RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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This Article surveys developments in the area of criminal law and procedure that were enacted by the 1998 General Assembly and addressed by the Indiana appellate courts since the last survey period.

I. 1998 LEGISLATIVE ENACTMENTS

In its forty-seven day[1] short session, the 110th General Assembly enacted several bills that impact the criminal statutes in relatively minor ways. The Indiana General Assembly overrode Governor Frank O'Bannon's veto of an act that amended several criminal statutes to provide liability for conduct that results in the death of a viable fetus.[2] These changes specifically except legally performed abortions.[3] The definition of "serious bodily injury" now includes bodily injury that creates a substantial risk of death or that causes "loss of a fetus."[4] The murder,[5] voluntary manslaughter,[6] and involuntary manslaughter[7] statutes were amended to criminalize the killing of a fetus. The aggravated battery statute now imposes liability for the "loss of a fetus."[8] A fetus is defined as a "fetus that has attained viability (as defined in [Indiana Code section] 16-18-2-365)."[9] Finally, the death penalty statute was also amended to add as an aggravating circumstance (permitting the State to seek either a death sentence or a sentence of life imprisonment without parole) that "[t]he victim of the murder was pregnant and the murder resulted in the intentional killing of a fetus that has attained viability."[10]

The legislature also created the new criminal offense of money laundering, which is generally a Class D felony but becomes a Class C felony if the value of the proceeds or funds is at least $50,000.[11] The crime is committed by:

A person who knowingly or intentionally: (1) acquires or maintains an

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1. *See* Suzanne McBride, *Lawmakers Got Paid $2.6 Million. Each Got At Least $17,800 During the Past Session, While some of the Biggest Issues Went Unresolved*, INDIANAPOLIS STAR, Apr. 26, 1998, at B1.

2. P.L. No. 261-1997, 1998 Ind. Acts 1 (vetoed by governor, May 12, 1997; passed over veto, Jan. 22, 1998).

3. IND. CODE § 35-42-1-0.5 (1998).

4. *Id.* § 35-41-1-25(5).

5. *Id.* § 35-42-1-1(4).

6. *Id.* § 35-42-1-3(a)(2).

7. *Id.* § 35-42-1-4(c).

8. *Id.* § 35-42-2-1.5(3).

9. *See, e.g.*, *id.* § 35-42-1-1(4).

10. *Id.* § 35-50-2-9(b)(16).

11. *See id.* § 35-45-15-5.

> interest in, receives, conceals, possesses, transfers, or transports the proceeds of criminal activity; (2) conducts, supervises, or facilitates a transaction involving the proceeds or criminal activity; or (3) invests, expends, receives, or offers to invest, expend, or receive, the proceeds of criminal activity or funds that are the proceeds of criminal activity, and the person knows that the proceeds or funds are the result of criminal activity.[12]

The statute also provides that it is a defense to the crime if the person acted with intent to facilitate a lawful seizure or forfeiture,[13] if the transaction was necessary to preserve a person's right to counsel,[14] or if the funds were received as legal fees, provided the attorney did not have actual knowledge that the funds were derived from criminal activity.[15]

The definition of lawful detention was amended to include "placement in a community corrections program's residential facility or electronic monitoring."[16] Now, a "person who knowingly or intentionally violates a home detention order and intentionally removes an electronic monitoring device commits escape, a Class D felony."[17]

Cruelty to an animal[18] remains a Class A misdemeanor in most cases, however, the statutory definition was changed, some exceptions were added, and whenever the offender has a prior unrelated conviction for the same offense it may now be charged as a Class D felony.[19] Previously, the crime was defined as a person who knowingly or intentionally (1) tortures, beats, or mutilates a vertebrate animal resulting in serious injury or death to the animal; or (2) kills a vertebrate animal without the authority of the owner of the animal.[20] The amended statute now criminalizes the conduct whenever a person "tortures, beats, or mutilates a vertebrate animal" but provides an exception if the person was "engaged in a reasonable and recognized act of training, handling, or disciplining the vertebrate animal."[21]

The resisting law enforcement statute was amended to make the offense a Class D felony if a person flees from a law enforcement officer with the use of a vehicle.[22] The offense remains a Class A misdemeanor in most other circumstances.[23]

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12. *Id.*
13. *Id.* § 35-45-15-5(b).
14. *Id.* § 35-45-15-5(c)(1).
15. *Id.* § 35-45-15-5(c)(2).
16. *Id.* § 35-41-1-18(a)(7).
17. *Id.* § 35-44-3-5(b).
18. *Id.* § 35-46-3-12.
19. *Id*. § 35-46-3-12(a).
20. *Id*. § 35-46-3-12(a) (1993) (amended by *id.* § 35-46-3-12(a)(1998)).
21. *Id*. §§ 35-46-3-12(a) & (b)(2) (1998).
22. *Id.* § 35-44-3-3(b)(1)(A).
23. *Id.* § 35-44-3-3(a).

The general assembly also amended several statutes to provide enhanced charges for the crimes of rape,[24] criminal deviate conduct,[25] child molesting,[26] vicarious sexual gratification,[27] sexual battery,[28] and sexual misconduct with a minor[29] when

> the commission of the offense is 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.[30]

The legislature also established as a new statutory aggravating circumstance, which trial courts may consider when imposing sentence, that

> [b]efore the commission of the crime, the person administered to the victim of the crime, without the victim's knowledge, a sedating drug or a drug that had a hypnotic effect on the victim, or the person had knowledge that such a drug had been administered to the victim without the victim's knowledge.[31]

The legislature also added another statutory aggravating circumstance that "the injury to or death of the victim of the crime was the result of shaken baby syndrome (as defined in [Indiana Code section] 16-41-40-2)."[32]

The bail statute was amended and now allows trial courts to increase bail if the state presents additional "clear and convincing evidence: (A) of the factors described in [Indiana Code section] 33-14-10-6(1)(A)[33] and [Indiana Code section] 33-14-10-6(1)(B);[34] or (B) that the defendant otherwise poses a risk to the physical safety of another person or the community."[35] The statute previously provided for an increase in bail only when the state presented additional "evidence relevant to a high risk of nonappearance, based on the factors set forth in section 4(b) of this chapter."[36] This change follows a 1996 amendment that

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24. *Id.* § 35-42-4-1(b)(4).

25. *Id.* § 35-42-4-2(b)(4).

26. *Id.* §§ 35-42-4-3(a)(4) & (b)(3).

27. *Id.* §§ 35-42-4-5(a)(2)(B) & (b)(3).

28. *Id.* § 35-42-4-8(b)(3).

29. *Id.* §§ 35-42-4-9(a)(2) & (b)(2).

30. *Id.* §§ 35-42-4-1(b)(4), -2(b)(4), -3(a)(4), -3(b)(3), -5(a)(2)(B), -5(b)(3), -8(b)(3), -9(a)(2), -9(b)(2).

31. *Id.* § 35-38-1-7.1(b)(12).

32. *Id.* § 35-38-1-7.1(b)(11).

33. "[T]hat an act or threat of physical violence or intimidation has been made against the victim or the immediate family of the victim." *Id.* § 33-14-10-6(1)(A).

34. "[T]hat the act or threat has been made by the defendant and the direction of the defendant." *Id.* § 33-14-10-6(1)(B).

35. *Id.* § 35-33-8-5(b)(2).

36. *Id.* § 35-33-8-5 (1993) (amended by *id.* § 35-33-8-5 (1998)).

allowed courts to consider whether a "defendant poses a risk of physical danger to another person or the community" and consider factors "to assure the public's physical safety" when setting bail.[37] The amended statute further provides that the court may not reduce bail "if [it] finds by clear and convincing evidence that the factors described in [Indiana Code section] 33-14-10-6(1)(A)[38] and [Indiana Code section] 33-14-10-6(1)(B)[39] exist or that the defendant otherwise poses a risk to the physical safety of another person or the community."[40]

Finally, the general assembly also enacted a statute that now allows counties to require individuals (1) sentenced to a county jail for a felony or misdemeanor, (2) subject to lawful detention in a county jail for more than seventy-two hours, (3) not a member of a family that makes less than 150% of the federal income poverty level, and (4) not detained as a child subject to juvenile court jurisdiction, to reimburse the county for the cost of incarceration.[41] At the time of sentencing the trial court "shall affix" the amount of this reimbursement that (1) may not exceed an amount the person can or will be able to pay, (2) does not harm the person's ability to reasonably be self-supporting or to reasonably support any dependent(s), and (3) takes into consideration and gives priority to any other restitution, reparation, repayment, cost, fine, or child support obligations that the defendant is required to pay.[42]

II. CASE DEVELOPMENTS

A. Search and Seizure

In *Jaggers v. State*, the supreme court granted transfer "to address the interplay between the 'good faith' exception to the exclusionary rule and the warrant statute, Indiana Code [section] 35-33-5-2."[43] In that case, an Indiana state trooper received an anonymous call asserting that Jaggers was growing and trafficking marijuana in his house. The caller claimed that (1) he had personally seen marijuana in and around Jaggers home on numerous occasions and (2) Jaggers was growing marijuana on two separate plots of land a few miles from Jaggers' house. The officer visited both plots of land, which were easily accessible to the public, and found marijuana growing there. Based on the officer's testimony at a probable cause hearing, a magistrate issued a warrant authorizing a search of Jaggers' home.[44] The search uncovered a substantial

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37. *Id.* § 35-33-8-3.1(a) (1993 & Supp. 1996) (recodified and amended by *id.* § 35-33-8-5 (1998)). *See also* Gary L. Miller & Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 30 IND. L. REV. 1005, 1005 (1997).

38. *See supra* note 32.

39. *See supra* note 33.

40. IND. CODE § 35-33-8-5(c) (1998).

41. *Id.* § 36-2-13-15(c).

42. *Id.* § 35-50-5-4(c).

43. 687 N.E.2d 180, 181 (Ind. 1997).

44. *See id.*

amount of marijuana and related paraphernalia, which Jaggers unsuccessfully moved to suppress before trial.[45]

Quoting *Illinois v. Gates*,[46] the supreme court noted that "'[i]nformants' tips doubtless come in many shapes and sizes from many different types of persons. . . . Rigid legal rules are ill-suited to an area of such diversity.'"[47] In *Jaggers*, however, the "search warrant . . . was issued on uncorroborated hearsay from an informant whose credibility was entirely unknown. This does not satisfy the Fourth Amendment's requirement of probable cause."[48] In addition, the court found that the hearsay in the case failed to satisfy Indiana's statute regulating the issuance of search warrants based on hearsay.[49]

As a final point, the court considered whether the evidence was nevertheless admissible under *United States v. Leon*,[50] which holds that "the exclusionary rule does not require the suppression of evidence obtained in reliance on a defective search warrant if the police relied on the warrant in objective good faith."[51] The good faith exception does not apply, however, if "the warrant was based on an affidavit 'so lacking in indica of probable cause as to render official belief in its existence entirely unreasonable.'"[52] The court observed that the uncorroborated hearsay "on which the warrant was based was so lacking in indicia of probable cause that no well-trained officer would reasonably have relied on the warrant."[53] Noting that *Leon*'s rationale would not be advanced "by effectively allowing the State to claim good faith reliance on a warrant after a less than faithful effort to establish probable cause to obtain it," the court held that the good faith exception did not save the illegally-seized evidence at issue in *Jaggers*.[54]

In *Perkins v. State*,[55] the court of appeals considered the validity of a search incident to lawful arrest. During the execution of a search warrant at a residence, police officers believed that Perkins, who was standing on the porch, was "either reaching for something or concealing something [and o]rdered him to lie down two or three times."[56] He did not comply and the officers pushed him to the floor, handcuffed him, and then entered the house.[57] Perkins first argued that the police were not justified in conducting a limited frisk of his person pursuant to *Terry v. Ohio*.[58] The court rejected this argument and held that "Perkins' actions

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45. *See id.* at 181-82.
46. 462 U.S. 213 (1983).
47. *Jaggers*, 687 N.E.2d at 182 (quoting *Gates*, 462 U.S. at 232).
48. *Id.* at 183.
49. *Id.* at 183-84; *see also* IND. CODE § 35-33-5-2 (1998).
50. 468 U.S. 897 (1984).
51. *Jaggers*, 687 N.E.2d at 184.
52. *Id.* (quoting *Leon*, 468 U.S. at 923).
53. *Id.* at 185.
54. *Id.* at 186.
55. 695 N.E.2d 612 (Ind. Ct. App. 1998).
56. *Id.* at 613.
57. *See id.*
58. 392 U.S. 1 (1968) (holding that a police officer may make a reasonable search for

on the porch were sufficient to justify the officers' concerns for their safety and the *Terry* frisk."[59]

The police discovered a handgun during that frisk, and discovered marijuana during a subsequent search. Perkins sought to suppress the marijuana on the basis that the officer did not have probable cause to arrest him for carrying a handgun without a license at the time of the marijuana's discovery.[60] Individuals may legally carry an unlicenced handgun on their own property, and Perkins was at a residence when the handgun was discovered.[61] Because the State has the burden to justify a warrantless search and the record was not clear whether the search took place before or after Perkins provided information justifying his arrest for carrying a handgun without a license, the court of appeals reversed the trial court's denial of the motion to suppress the marijuana.[62]

In *Carter v. State*,[63] a police officer in plain clothes observed the defendant standing in line at a restaurant. The officer recognized Carter as a person with a prior cocaine conviction and saw Carter "turn toward his direction as the crowd of people entered the restaurant and then turn back toward the counter," place his right hand in his coat pocket, then turn and walk with "long steps" toward the door, bumping into the officer's partner as he exited.[64] The officer followed Carter outside and, as Carter approached a car, the officer reached around and patted the right pocket of Carter's coat. The officer felt what he believed to be a gun, pulled Carter's hand from the coat pocket, retrieved the gun, and placed Carter under arrest.[65]

Carter filed a motion to suppress the evidence obtained during this warrantless search, and the motion was denied by the trial court.[66] Upon consideration of the "totality of the circumstances," the court of appeals reversed the trial court, holding that "the facts and the reasonable inferences arising from the facts would not cause an ordinarily prudent person to believe that criminal activity had or was about to occur."[67]

In *Haley v. State*,[68] the court of appeals considered "[w]hether a person camping in a tent erected in a public campground is entitled to constitutional protection against unreasonable search and seizure[,] an issue of first impression

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weapons on a person the officer believes to be armed and dangerous, if the officer reasonably believes that the officer's safety or the safety of others is endangered).

59. *Perkins*, 695 N.E.2d at 614.

60. *See id.*

61. *See id.*; *see also* IND. CODE § 35-47-2-1 (1998).

62. *Perkins*, 695 N.E.2d at 614.

63. 692 N.E.2d 464 (Ind. Ct. App. 1997).

64. *Id.* at 465.

65. *See id.*

66. *See id.*

67. *Id.* at 467-68.

68. 696 N.E.2d 98 (Ind. Ct. App.), *trans. denied*, No. 66A03-9706-CR-223 (Ind. Oct. 28, 1998).

in Indiana."[69] The court noted that Indiana cases have held that a person renting a hotel or motel room may have a legitimate expectation of privacy in the room.[70] The court agreed with the defendant "that the constitutional protections provided to those who rent hotel rooms should also extend to those who choose to make their 'transitory home' a tent, if they have exhibited a subjective and reasonable expectation of privacy in that tent."[71] The court ultimately concluded that the warrantless seizure of the contraband inside the tent was not justified by exigent circumstances, because it is not likely that the marijuana cigarette at issue would have been "so totally consumed that no evidence of its existence remained."[72]

In *L.A.F. v. State*,[73] the court of appeals addressed whether officers patrolling a housing complex at 12:30 a.m. were justified in performing a *Terry* frisk of a juvenile sleeping in the back seat of a car that they stopped. The court held that the search violated the Fourth Amendment.[74]

> The fact that the officers were investigating L.A.F. and another individual for curfew violations and that L.A.F. had been sleeping in a car at the time the officers arrived is insufficient for a reasonably prudent man to be warranted in the belief that his safety or that of others was in danger.[75]

The trial court erred by admitting into evidence the handgun found during the search.[76]

A similar issue was presented in *State v. Joe*.[77] In that case, the court of appeals considered whether police officers were justified in conducting a *Terry* search for weapons of a car pulled over for speeding and driving left of center. The police were patrolling a neighborhood well known for drug trafficking and shootings. After stopping the car, the driver (Joe) began fidgeting with his hand between the console and the driver's seat, and the police ordered him to put his hands where they could be seen.[78] He did not comply until after the police officer made repeated demands and had drawn his gun. Based on these circumstances, the court upheld the search, noting that "Joe's actions gave rise to a reasonable belief that a limited search of the interior of the car for weapons was necessary to ensure the officers' safety."[79]

In *Parker v. State*,[80] the court of appeals addressed the "plain feel" seizure

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69. *Id.* at 100-01.
70. *Id.* at 101.
71. *Id.*
72. *Id.* at 103.
73. 698 N.E.2d 355 (Ind. Ct. App. 1998).
74. *Id.* at 356.
75. *Id.*
76. *See id.*
77. 693 N.E.2d 573 (Ind. Ct. App. 1998).
78. *See id.* at 574.
79. *Id.* at 575.
80. 697 N.E.2d 1265 (Ind. Ct. App. 1998).

of cocaine found in a suspect's front pants pocket during a patdown search for weapons. The plain feel doctrine was first recognized by the U.S. Supreme Court in *Minnesota v. Dickerson*:

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context.[81]

The officer who performed the patdown search testified at trial that he "merely suspected" that the object was narcotics.[82] Because the identity of the object must be "immediately apparent or instantaneously ascertainable," the plain feel doctrine was not satisfied and the seizure violated the Fourth Amendment.[83]

The plain feel doctrine was also considered in *Burkett v. State*.[84] After pulling over Burkett's car for speeding, the police officer smelled alcohol on the defendant's breath, asked him to take some field sobriety tests, and ultimately administered a portable breath test that registered a blood alcohol content of .08.[85] The officer then escorted Burkett to his police car to transport him to the county jail for a certified breath test. While conducting a patdown search prior to placing Burkett in the police car, the officer felt a round, hard object that he immediately recognized from his experience to be a "one hitter," a pipe used to smoke marijuana.[86] Upon removal of the object from Burkett's pocket, the officer found that it was not a pipe but was a green leafy substance tightly rolled in a plastic bag.[87] The substance tested positive for marijuana. Burkett was charged with possession of marijuana and moved to suppress the evidence, contending that the officer had no basis for conducting a patdown search.[88] Because the police officer would be alone with Burkett in his vehicle as he transported him to the county jail, "a reasonably prudent man in the same circumstances would be warranted to pat down Burkett for his own safety."[89] Accordingly, the trial court properly denied Burkett's motion to suppress.[90]

B. Confessions

The supreme court considered the admissibility of a defendant's

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81. 508 U.S. 366, 375-76 (1993).
82. *See Parker*, 697 N.E.2d at 1268.
83. *Id.*
84. 691 N.E.2d 1241 (Ind. Ct. App. 1998), *trans. denied*, 698 N.E.2d 1194 (Ind. 1998).
85. *See id.* at 1243.
86. *See id.*
87. *See id.*
88. *See id.* at 1243-44.
89. *Id.* at 1244.
90. *See id.* at 1245.

incriminating statement to police in a few different contexts. In *Taylor v. State*,[91] the supreme court considered whether a defendant's *Miranda* rights[92] were violated when police continued to question him after he said: "I don't know what to say. I guess I really want a lawyer, but, I mean, I've never done this before so I don't know."[93] The supreme court applied the standard set forth by the U.S. Supreme Court in *Davis v. United States*.[94] "Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney."[95] The level of clarity required is whether a "reasonable police officer in the circumstances would understand the statement to be a request for an attorney."[96] Davis's statement that "maybe I should talk to a lawyer" was held not to be a request for counsel.[97] The holding of *Davis*, as summarized in *Taylor*, is that "police have no duty to cease questioning when an equivocal request for counsel is made. Nor are they required to ask clarifying questions to determine whether the suspect actually wants a lawyer."[98] The four member majority[99] of the court concluded that Taylor's comments were nothing more than "think[ing] out loud," an expression of doubt and not an unambiguous request for a lawyer.[100] Accordingly, Taylor's statement to the police following this ambiguous request was properly admitted into evidence.[101]

In *Sauerheber v. State*,[102] the court considered the significance of the timing of a defendant's request for counsel. Sauerheber made several requests for an attorney in the presence of a detective during the execution of a search warrant for the collection of samples of his hair, saliva, and blood.[103] Four days later, the police interrogated him after securing a *Miranda* waiver. Sauerheber argued that his confession should have been suppressed based on *Edwards v. Arizona*,[104]

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91. 689 N.E.2d 699 (Ind. 1997).

92. Miranda v. Arizona, 384 U.S. 436 (1966).

93. *Taylor*, 689 N.E.2d at 702-03.

94. 512 U.S. 452 (1994).

95. *Id.* at 459.

96. *Id.*

97. *Id.* at 462.

98. *Taylor*, 689 N.E.2d at 703.

99. Justice Sullivan filed a dissenting opinion in which he considered some of Taylor's other statements in addition to the one quoted above by the majority. He concluded that the "four statements, taken together, constituted a sufficiently clear and unambiguous request to have an attorney present [and] that all the questioning should have ceased." *Id.* at 707 (Sullivan, J., dissenting).

100. *Id.* at 703, 704. Taylor also raised an Indiana Constitutional claim, but the court noted that he "offer[ed] no authority contrary to the *Davis* view construing the Indiana constitutional right to counsel, and [the court] discern[ed] no good reason for a different rule." *Id.* at 704.

101. *Id.* at 703.

102. 698 N.E.2d 796 (Ind. 1998).

103. *See id.* at 800-01.

104. 451 U.S. 477 (1981).

which holds that when a defendant invokes his right to counsel, the police must cease questioning until counsel has been made available or until the accused initiates further communication with the police. The court began by noting that the purpose underlying *Miranda* warnings is to protect an individual's privilege against self-incrimination, but that the privilege does not apply to the taking of blood samples.[105] Moreover, the holdings of *Miranda* and *Edwards* were "explicitly limited to circumstances in which an individual is 'subjected to questioning' or 'during custodial interrogation[.]'"[106] Finally, the court quoted from the fairly recent opinion in *McNeil v. Wisconsin*,[107] in which the U.S. Supreme Court observed in dicta that it had "never held that a person can invoke his *Miranda* rights anticipatorily in a context other than 'custodial interrogation' . . . . Most rights must be asserted when the government seeks to take the action they protect against."[108] Because Sauerheber's request for counsel fell outside of one of the "windows of opportunity" during which a defendant must assert his right to counsel, the police were not prevented under *Edwards* from questioning him four days later, after advising him at that time of his *Miranda* rights and receiving no request for an attorney.[109]

Finally, in *Smith v. State*,[110] the supreme court clarified the standard to be applied when a defendant challenges the voluntariness of a confession under the Fifth Amendment.[111] The court noted that Indiana courts have cited to and applied different standards when evaluating voluntariness issues under the U.S. Constitution. Under U.S. Supreme Court case law, however, the correct standard is the preponderance of the evidence standard.[112] Accordingly, the court overruled several Indiana cases that relied on the beyond a reasonable doubt standard.[113]

C. Dismissal and Refiling of Additional Charges

In *Davenport v. State*,[114] the supreme court considered whether, four days after the denial of a motion to amend the charging information by adding three additional counts, the State could dismiss the original charge and refile it along with the three additional charges. As a general proposition, once an information has been dismissed by the State, it may be refiled subject to certain restrictions.[115] For example, the State may not refile the same offense if jeopardy has attached

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105. *Sauerheber*, 698 N.E.2d at 801-02 (citing Schmerber v. California, 384 U.S. 757 (1966)).
106. *Id.* at 802.
107. 501 U.S. 171 (1991).
108. *Sauerheber*, 698 N.E.2d at 802 (quoting *McNeil*, 501 U.S. at 182 n.3).
109. *Id.* at 802-03 (quoting United States v. LaGrone, 43 F.3d 332, 338 (7th Cir. 1994)).
110. 689 N.E.2d 1238 (Ind. 1997).
111. *Id.* at 1246 n.11.
112. *See id.*
113. *Id.*
114. 689 N.E.2d 1226 (Ind. 1997), *modified on reh'g*, 696 N.E.2d 870 (Ind. 1998).
115. *See id.* at 1229.

or to evade the defendant's speedy trial rights.[116] In this case, however, the court considered whether the filing of additional charges would "prejudice the substantial rights of the defendant."[117] The court held that the State's action

> not only crossed over the boundary of fair play but also prejudiced the substantial rights of the defendant. Because of a sleight of hand, the State was able to escape the ruling of the original court and pursue the case on the charges the State had sought to add belatedly. This is significantly different than what has been permitted in the past.[118]

The court reversed the convictions on the additional charges.[119]

D. Speedy Trial

In *State ex rel. Bishop v. Madison Circuit Court*,[120] the supreme court published a per curiam "Original Action" opinion "to make a more public record of the continuing importance of Criminal Rule 4(C)."[121] That rule provides in material part:

> No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later . . . . Any defendant so held shall, on motion, be discharged.[122]

In this case, the defendant appeared in court and pled not guilty to charges of Intimidation and Harassment on May 21, 1996.[123] The case progressed in normal course for about three months when, on August 16, the defendant filed a motion to compel discovery. The State did not file a response until eleven months later—on July 14, 1997—at which time it also requested that a trial date be set.[124] Two days later the defendant filed an objection to the setting of a trial date and a motion for discharge pursuant to Criminal Rule 4(C).[125] The motion was denied, a trial date was set, and the defendant filed an original action with the supreme court.[126] Noting that "[t]here is nothing in the record of proceedings suggesting that the delay in bringing this case to trial—indeed, the delay in even setting a trial date—was in any way attributable to the relator," the court issued

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116. *See id.*
117. *Id.*
118. *Id.* at 1230.
119. *Id.*
120. 690 N.E.2d 1173 (Ind. 1998).
121. *Id.* at 1174.
122. *Id.* (quoting IND. R. CRIM. P. 4(C)).
123. *See id.* at 1173.
124. *See id.*
125. *See id.* at 1174.
126. *See id.*

a writ of mandamus directing his discharge.[127]

The court of appeals also addressed a Criminal Rule 4(C) claim in *Haston v. State*.[128] In that case, the defendant was charged with operating a vehicle while intoxicated on December 10, 1992. On March 23, 1993, he filed a motion to suppress the Breathalyzer test results. The motion was denied on the same day and the trial court certified the ruling for interlocutory appeal.[129] Haston never pursued an interlocutory appeal. On May 15, 1996, the trial court set the case for trial on July 30, 1996, nearly four years after charges were filed.[130] Haston moved for discharge the day before his trial, and that motion was denied.

The State argued that the delay in bringing Haston to trial was attributable to him because he requested but never pursued an interlocutory appeal. The court of appeals noted that under Criminal Rule 4 decisional law defendants are properly charged with the "time from initially seeking an interlocutory appeal to the date an appellate decision is issued."[131] According to the appellate rules, Haston had only thirty days from the certification order in which to petition the court of appeals to entertain his interlocutory appeal.[132] Accordingly, Haston's opportunity to seek appellate review expired by operation of law after thirty days.[133] Although the State argued that it should be granted "equitable time" for its detrimental reliance on Haston's representation that he would be filing an interlocutory appeal, the court of appeals concluded that "this additional time falls woefully short of the approximately two and one-half years required to comply with [Criminal Rule] 4(C) in this case."[134] Because the trial court erred by denying Haston's timely motion for discharge, the court of appeals reversed his convictions.[135]

E. Courtroom Security

The notorious 1996 "Ghetto Boys" trial in Marion County presented the somewhat novel issue of courtroom security procedures to the supreme court. The Ghetto Boys were a group organized to sell crack cocaine, and five of the Ghetto Boys fired at least sixty-five rounds of ammunition from assault rifles at an apartment complex in apparent retaliation against someone who had stolen from the group's stash of cocaine.[136] At the joint trial, members of the public

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127. *Id.*

128. 695 N.E.2d 1042 (Ind. Ct. App. 1998).

129. *See id.* at 1043.

130. *See id.*

131. *Id.*

132. *Id.* (citing IND. R. APP. P. 2(A)).

133. *See id.*

134. *Id.* at 1044 (citation omitted).

135. *Id.* at 1044-45.

136. *See* Williams v. State, 690 N.E.2d 162, 165 (Ind. 1997); *see also* Marbley v. State, 690 N.E.2d 185, 186 (Ind. 1997); Morrow v. State, 690 N.E.2d 183, 184 (Ind. 1997); Ridley v. State, 690 N.E.2d 177, 179 (Ind. 1997).

who sought access to the courtroom were required to pass through a metal detector and "wand" inspection. Spectators who were unknown to the court were also required to present identification to the officer at the door and sign in.[137] On appeal, the defendant challenged these procedures as infringing upon his right to a public trial under the Sixth Amendment.[138] He also challenged the restrictions based on statute, which provides that "[c]riminal proceedings are presumptively open to attendance by the general public."[139]

The court noted the important interests served by a public trial. "[T]he presence of interested spectators may keep [the accused's] triers keenly alive to a sense of their responsibility and to the importance of their functions . . . ."[140] It protects the accused by allowing the public access to scrutinize the fairness of the proceedings, encourages witnesses to come forward, and discourages perjury.[141] The court found no constitutional or statutory violation because these protections "conceive of an exclusion as an affirmative act specifically barring some or all members of the public from attending a proceeding."[142] In this case, however, "[n]either requirement actively exclude[d] anyone. The identification requirement introduced a minor procedural hurdle to gaining admittance to the trial by demanding the production of some form of identification, which is an item readily available to the general public."[143] At most, the procedures may have kept some of Williams' supporters with shady backgrounds away from the proceedings, but the court concluded that there was no evidence or even an allegation as to how these procedures affected the fairness of the proceedings or any of the objectives of the Sixth Amendment.[144]

Although the court found no violation of Williams' Sixth Amendment right, the court stated that "it does not follow that the procedures were justified or properly taken" because of the First Amendment rights of the press and the public to attend the trial.[145] To guard against any future violations of the First Amendment, the court announced a new rule under its supervisory powers that applies to trials conducted after the publication of the opinion.[146] Trial courts must now "make a finding that specifically supports any measures taken beyond

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137. *See Williams*, 690 N.E.2d at 166.

138. *Id.* The supreme court found any challenge to the use of a metal detector or wand to be waived because there was no objection at trial to these measures. Therefore, the court only considered the identification and sign-in and procedures. Moreover, because the defendant made no contention based on the language or history of the Indiana Constitution, the court resolved his state and federal constitutional claim based on federal constitutional doctrine and expressed no opinion as to what, if any, difference there may be under the state constitution. *Id.* at 167.

139. *Id.* (quoting IND. CODE § 5-14-2-2 (1998)).

140. *Id.* (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979)).

141. *See id.*

142. *Id.* at 168.

143. *Id.*

144. *Id.*

145. *Id.* at 169.

146. *Id.* at 169-70.

what is customarily permitted . . . . The finding need not be extensive, but must provide the reasons for the action taken, and show that both the burden and benefits of the action have been considered."[147]

F. Jury

1. Deliberations.—In December of 1997, a panel of the court of appeals issued an opinion in *Riggs v. State.*[148] The opinion noted the divergence of opinions of that court regarding what triggers the application of Indiana Code section 34-1-21-6. That statute provides:

> After the jury have retired for deliberations, if there is a disagreement between them as to any part of the testimony, or if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the partes or their attorneys.[149]

Relying on the plain language of the statute, the *Riggs* court held that "[w]here the jury does not explicitly manifest any disagreement about the testimony or does not ask for clarification of a legal issue, [Indiana Code section] 34-1-21-6 simply does not apply."[150] The court acknowledged that its decision conflicted with opinions from other panels of the court of appeals in two respects. Specifically, the *Riggs* panel noted that "[r]equests by the jury to review exhibits, which are items of physical evidence, are never within the scope of the statute."[151] This conflicts with the view expressed by a different panel of the court of appeals in *Anglin v. State*[152] that requests to review exhibits may sometimes fall within the scope of the statute. Moreover, *Riggs* also held that the statute is not triggered whenever the jury requests to rehear testimony or see exhibits for a second time, but rather only when the jury explicitly manifests disagreement about testimony.[153]

Several months later, the supreme court resolved the split in the court of appeals on the latter issue. In *Bouye v. State*, the jury sent a note that read

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147. *Id.* at 169 (citation omitted).

148. 689 N.E.2d 460 (Ind. Ct. App. 1997).

149. IND. CODE § 34-1-21-6 (1993) (current version at IND. CODE § 34-36-1 (1998)). The 1998 recodification contains only minor editorial changes.

150. *Riggs*, 689 N.E.2d at 463.

151. *Id.* at 462.

152. 680 N.E.2d 883, 885 n.2 (Ind. Ct. App. 1997), *trans. denied*, 690 N.E.2d 1185 (Ind. 1997).

153. *Riggs*, 689 N.E.2d at 463. *Riggs* was written by Judge Friendlander, who not surprisingly expressed similar views a few months later in *Nuckles v. State*, 691 N.E.2d 211 (Ind. Ct. App. 1998), over the concurring opinion of Judge Kirsch. Judge Kirsch wrote *Winters v. State*, 678 N.E.2d 405 (Ind. Ct. App. 1997), which held that the statute was triggered whenever the jury makes a request during deliberations.

"Deborah's testimony" to the trial judge during deliberations.[154] The court responded, without first informing the defendant or his counsel, with a note that said no transcripts were available.[155] On appeal, the defendant contended that this ex parte communication violated Indiana Code section 34-1-21-6. The supreme court characterized the split in the court of appeals as follows: "One line holds that, where the jury does not *explicitly* manifest any disagreement about the testimony or does not ask for clarification of a legal issue, the statute does not apply."[156] However, "[t]he other line holds that, whenever a jury requests that it be given the opportunity to rehear testimony for a second time, the jury is *inherently* expressing disagreement or confusion about that evidence, thus triggering the statute *any* time a jury makes a request for testimony."[157] Relying on the plain language of the statute, the supreme court found the first line cases more persuasive and divined that the legislature's intent was to limit the statute's application to those cases "in which the jury explicitly indicated a disagreement."[158] Because the jury note in *Bouye* did not indicate disagreement regarding testimony, the statute was not implicated.[159]

A couple of months later, the supreme court applied the rule announced in *Bouye* to a case involving a request to review exhibits after deliberations had begun. In *Robinson v. State*,[160] the court held that the statute was not triggered because the jury's note merely requested the exhibits and did not "explicitly indicate[] a disagreement"[161] The court also noted the division on the court of appeals regarding whether the statute can ever be triggered by a request for exhibits, or instead is triggered only by a disagreement about testimony.[162] *Robinson* did not resolve that issue, but instead rested on the rule announced in *Bouye*. The court also held that the same standards that apply to the trial court's decision to send exhibits to the jury room before deliberations begin also apply to the decision to send exhibits to the jury room after deliberations have begun.[163]

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154. 699 N.E.2d 620, 627 (Ind. 1998).

155. *See id.*

156. *Id.* (citing *Riggs*, 689 N.E.2d at 460; Johnson v. State, 674 N.E.2d 180 (Ind. Ct. App. 1996); State v. Chandler, 673 N.E.2d 482 (Ind. Ct. App. 1996); Jones v. State, 656 N.E.2d 303 (Ind. Ct. App. 1995)) (emphasis in original).

157. *Id.* (citing Anglin v. State, 680 N.E.2d 883 (Ind. Ct. App. 1997); State v. Winters, 678 N.E.2d 405 (Ind. Ct. App. 1997)) (emphasis in original).

158. *Id.* at 627-28.

159. *Id.* at 628.

160. 699 N.E.2d 1146 (Ind. 1997).

161. *Id.* at 1149.

162. *Id.*

163. *Id.* at 1150. In so holding the court cited *Ingram v. State*, 547 N.E.2d 823, 828-29 (Ind. 1989), *Roland v. State*, 501 N.E.2d 1034, 1040 (Ind. 1986), *Torres v. State*, 442 N.E.2d 1021, 1025-26 (Ind. 1982), and *Pearson v. State*, 441 N.E.2d 468, 476 (Ind. 1982), all cases that applied the ABA standard adopted in *Thomas v. State*, 289 N.E.2d 508 (Ind. 1972), to jury requests made after deliberations had begun.

The test, which was first adopted in *Thomas v. State*,[164] is: "'(i) whether the material will aid the jury in a proper consideration of the case; (ii) whether any party will be unduly prejudiced by submission of the material; and (iii) whether the material may be subjected to improper use by the jury.'"[165] The trial court in *Robinson* properly considered these three factors, and therefore did not err by sending the requested photographs to the jury room after deliberations had begun.[166] As a final point, the supreme court held that the defendant's right to be present under both the state and federal constitutions was not violated by sending exhibits to the jury room in the absence of the defendant.[167]

2. Size.—In *Henderson v. State*,[168] the supreme court resolved another conflict between two decisions of the court of appeals. That conflict concerned whether a defendant charged with a misdemeanor or Class D felony offense that is enhanced to a Class C felony based on a prior conviction is to be tried by a jury of six or twelve. According to statute, when an individual is tried by jury on misdemeanor or Class D felony charges, the jury consists of six jurors.[169] An individual charged with a Class C felony or higher offense, however, must statutorily be tried by a jury of twelve.[170] The court held that "when the State's charging instrument charges the defendant with a Class C felony or higher, regardless of whether the charge has been elevated by virtue of a prior conviction, a twelve-person jury is required."[171]

G. Lesser Included Offenses

The standards by which a trial court determines whether to accept a party's instructions on lesser included offenses is well established. Under the test established in *Wright v. State*,[172] the court must first decide whether the lesser included offense is either inherently or factually included within the crime charged in the information.[173] If the lesser included offense is inherently or

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164. 289 N.E.2d 508 (Ind. 1972).

165. *Robinson*, 699 N.E.2d at 1150 (quoting *Thomas*, 289 N.E.2d at 509).

166. *See id.*

167. *Id.* at 1150-51.

168. 690 N.E.2d 706 (Ind. 1998).

169. *See id.*; *see also* IND. CODE § 35-37-1-1(b) (1998).

170. *See Henderson*, 690 N.E.2d at 706.

171. *Id.* at 707. The court of appeals cited *Henderson* several months later when considering the applicable statute of limitations for a Class D felony, enhanced dealing in marijuana charge. *See* Lamb v. State, 699 N.E.2d 708 (Ind. Ct. App.), *trans. denied*, No. 48A02-9712-CR-847 (Ind. Nov. 4, 1998). The defendant in *Lamb* was charged with a Class A misdemeanor enhanced to a Class D felony by virtue of a prior conviction. The court of appeals held that the five year felony statute of limitations, rather than the two year misdemeanor statute of limitations, applied to his case. However, "if the State proves all the elements of felony dealing except a prior conviction, [the defendant] shall not be convicted of felony dealing or misdemeanor dealing." *Id.* at 711.

172. 658 N.E.2d 563 (Ind. 1995).

173. *See* Young v. State, 699 N.E.2d 252, 255 (Ind. 1998) (citing *Wright*, 658 N.E.2d at 563).

factually included, the trial court must then consider whether the evidence presented at trial creates a serious evidentiary dispute about the element or elements that distinguish the greater from the lesser offense.[174] The failure to give a properly tendered instruction when a serious evidentiary dispute exists is reversible error if a jury could conclude that the lesser offense was committed but not the greater.[175]

In *Young v. State*, the defendant was charged with murder and presented an alibi defense at trial.[176] Nevertheless, he also sought to have the jury instructed as to the lesser included offenses of reckless homicide and involuntary manslaughter. The trial court made no findings regarding whether a serious evidentiary dispute existed on the issue of Young's mens rea, but simply stated that Young was not entitled to lesser included instructions because he raised an alibi defense.[177] The supreme court noted that "[p]resenting an alibi defense does not automatically bar instructions on a lesser included offense."[178] As to the proffered lesser included instruction for reckless homicide, the court concluded that there was a genuinely disputed issue as to whether Young knowingly or recklessly killed.[179] Young fired shots from a car in the general direction of a number of people in front of a house, but trial testimony differed as to whether he was aiming at any particular person or people, or was just engaged in random shooting.[180] Because refusing the instruction denied the jury its prerogative to decide this question of fact, the court remanded the case for a new trial.[181] As to the involuntary manslaughter instruction, however, the court held that it was properly refused because there was no serious evidentiary dispute regarding whether Young "recklessly, knowingly, or intentionally inflicted serious bodily injury on another person, and killed that person in the course of such acts."[182] Young knew the gun was loaded, realized people were standing in the general direction of his firing, shouted taunting words, and returned and fired more shots after the initial shooting.[183]

H. Habitual Offender

The supreme court decided a pair of cases that considered the jury's role during a habitual offender phase of a trial. Both cases were decided based on the Indiana constitutional provision that "[i]n all criminal cases whatever, the jury

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174. *See id.* (citing *Wright*, 658 N.E.2d at 563).
175. *See id.*
176. *Id.* at 256.
177. *See id.* at 255-56.
178. *Id.* at 256.
179. *See id.* at 257; *see also* IND. CODE § 35-41-2-2(c) (defining recklessly).
180. *Young*, 699 N.E.2d at 254.
181. *Id.* at 257.
182. *Id.*; *see also* IND. CODE § 35-42-1-4 (1998).
183. *See Young*, 699 N.E.2d at 257.

shall have the right to determine the law and the facts."[184] In *Seay v. State*,[185] the court described the issue as follows:

> [W]hether the jury in a habitual offender proceeding is permitted to render a verdict that the defendant is not a habitual offender even if it finds that the Sate has proved beyond a reasonable doubt that the defendant has accumulated two prior unrelated felonies. That is, is the jury entitled to make a determination of habitual offender status as a matter of law independent of its factual determinations regarding prior unrelated felonies?[186]

The court noted that it was "difficult to reconcile" some of its prior decisions on the issue, but then adopted the principles enunciated by Justice Dickson in his concurring and dissenting opinions in two earlier cases.[187] Specifically, the verdict form used during a habitual offender phase must allow the jury not only to "determine whether the defendant has been twice previously convicted of unrelated crimes, but [the jury] must further determine whether such two convictions, when considered along with the defendant's guilt of the charged crime, lead them to find that the defendant is a habitual criminal."[188] The court also considered legislative intent on the issue. "If the legislature had intended an automatic determination of habitual offender status upon the finding of two unrelated felonies, there would be no need for a jury trial on the status determination."[189]

The court found that the instructions at issue in *Seay* were erroneous,[190] but the analysis did not end there. In *Seay*, the issue was presented in a post-conviction proceeding in which the defendant contended that it was fundamental error for the trial court to give the erroneous instruction. The defendant also argued that he was denied the effective assistance of counsel when trial counsel did not object to the instruction and when appellate counsel did not raise a claim of fundamental error on direct appeal.[191] The court summarily affirmed the court of appeals' finding that no fundamental error resulted from the giving of the instructions and that trial and appellate counsel were not ineffective.[192]

In *Parker v. State*,[193] decided on the same day as *Seay*, the supreme court considered the same issue in the context of a criminal direct appeal. Parker

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184. IND. CONST. art. I, § 19.

185. 698 N.E.2d 732 (Ind. 1998).

186. *Id.* at 734.

187. *Id.* at 735-36.

188. *Id.* at 736 (quoting Duff v. State, 508 N.E.2d 17, 23 (Ind. 1987) (Dickson, J., separate opinion)).

189. *Id.* (citing Hensley v. State, 497 N.E.2d 1053, 1058 (Ind. 1986) (Dickson, J., concurring and dissenting)).

190. *Id.* at 737.

191. *See id.*

192. *Id.*; *see also* Seay v. State, 673 N.E.2d 475 (Ind. Ct. App. 1996).

193. 698 N.E.2d 737 (Ind. 1998).

contended that "the trial court erred by instructing the jury that if it found that the State had proved the predicate felonies, it 'should' find him to be a habitual offender."[194] The court observed that this type of instruction "prevented the jury from making an independent and separate decision on habitual offender status,"[195] which was exactly the result its decision in *Seay* was aimed at preventing.[196] However, "reversible error does not necessarily occur when the type of instruction provided in this case is accompanied by another instruction informing the jury that it is the judge of the law and the facts."[197] Nevertheless, the court found that giving the instruction under the particular circumstances of the case to be reversible error.[198] Specifically, the trial court

> both (i) provided over defendant's objection an instruction which minimized the jury's power of discretion in making a determination on habitual offender status, and (ii) refused over defendant's objection to re-read the guilt phase instruction (which had been delivered two weeks earlier) advising the jury that it was the judge of both the law and the facts.[199]

In a different context the supreme court also held in *Leach v. State*[200] that is was error to inform prospective jurors during voir dire that a defendant is charged "with being a Habitual Criminal Offender."[201] The court noted that "[t]he defendant's criminal history was not directly relevant to an issue in the guilt phase, and, therefore, the trial court's comments were clearly improper."[202] Nevertheless, the court held that the error was "a trial error rather than a structural error," and therefore subject to harmless error analysis.[203] Although noting that "the trial court's comments regarding the habitual offender charge were improper and prejudicial and that, in almost any other instance, such comments would be reversible error," the supreme court found the error to be harmless because "the evidence of guilt was so overwhelming."[204]

I. Selling a Handgun to a Minor

In *State v. Shelton*,[205] the court of appeals considered whether the legislature intended for the sale of a handgun to a minor to be a strict liability offense in

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194. *Id.* at 741.
195. *Id.* at 742.
196. *Id.*
197. *Id.*
198. *Id.* at 743.
199. *Id.*
200. 699 N.E.2d 641 (Ind. 1998).
201. *Id.* at 642.
202. *Id.* at 643.
203. *Id.*
204. *Id.* at 644.
205. 692 N.E.2d 947 (Ind. Ct. App. 1998).

which no culpable mental state need be proven.[206] After Andrew Spalding pled guilty to Reckless Homicide and Carrying a Handgun Without a License, he identified Shelton as the person who sold him the handgun used to commit these offenses.[207] Shelton was charged with Selling a Handgun to a Minor, a Class C felony.[208] In material part, that offense is defined as "a person may not sell, give, or in any manner transfer the ownership or possession of a handgun or assault weapon (as defined in [Indiana Code section] 35-50-2-11) to any person under eighteen years of age."[209] The statute does not specify a culpable mental state. The trial court, over the objection of the State, instructed the jury that the State was required to prove that "the defendant knowingly or intentionally sold a handgun to a person under the age of eighteen."[210] The court of appeals noted that "other statutes which ban the sale of certain items to minors explicitly state the culpable mental state required for a conviction."[211] Although courts presume that the legislature intended to include a culpable mental state in a criminal statute, that presumption may be overcome if the following factors decisively indicate that no mental state was intended:

> 1. the legislative history, title of context of the criminal statute;
> 2. similar or related statutes;
> 3. the severity of punishment (greater penalties favor culpable mental state requirement);
> 4. the danger to the public of prohibited conduct (greater danger disfavors need for culpable mental state requirement);
> 5. the defendant's opportunity to ascertain the operative facts and avoid the prohibited conduct;
> 6. the prosecutor's difficulty in proving the defendant's mental state; and
> 7. the number of expected prosecutions (greater numbers suggest that crime does not require culpable mental state).[212]

Of these seven factors, the court found that only two "militate against the imposition of strict liability, (1) the severity of the punishment and (2) the expected number of prosecutions."[213] The court concluded that

> youths with handguns present a great danger both to our youth and the general public, which weighs heavily in favor of the conclusion that the legislature intended to make the sale or transfer of a handgun to a person less than eighteen years of age a strict liability offense. That is especially true when considered the ease with which a defendant can

206. *Id.* at 949.
207. *See id.* at 948.
208. *See id. See also* IND. CODE § 35-47-2-7 (1998).
209. IND. CODE § 35-47-2-7(a) (1998).
210. *See Shelton*, 692 N.E.2d at 951.
211. *Id.* at 950.
212. *See id.* at 949 (quoting State v. Keihn, 542 N.E.2d 963, 967 (Ind. 1989)).
213. *Id.* at 950.

> ascertain the transferee's age. The two factors which militate against that conclusion are insufficient to overcome it. We conclude that the legislature did not intend to require a culpable mental state.[214]

Although the trial court erred when it determined that the State was required to prove that Shelton knew that Spalding was under the age of eighteen, retrial was barred because Shelton was acquitted at trial.[215]

J. Probation

The court of appeals considered a variety of issues relating to probation. Three of those are discussed here. In *Wright v. State*,[216] the defendant appealed the revocation of his probation based on the alleged violation of a no-contact order. Wright had been convicted of intimidation and harassment for threatening the life of a doctor who refused to prescribe a controlled substance for him.[217] As a condition of his probation, Wright was prohibited from contacting the doctor or any member of the doctor's family. Nevertheless, Wright filed a complaint against the doctor alleging negligence, destruction of the doctor/patient relationship, and harassment.[218] A summons, complaint, and set of interrogatories were all served on the doctor. The State sought and obtained revocation of Wright's probation on the basis that filing a lawsuit was an indirect written communication, which was prohibited by the no-contact order.[219] The court of appeals reversed the trial court, noting that "the purpose of the no-contact order was to prevent Wright form harassing and intimidating" the doctor and his family.[220] Because the court could not conclude that the complaint was filed merely to harass the doctor, absent a determination that it is frivolous or groundless, the court held that the State failed to present sufficient evidence that Wright violated the no-contact order.[221]

In *Bell v. State*,[222] the court of appeals considered whether a defendant was denied his right to due process when the trial court failed to determine whether his decision to proceed without counsel at his probation revocation hearing was voluntary.[223] While on probation, Bell was charged with public intoxication and pled guilty to that charge. The court held an evidentiary hearing on the probation violation at which the State presented evidence of Bell's new conviction.[224] Bell's probation was revoked and he was ordered to execute his previously

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214. *Id.* at 950-51.
215. *See id.* at 951.
216. 688 N.E.2d 224 (Ind. Ct. App. 1997).
217. *See id.* at 225.
218. *See id.*
219. *See id.*
220. *Id.* at 226.
221. *Id.*
222. 695 N.E.2d 997 (Ind. Ct. App. 1998).
223. *Id.* at 998.
224. *See id.*

suspended sentence.[225] Bell was not represented by counsel at the revocation hearing or when he pleaded guilty to the public intoxication charge.[226]

The court of appeals noted the well-established rule that "whenever a defendant proceeds without the benefit of counsel, the record must reflect that the right to counsel was voluntarily, knowingly, and intelligently waived."[227] In this case, however, the record did not show that the trial court advised Bell of his right to counsel nor did it determine that his waiver was voluntary.[228] The court observed that it "was under no illusion that the outcome of the probation revocation hearings would have been any different had Bell been represented by counsel."[229] However, because invalid waivers of counsel are not subject to harmless error analysis, the court reversed the revocation of probation and remanded for a new hearing that complies with the requirements of due process.[230]

Finally, in *Williams v. State*,[231] the court of appeals considered whether a defendant's *Alford* plea in another state was sufficient to support the revocation of his probation for committing further criminal offenses. An *Alford* plea is a guilty plea where the defendant accepts punishment but denies guilt.[232] Indiana has specifically declined to accept *Alford* pleas from defendants.[233] Nevertheless, Williams entered an *Alford* plea to charges in Kentucky, and the State presented certified documents to the Indiana court supervising his probation showing that he had entered this plea.[234] The court of appeals observed that "[u]nder Kentucky law, an *Alford* plea is a guilty plea and clearly constitutes a conviction, the defendant's protestations of innocence notwithstanding."[235] Moreover, probation revocation under Indiana law "may be based upon evidence of the commission of an offense, even if the probationer has been acquitted of the crime after trial."[236] Accordingly, the court affirmed the revocation of Williams' probation.[237]

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225. *See id.*
226. *See id.* at 998-99.
227. *Id.* at 998.
228. *Id.* at 999.
229. *Id.*
230. *Id.*
231. 695 N.E.2d 1017 (Ind. Ct. App. 1998).
232. *Id.* at 1018 n.2 (citing North Carolina v. Alford, 400 U.S. 25 (1970)).
233. *See id.* at 1018.
234. *See id.*
235. *Id.*
236. *Id.* at 1019 (citing Justice v. State, 550 N.E.2d 809, 812 (Ind. Ct. App. 1990)).
237. *Id.*