poindexter v. State*, 926 N.E.2d 1133 (Ind. Ct. App.) (unpublished table decision), *trans. denied*, 940 N.E.2d 820 (Ind. 2010); *Arnold v. State*, 923 N.E.2d 30 (Ind. Ct. App. 2010) (unpublished table decision); *McClish v. State*, 921 N.E.2d 56 (Ind. Ct. App. 2010) (unpublished table decision); *McGuffin v. State*, 919 N.E.2d 614 (Ind. Ct. App. 2009) (unpublished table decision); *Davidson v. State*, 916 N.E.2d 954 (Ind. Ct. App. 2009), *vacated on transfer*, 926 N.E.2d 1023 (Ind. 2010); *Moore v. State*, 907 N.E.2d 179 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 555 (Ind. 2009); *Lewis v. State*, 905 N.E.2d 1104 (Ind. Ct. App. 2009) (unpublished table decision); *Atwood v. State*, 905 N.E.2d 479 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 556 (Ind. 2009); *Douglas v. State*, 904 N.E.2d 394 (Ind. Ct. App. 2009) (unpublished table decision).

230. The Indiana Supreme Court heard oral argument in *Akard* on November 4, 2010. The webcast may be accessed at INCITE, <http://mycourts.in.gov/arguments/default.aspx?view=detail&id=1114> (last visited Aug. 11, 2011).

231. *Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005).

232. *Id.* (citations omitted). *But cf.* *Miles v. State*, 889 N.E.2d 295, 296 (Ind. 2008) (refusing to apply the invited error doctrine when defense counsel requested a sentence no more than sixty-five years because "the trial court exercised discretion in determining Miles's sentence and Miles is entitled to contest the reasonableness of a trial court's sentencing discretion on appeal").

233. See *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008) (observing that there is "no right answer as to the proper sentence in any given case").

234. *Id.*

for the increase of twenty-five years but merely recited the graphic facts before concluding that “this is a most unusual case that warrants the extreme rarity of this [c]ourt invoking its authority to revise a defendant’s sentence upward.”²³⁵

A detailed statement of reasons seems like a minimal requirement before a sentence is increased on appeal. The Indiana Supreme Court has long held that “a sentencing statement identifying aggravators and mitigators retains its status as an integral part of the trial court’s sentencing procedure”²³⁶ and is crucial to “help both the defendant and the public understand why a particular sentence was imposed.”²³⁷ Before a sentence is altered on appeal, the defendant, the victim, lawyers, judges, and the public should have a clear understanding of the specific reasons for the increase.

Recent cases in which the supreme court reduced sentences included specific reasons and sometimes even citations to similar cases.²³⁸ Consider, for example, a couple of cases decided during the survey period. In *Knight v. State*,²³⁹ the court reduced a seventy-year sentence to forty years, relying heavily on a comparison to a co-defendant’s sentence, which had also been reduced on appeal, as well as the defendant’s youthful age of seventeen and criminal history that did not demonstrate “recalcitrance or depravity.”²⁴⁰ In *Rivers v. State*,²⁴¹ the supreme court ordered two consecutive terms of thirty years for child molesting to be served concurrently. The defendant had no prior convictions, maintained steady employment, and had “served as a father figure” to the victim for many years. The court found that the defendant’s violation of his position of trust as the

235. *Akard v. State*, 924 N.E.2d 202, 212 (Ind. Ct. App.), *vacated*, 937 N.E.2d 811 (Ind. 2010).

236. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007).

237. *Id.* (quoting *Abercrombie v. State*, 417 N.E.2d 316, 319 (Ind. 1981)).

238. Most notably, in *Smith v. State*, 889 N.E.2d 261 (Ind. 2008), the court cited the defendant’s minor criminal history and poor mental health balanced against his violation of the victim’s trust and psychological abuse in reducing a 120-year sentence to sixty years. The opinion included a string citation of cases to demonstrate that the revision was “consistent with this [c]ourt’s general approach to . . . [sentencing] matters.” *Id.* at 264-65.

239. 930 N.E.2d 20 (Ind. 2010).

240. *Id.* at 23. In a case decided a few months earlier, the court of appeals reiterated that no authority required proportional sentences for co-participants. *Abrajan v. State*, 917 N.E.2d 709, 713 (Ind. Ct. App. 2009). Regardless of whether proportional sentences are required, the Indiana Supreme Court appears willing to consider the sentence imposed against a co-defendant.

Even more troubling, the court of appeals in *Abrajan* appeared to fault the defendant for admitting “only to the rape” when the co-defendant admitted “all of his guilt.” *Id.* A defendant should not be required to plead guilty to every charge against him in order to receive mitigating weight on appeal. This should be especially true when a co-defendant who pleads guilty to multiple charges receives a shorter sentence. As the Indiana Supreme Court has made clear, appellate sentence review “should focus on the forest—the aggregate sentence—rather than the trees” *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008).

241. 915 N.E.2d 141 (Ind. 2009).

victim's uncle "deserve[d] a serious sanction."²⁴² However, the crimes did not occur over a long period of time, but rather involved two separate incidents in a short period of time—seven years before the defendant was charged.²⁴³

One way to constrain *McCullough* in a manner that will help appellate counsel advise clients and better ensure consistency would be to limit increases on appeal to cases where the trial court has disregarded one or more established sentencing principles. Limiting increases to cases involving an extreme violation of established sentencing principles would be consistent with the purpose of article 7, sections 4 and 6 of the Indiana Constitution, which were proposed in the 1960s and took effect as constitutional amendments approved by the voters in 1970.²⁴⁴ The framers of "these provisions had in mind the sort of sentencing revision conducted by the Court of Criminal Appeals in England."²⁴⁵ At the time of the amendment, the English system included "a complex and coherent body of sentencing principles and policy," which had been developed to realize the goal of eradicating disparities in the sentences imposed by trial courts.²⁴⁶

In reducing sentences, principles aimed at eradicating disparities have been applied in many cases. For example, consistent with English practice, in reducing sentences, the supreme court has taken an especially hard look at consecutive sentences, especially those involving the same victim.²⁴⁷ In England, trial courts also enjoy considerable discretion in imposing concurrent or consecutive sentences, but

the aggregate of the sentences imposed must bear some relationship to the gravity of the individual offences. Even for completely separate offences, it is not permissible to aggregate consecutive sentences so that a total is reached which is far in excess of what would be considered appropriate for the most serious of the individual offences.²⁴⁸

Although an increase may be warranted when a trial court imposes short,

242. *Id.* at 143.

243. *Id.* at 144.

244. *See* Walker v. State, 747 N.E.2d 536, 537 (Ind. 2001).

245. *Id.* at 537-38; *see also* JUDICIAL STUDY COMMISSION, REPORT OF THE JUDICIAL STUDY COMMISSION '140 (1966) ("The proposal that the appellate power in criminal cases include the power to review sentences is based on the efficacious use to which the power has been put by the Court of Criminal Appeals in England.").

246. D.A. Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193, 194, 197 (1968).

247. *See generally* Serino v. State, 798 N.E.2d 852, 857-58 (Ind. 2003).

248. Thomas, *supra* note 246, at 203. In reviewing sentences of defendants who plead guilty in England, "the Court of Appeal has formulated the principle that . . . an offender's remorse, expressed in his plea of guilty, may properly be recognized as a mitigating factor." *Id.* at 201. The supreme court has taken a similar view, recognizing that an early guilty plea saves the victims from going through a full-blown trial and conserves limited prosecutorial and judicial resources; therefore, it is a mitigating circumstance entitled to significant weight. Francis v. State, 817 N.E.2d 235, 238 (Ind. 2004).

concurrent sentences in a case with separate and extraordinary harm to multiple victims, the crimes in *Akard* were committed against the same victim.²⁴⁹ Moreover, an increase may be warranted for a defendant with a violent and lengthy criminal history who receives a near-minimum sentence, but the defendant there had a modest criminal history and received near-maximum and consecutive sentences.²⁵⁰

Requiring the recitation and application of these principles would ensure that any increase on appeal occurs with consistency and only in a most extreme and unusual case. The English appellate court “is clearly conscious of its policy making role” and appropriately “establishes policy not by dramatic declarations in isolated decisions but by regularly exhibiting the same approach to the same kind of case.”²⁵¹ Although sentencing appeals in Indiana are randomly assigned to rotating panels on the court of appeals, sentence revisions (both reductions and increases) should not be anything close to random. Rather, revisions should occur in a consistent manner grounded in principle and precedent. Appellate counsel has no idea which three judges will hear a case when advising a client whether to appeal a sentence, and some judges are more amenable to revisions than others. Limiting and better defining the ability of appellate courts to increase sentences is crucial to allow appellate counsel the ability to fulfill their ethical and constitutional responsibility to provide competent and effective advice to clients who seek to appeal their sentence. It is also essential to fulfill the laudable goal of the review and revise power; “a respectable legal system attempts to impose similar sentences on perpetrators committing the same acts who have the same backgrounds.”²⁵²

M. Probation

A pair of cases highlights limitations on the use of probable cause affidavits at probation revocation hearings. In *Davis v. State*,²⁵³ defense counsel admitted his client had been arrested for a crime while on probation.²⁵⁴ Although an admission by counsel is binding on the probationer, the majority nevertheless found insufficient evidence to support revocation because there was no admission of probable cause for the arrest.²⁵⁵ Moreover, the State offered no evidence that Davis had committed an offense; nor was the probable cause affidavit admitted into evidence.²⁵⁶ Judge Mathias dissented, noting that counsel did not simply admit an arrest but also an “agreement” for “twelve years” in prison, which

249. *Akard v. State*, 924 N.E.2d 202, 204-05 (Ind. Ct. App.), *vacated*, 937 N.E.2d 811 (Ind. 2010).

250. *Id.* at 211-12.

251. Thomas, *supra* note 246, at 197.

252. *Serino*, 798 N.E.2d at 854.

253. 916 N.E.2d 736 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 786 (Ind. 2010).

254. *Id.* at 740.

255. *Id.*

256. *Id.*

evidenced an agreement that his probation would be revoked.²⁵⁷

In *Figures v. State*,²⁵⁸ the court of appeals held that a trial court erred in admitting into evidence a probable cause affidavit “absent any foundation to establish its reliability.”²⁵⁹ Although the rules of evidence do not apply in probation hearings, hearsay evidence is only admissible if “substantially trustworthy.”²⁶⁰ Trial courts are encouraged to explain on the record why the hearsay is trustworthy, which did not occur in *Figures*; nor was any corroborating evidence offered.²⁶¹ Although the court had previously affirmed the revocation of probation in a case supported only by a probable cause affidavit,²⁶² the panel in *Figures* found that case distinguishable because it did not involve an affidavit from a case that was dismissed.²⁶³

Figures reiterated the general “risk of unreliability” in any probable cause affidavit.²⁶⁴ A case could be dismissed for a variety of reasons, though, which may have little to do with the probable cause affidavit. For example, one or more cases might be dismissed as part of a plea agreement to charges in another case.

The safer route for prosecutors and trial courts would be to avoid reliance on probable cause affidavits and instead secure an admission to the arrest with the stipulation that it was supported by probable cause or call a witness to establish the facts supporting the arrest. The burden of proof in probation proceedings is merely by a preponderance of the evidence,²⁶⁵ and securing a proper stipulation or calling a witness would seem to pose a minimal burden before revocation and a lengthy prison sentence. Simply proving some violation other than a new arrest (such as failing to report to probation or complete community service work) is a safer path to support revocation.²⁶⁶

N. Sex Offender Registry

As summarized in last year’s survey,²⁶⁷ the Indiana Supreme Court held in *Wallace v. State*²⁶⁸ that the Sex Offender Registration Act does not apply to defendants who committed offenses before the Act was enacted.²⁶⁹ That opinion spawned appellate opinions on a variety of related issues and new legislation to create a procedure for removal of *Wallace*-like defendants from the registry.

In the wake of *Wallace*, many defendants filed petitions in the court where

257. *Id.* at 741 (Mathias, J., dissenting).

258. 920 N.E.2d 267 (Ind. Ct. App. 2010).

259. *Id.* at 272.

260. *Id.* at 271.

261. *Id.* at 271-72.

262. *Id.* at 272 (citing *Whatley v. State*, 847 N.E.2d 1007 (Ind. Ct. App. 2006)).

263. *Id.*

264. *Id.* (quoting *Tate v. State*, 835 N.E.2d 499, 509 (Ind. Ct. App. 2005)).

265. *Id.*

266. *See id.*

267. Schumm, *supra* note 119, at 716-17.

268. 905 N.E.2d 371 (Ind. 2009).

269. *Id.* at 384.

they had been convicted requesting removal. Even a letter to the judge could sometimes result in removal from the registry.²⁷⁰ The 2010 legislation changed much of this, requiring a petition for removal to be filed in the circuit or superior court where the offender currently resides.²⁷¹ Non-resident offenders are required to file the petition in the county where they work or go to school.²⁷² The petition for removal must list information about each conviction (date, court, and whether by plea or trial), list each jurisdiction where the person is required to register, and be made under penalty of perjury.²⁷³ A petition may be summarily dismissed or set for a hearing.²⁷⁴ If a hearing is scheduled, notice must be given to the department of correction, attorney general, prosecuting attorney (where the petition was filed, where the offender was convicted, and where the offender resides), and the sheriff in the county of the offender's residence.²⁷⁵ In addition to the statutory requirements, the attorney general's office has requested that judges construct their removal orders to instruct the sex offenders that they may be required to register under the federal Sex Offender Registration and Notification Act (SORNA).²⁷⁶ Not surprisingly, some judges have been hesitant to "muddy the waters" with such language or overstep their jurisdiction.²⁷⁷

In the weeks after the statutory amendments, which took effect on March 24, 2010, the court of appeals affirmed the denials of motions that did not comply with (and had been filed months earlier than) the new procedures. For example, in *Wiggins v. State*,²⁷⁸ the court stressed that it did not "have enough information to make a determination as to whether Wiggins should be required to continue registering as a sexual violent predator."²⁷⁹ He was directed to file an amended petition that complied with the statutory requirements in the county in which he resides.²⁸⁰ Similar instructions were given to a defendant who filed the petition in Noble County, where he had pleaded guilty to child molesting in 1994 but was presently incarcerated in a state prison in Henry County on a sentence out of Huntington County.²⁸¹

Other cases were found not ripe for adjudication. For example, in *Gardner v. State*,²⁸² the court of appeals considered an ex post facto claim of a man currently incarcerated for a murder conviction. Although the man was convicted

270. See Rebecca S. Green, *Judges, State Duel over Sex Registry*, J. GAZETTE, July 12, 2010, available at <http://www.journalgazette.net/article/20100712/LOCAL03/307129994>.

271. IND. CODE § 11-8-8-22(d) (2011).

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. Green, *supra* note 270.

277. *Id.*

278. 928 N.E.2d 837 (Ind. Ct. App. 2010).

279. *Id.* at 838.

280. *Id.* at 840.

281. *Brogan v. State*, 925 N.E.2d 1285, 1290 (Ind. Ct. App. 2010).

282. 923 N.E.2d 959 (Ind. Ct. App. 2009).

in 1989, years before the violent offender registry was created, he was presently incarcerated and no evidence was offered that he “[had] been court-ordered to register as a violent offender, or that he . . . [had] been notified by any correctional authority or registry coordinator that he . . . [would] be required to register.”²⁸³

In *Vickery v. State*,²⁸⁴ the court of appeals relied heavily on *Jensen v. State*²⁸⁵ in finding no ex post facto violation from the designation of a defendant on the registry as a sexually violent predator (SVP). At the time of his guilty plea in 2000, Jensen was required to register as a sex offender for ten years.²⁸⁶ The 2006 amendments, however, classified him as a “sexually violent predator” and required lifetime registration.²⁸⁷ The plurality opinion, written by Justice Rucker and joined by Chief Justice Shepard, found that some of the *Mendoza-Martinez* factors weighed differently in distinguishing *Wallace*.²⁸⁸ As to the weighty seventh factor, the plurality emphasized that the “broad and sweeping” disclosure requirements were in effect in 2000 and that sexually violent predators may petition the trial court after ten years to have their status changed, which could result in removal from the registry.²⁸⁹ *Vickery* similarly emphasized that the defendant, who committed his offense after the registry was created but before the sexually violent predator (SVP) designation existed, had an opportunity to petition for removal of the SVP designation, which counseled against a conclusion that the act was punitive.²⁹⁰

Wallace seldom helps defendants convicted of sex offenses in other states. Indiana Code section 11-8-8-19(f) requires offenders who are required to register as a sex offender in another state to register in Indiana for the same period required in the other state. In *Herron v. State*,²⁹¹ the court rejected the ex post facto challenge of a man required to register for life under Arizona law because the registration requirement was in effect at the time of the offense.²⁹²

Not all registry offenders struck out, though. In *Hevner v. State*,²⁹³ the supreme court applied and extended *Wallace* to a defendant who committed possession of child pornography in 2005. The registry statute was amended in 2007 to include child pornography.²⁹⁴ The ex post facto clauses prohibit additional punishment for acts that were not punishable at the time of the

283. *Id.* at 960.

284. 932 N.E.2d 678 (Ind. Ct. App. 2010).

285. 905 N.E.2d 384 (Ind. 2009).

286. *Id.* at 388-89.

287. *Id.* at 389.

288. *Id.* at 391-94.

289. *Id.* at 394.

290. *Vickery v. State*, 932 N.E.2d 678, 682 (Ind. Ct. App. 2010).

291. 918 N.E.2d 682 (Ind. Ct. App. 2009).

292. *Id.* at 684.

293. 919 N.E.2d 109 (Ind. 2010).

294. *Id.* at 111 (citing IND. CODE § 11-8-4.5(a)(13) (2010)). Previously, first-time offenses did not qualify.

offense.²⁹⁵ Although the statute was amended before Hevner's trial and sentencing, he could not be ordered to register as a sex offender because doing so would impose additional punishment beyond what could have been imposed at the time of the offense.²⁹⁶

In *Blakemore v. State*,²⁹⁷ the court of appeals rejected some novel arguments by the State in a case involving a defendant convicted of an offense that was not part of the registry when committed in 1999.²⁹⁸ The State attempted to escape *Wallace*'s reach because the defendant agreed to follow the statutory guidelines for sex offender registration as part of his plea agreement.²⁹⁹ The court emphasized the contractual nature of a plea agreement and declined to enlarge the agreement beyond the statute at the time "to predict any changes in the law the legislature might subsequently enact, and to comply with any such changes."³⁰⁰ The court also rejected the State's argument that Blakemore was required to object to the constitutional concerns when he pleaded guilty because "neither he nor his counsel could be expected to predict what amendments our legislature might make to the sex offender registration act."³⁰¹

Finally, beyond the ex post facto realm, in *Branch v. State*,³⁰² the defendant was charged with failing to register a change of address. The court of appeals considered the meaning of the statutorily defined terms "principal residence" and "temporary residence" in the context of the defendant's claim that he was homeless.³⁰³ The majority upheld the conviction because the defendant failed to register a change of address from the homeless shelter where he lived for several days before staying in several different places for only a few days at a time.³⁰⁴ Judge Riley dissented, concluding that the charge did not reference the proper statutory section when the defendant had neither a principal nor a temporary residence.³⁰⁵

295. *Id.*

296. *Id.* at 112-13.

297. 925 N.E.2d 759 (Ind. Ct. App. 2010).

298. *Id.* at 760-61.

299. *Id.* at 762.

300. *Id.*

301. *Id.* at 762-63.

302. 917 N.E.2d 1283 (Ind. Ct. App. 2009).

303. *Id.* at 1284-85.

304. *Id.* at 1286.

305. *Id.* at 1287 (Riley, J., dissenting).

