RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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This Article will survey developments in the area of criminal law and procedure that were enacted by the 2000 Indiana General Assembly and addressed by the Indiana appellate courts since the last Survey.

I. LEGISLATIVE ENACTMENTS

A. Blood Alcohol Content

On July 7, 1999, the court of appeals issued its opinion in *Sales v. State*,[1] in which it held that Indiana Code section 9-30-5-1(a)(2), as amended in 1997, was "defective on its face" and would not support a conviction in many instances.[2] That statute provided: "A person who operates a vehicle with at least ten-hundredths percent (0.10%) of alcohol by weight in grams in: . . . (2) two hundred ten (210) liters of the person's breath; commits a Class C misdemeanor."[3] The court of appeals observed:

> As written, to be convicted under the breath-alcohol provision a person must have .10% by weight of alcohol in grams in 210 liters of his breath. To express the weight of alcohol as a percentage of 210 liters of breath, we would divide the weight in grams of alcohol by 210, then multiply by 100 to obtain a "percentage."[4]

Applying this formula to *Sales*' breathalyzer reading of ".14 grams of alcohol per 210 liters of breath" yielded .0667%, which is less than the .10% necessary for a conviction under the statute.[5] Thus, the court of appeals affirmed the trial court's sua sponte dismissal of that count.[6] In so doing, its ruling also cast grave doubt over the ability of the State to secure convictions (and the validity of those that had been secured since 1997) in thousands of cases under this statute.

In a special session in November 1999, the General Assembly laid at least some of these concerns to rest when it amended the statute to provide "[a] person who operates a vehicle with an alcohol concentration equivalent to at least ten-hundredths (0.10) gram of alcohol per: . . . two hundred ten (210) liters of the

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1. 714 N.E.2d 1121 (Ind. Ct. App. 1999), *rev'd*, 723 N.E.2d 416 (Ind. 2000).
2. *Id.* at 1129.
3. *Id.* at 1126.
4. *Id.* at 1128.
5. *Id.*
6. *See id.* at 1129.

person's breath; commits a Class C misdemeanor."[7] Although the amendment was effective upon passage, it did not—indeed, it could not—do anything about convictions and pending cases that occurred between the 1997 amendment and the 1999 amendment, which continued to be controlled by the court of appeals' interpretation of the statute in *Sales*.

On January 18, 2000, the supreme court granted transfer in *Sales* and on February 7, it issued its opinion reversing the pertinent part of the court of appeals' opinion.[8] The supreme court began by noting that the 1997 amendment created an "inherently ambiguous provision."[9] Nevertheless, the court found the General Assembly's intent to be clear based on the statute as a whole, the usage of "percentage" in scientific circles, the regulations for instruments that measure blood alcohol content, cases on the same subject from other jurisdictions, and common sense.[10] On the latter point, the court noted that there had been a push in recent years to lower the legal blood alcohol level to .08, but no one had ever proposed more than doubling it to .21 as the court of appeals' interpretation of the statute would have required.[11] Accordingly, the court held that prosecutions of cases that occurred between the 1997 amendment and the 1999 correction "may proceed upon proof of operating a vehicle with .10 grams of alcohol in 210 liters of the person's breath."[12]

B. Venue

In October of 1998, the court of appeals in *Navaretta v. State*[13] reversed convictions for operating a vehicle while intoxicated and other offenses based on improper venue. In *Navaretta*, the defendant was driving east on 96th Street on the northeast side of Indianapolis. After noticing that Navaretta's taillights were not functioning properly, a Hamilton County Sheriff Deputy followed him. Navaretta accelerated his vehicle before crashing into a privacy fence. Navaretta was charged and tried in Hamilton County, but the evidence at trial showed that the eastbound lane of 96th Street in the area in which Navaretta was driving was

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7. IND. CODE § 9-30-5-1 (Supp. 2000).
8. *See* Sales v. State, 723 N.E.2d 416 (Ind. 2000).
9. *Id.* at 419. The court explained:

> The statutory language at face value asks for a calculation of the "percent" of a number of grams (a unit of weight) found in a number of liters (a unit of volume). It is, of course, sensible to speak of the number of grams of alcohol found in a given volume of blood or breath. It is not meaningful to speak of a number of grams as a "percent" of a number of liters, at least as "percent" would be understood by one accustomed to dealing with numbers. The two are not qualitatively the same thing and neither is a portion of the other's whole.

Id.

10. *See id.* at 420-21.
11. *See id.* at 421.
12. *Id.* at 417.
13. 699 N.E.2d 1207 (Ind. Ct. App. 1998), *rev'd*, 726 N.E.2d 787 (Ind. 2000).

located in Marion County and the westbound lane was in Hamilton County. Navaretta was convicted, and on appeal raised the venue issue.[14]

The State relied on Indiana Code section 35-32-2-1(h), which provides: "If an offense is committed at a place which is on or near a common boundary which is shared by two (2) or more counties and it cannot be readily determined where the offense was committed, then the trial may be had in any county sharing the common boundary."[15] However, the court of appeals found the statute inapplicable because it was readily apparent that the offenses were committed in Marion County, albeit near the county line.[16] Accordingly, it reversed Navaretta's convictions.[17]

In response to *Navaretta*, the General Assembly added a subsection to the venue statute in 2000, which provides: "If an offense is committed on a public highway (as defined in IC 9-25-2-4) that runs on and along a common boundary shared by two (2) or more counties, the trial may be held in any county sharing the common boundary."[18] Moreover, as in *Sales*, the supreme court granted transfer shortly after the amendment and reversed the court of appeals' holding, noting:

> The record contains evidence that the southern border of Hamilton County may extend up to two feet south of the centerline of 96th Street, which had one eastbound and one westbound lane at the time, we find that substantial evidence was presented to establish that it cannot be readily determined in which county the offense was committed, thus permitting the defendant's trial to occur in Hamilton County or Marion County.[19]

C. Other Enactments

The General Assembly also passed several other bills that generated little publicity or controversy. The statute of limitations provision of Title 35 was amended to explicitly provide that a prosecution for murder may be commenced at any time regardless of the amount of time that passes between the date a person allegedly commits the elements of the crime and the date the victim actually dies.[20] The public indecency statute was amended to increase the offense from a class A misdemeanor to a class D felony when it is committed in a public park, in or on school property, or in a property owned or managed by the department of natural resources and the defendant has a prior, unrelated public

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14. *See id.* at 1208-09.
15. IND. CODE § 35-32-2-1(h) (1998).
16. *See Navaretta*, 699 N.E.2d at 1209.
17. *See id.*
18. IND. CODE § 35-32-2-1(i) (Supp. 2000).
19. Navaretta v. State, 726 N.E.2d 787, 789 (Ind. 2000).
20. *See* IND. CODE § 35-41-4-2(c) (Supp. 2000).

indecency conviction that was entered after June 30, 2000.[21] The battery statute was amended to provide that battery against a firefighter while the firefighter is in engaged in the execution of his or her official duty is a Class A misdemeanor and a Class D felony if it results in bodily injury to the firefighter.[22]

The General Assembly also created a new section criminalizing the knowing or intentional directing of "light amplified by the stimulated emission of radiation that is visible to the human eye or any other electromagnetic radiation from a laser pointer at a public safety officer."[23] The offense is a Class B misdemeanor.[24]

Finally, the code was amended to allow law enforcement officers who have probable cause to believe a person has committed domestic battery to make a warrantless arrest based on an affidavit from an individual with "direct knowledge of the incident."[25] This is an exception to the general requirement that allows a warrantless arrest only when there is probable cause to believe a felony was committed or when a misdemeanor is committed in the officer's presence.

II. CASE DEVELOPMENTS

A. Confessions

Just three years ago, the Indiana Supreme Court in *Smith v. State*[26] acknowledged that several of its opinions had applied the wrong standard of review in cases challenging confessions under the United States Constitution.[27] In *Smith*, the court noted that United States Supreme Court precedent dating back to 1972[28] requires that the State prove the voluntariness of a confession only by a preponderance of evidence, not beyond a reasonable doubt as many Indiana cases, purportedly relying on the federal constitution, had required for decades.[29]

The *Smith* opinion cited Professor's Kerr's treatise on Criminal Procedure,[30] which provides a detailed and somewhat critical analysis of the court's inconsistencies on this issue. As Professor Kerr explains, the "beyond a reasonable doubt" standard was initially adopted under "questionable"[31] circumstances in the 1973 opinion of *Burton v. State*,[32] in which the court stated:

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21. *See id.* § 35-41-4-1(b)(2)-(4).
22. *See id.* §§ 35-42-2-1(a)(1)(D), 35-42-2-1(a)(2)(K).
23. *See id.* § 35-47-4.5-4.
24. *See id.*
25. *Id.* § 35-33-1-1(a)(5).
26. 689 N.E.2d 1238 (Ind. 1997).
27. *See id.* at 1146 n.11.
28. *See* Lego v. Twomey, 404 U.S. 477, 488-89 (1972).
29. *See Smith*, 689 N.E.2d at 1246 n.11.
30. 16 WILLIAM A. KERR, INDIANA PRACTICE § 7.2g (1991 & Supp. 1997).
31. *Id.* § 7.2g, at 554.
32. 292 N.E.2d 790 (Ind. 1973).

> The state, according to Miranda, has a "heavy burden . . . to demonstrate that the defendant knowingly and intelligently waived his privilege against self incrimination." We have adopted this standard in past decisions. The issue, therefore, before this Court, is whether the state met its "heavy burden", i.e., proved beyond a reasonable doubt that the confession was voluntarily given.[33]

As Professor Kerr explained,

> The court in this brief paragraph adopted the reasonable doubt standard without any citation of authority or any discussion whatever. In fact, the last few words of the paragraph appear to be included in the opinion almost as an after-thought and as a statement concerning a definition that appeared to be self-evident to the author of the opinion.[34]

In *Smith*, however, the court appeared to resolve the issue, overruling several cases, including *Burton*, which had instituted the "beyond a reasonable doubt" standard under the federal constitution.[35]

In the year after *Smith*, the supreme court reiterated its holding in three cases. First, in *Haak v. State*,[36] the court stated "[w]hen a defendant challenges the voluntariness of a confession under the United States Constitution, the State must prove by a preponderance of the evidence that the confession was voluntarily given."[37] Next, in *Sauerheber v. State*,[38] the court noted, "[t]he State must prove the voluntariness of a waiver of Miranda rights and the voluntariness of a confession by a preponderance of the evidence."[39] Finally, in *White v. State*,[40] the court stated "[i]f a defendant challenges the admissibility of his confession on voluntariness grounds, the State must prove by a preponderance of the evidence that the confession was voluntarily given."[41] The court explained in a footnote that "because defendant did not clearly challenge the admissibility of his confessions under the Indiana Constitution, we will assume that the claim is raised only under the United States Constitution and will analyze it as such."[42]

Less than five months after the court decided *White*, the supreme court issued *Berry v. State*,[43] in which it stated "[t]he State bears the burden of proving beyond a reasonable doubt that the defendant voluntarily and intelligently waived

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33. *Id.* at 797-98 (internal citations omitted).
34. KERR, *supra* note 30, § 7.2g, at 555.
35. *See Smith*. 689 N.E.2d at 1247.
36. 695 N.E.2d 944 (Ind. 1998).
37. *Id.* at 947-48.
38. 698 N.E.2d 796 (Ind. 1998).
39. *Id.* at 803.
40. 699 N.E.2d 630 (Ind. 1998).
41. *Id.* at 633.
42. *Id.* at 633 n.2.
43. 703 N.E.2d 154 (Ind. 1998).

his rights, and that the defendant's confession was voluntarily given."[44] There was no mention of the Indiana Constitution or a retreat from the standard announced in *Smith* and followed in *Haak*, *Sauerheber*, and *White*. Rather, the court merely cited *Owens v. State*,[45] a 1981 case that had not been overruled in *Smith*.

A year and a half later, the court, citing *Berry* and again without mention of *Smith* or the Indiana Constitution, noted in *Schmitt v. State*[46] that "[t]he State bears the burden of proving beyond a reasonable doubt that the defendant voluntarily and intelligently waived his rights, and that the defendant's confession was voluntarily given."[47] Three weeks later, the court reiterated this standard in *Carter v. State*,[48] in which it noted, without citation to any authority, that "[t]he trial court required the State to prove beyond a reasonable doubt that the Defendant voluntarily and intelligently waived his constitutional rights and that his confession was voluntarily given before his statement would be admitted into evidence."[49]

Not until *Luckhart v. State*[50] and *Jackson v. State*,[51] both authored by Justice Rucker and issued on October 5, 2000, did the court provide any type of explanation as to the correct standard. Both opinions cite *Schmitt* and *Carter* and include an identically worded footnote that states:

> We note that the federal constitution requires the State to prove only by a preponderance of the evidence that a defendant's confession was voluntarily given. However, in Indiana we require the State to prove the voluntariness of a confession beyond a reasonable doubt, and trial courts are bound to apply this standard when evaluating such claims."[52]

Based on *Luckhart* and *Jackson*, it appears that the issue is now settled. Nevertheless, one is left to wonder on what basis the court has retreated to the "beyond a reasonable" doubt standard. None of the opinions that rely on the "beyond a reasonable doubt" standard mention any provision of the Indiana Constitution, let alone engage in the detailed, exhaustive historical analysis that usually accompanies opinions in which the court holds that the Indiana Constitution offers greater protection than does an analogous provision of the federal constitution.[53] Thus, although the court never says so, it appears to have

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44. *Id.* at 157.

45. 427 N.E.2d 880 (Ind. 1981).

46. 730 N.E.2d 147 (Ind. 2000).

47. *Id.* at 148.

48. 730 N.E.2d 155 (Ind. 2000).

49. *Id.* at 156.

50. 736 N.E.2d 227 (Ind. 2000).

51. 735 N.E.2d 1146 (Ind. 2000).

52. *Luckhart*, 736 N.E.2d at 229 n.1 (internal citations omitted); *Jackson*, 735 N.E.2d at 1153 n.4 (internal citations omitted).

53. *See, e.g.*, Richardson v. State, 717 N.E.2d 32, 38-50 (Ind. 1999) (tracing the history of the double jeopardy clause of the Indiana Constitution).

adopted a higher standard simply as a rule of criminal procedure.

The bottom line, regardless of whether or not one agrees with the court's recent opinions, is that the issue appears to be resolved. When a defendant challenges the voluntariness of his confession, the State must prove the voluntariness "beyond a reasonable doubt." Although trial courts are bound to apply this standard, it probably makes little difference in the typical confession case in which the defendant alleges various sorts of police misconduct but police officers testify otherwise. Such cases require credibility assessments by the trial court, which, regardless of the standard applied, means that most defendants will continue to lose.

Nevertheless, the court's recent opinions are a potential trap for litigants and even judges who have not thoroughly read and digested the conflicting cases. Indeed, if one were to Shepardize or KeyCite *Smith*, it is good law, as are the cases following it. Moreover, Shepardizing or KeyCiting the cases overruled in *Smith* suggests they are not good law, when in fact they are. Because it does not appear that the court will offer any more of an explanation, overrule, or "un-overrule" any other cases, one can hope that continued application of the what the court has determined to be the proper standard will eventually lead trial courts and litigants to understand and apply the beyond a reasonable doubt standard.

B. Jury Deliberations and Return of Verdict

In *Dickenson v. State*,[54] the court of appeals addressed a claim that a juror lied during voir dire. Dickenson was charged with the attempted murder of Jessie Stinnett. During voir dire the trial court apprised the prospective jurors of the names of the potential witnesses in the case, which included Stinnett's wife Karen. One prospective juror acknowledged that she had been a childhood neighbor of Dickenson's and knew a few of the potential witnesses, but maintained that her ability to weigh the testimony of those witnesses would not be affected. In addition, the juror did not respond when the trial court asked if any of the prospective jurors had prior knowledge about the facts of the case. The juror was selected, and Dickenson was convicted.[55]

After trial, Dickenson filed a motion for an evidentiary hearing to determine juror misconduct, alleging that the juror had lied about her relationship with Karen and her pretrial knowledge of the case. Dickenson also filed affidavits from persons who had seen the juror and Karen together or had overheard the two discussing the incident before trial.[56]

At the evidentiary hearing, the juror testified that she knew both Dickenson and Karen but had only a casual relationship with either of them.[57] However, other witnesses, including Dickenson's two brothers, testified that they had seen

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54. 732 N.E.2d 238 (Ind. Ct. App. 2000).

55. *See id.* at 240.

56. *See id.*

57. *See id.* at 241.

the juror and Karen together following the incident but before trial.[58] One witness testified that she had seen the juror and Karen together at a bar "almost every weekend" and overheard them discussing the incident shortly after it happened.[59] Other witnesses testified that they had seen the juror and Karen together at other bars. The trial court questioned the juror about her answers on voir dire, determined that she did not lie, and denied the motion for a new trial.[60]

The court of appeals noted that, in order to secure a new trial, a defendant alleging juror misconduct must present "specific, substantial evidence showing a juror was possibly biased" and demonstrate that the misconduct was gross and probably harmed the defendant.[61] Based on the evidence presented, the court of appeals concluded that the juror "misrepresented her relationship with Karen when asked about it on voir dire and at the post-verdict evidentiary hearing . . . [and] was not truthful when she failed to affirmatively respond to the court's inquiry on voir dire as to whether any of the potential witnesses had prior knowledge of the case."[62] "[B]ecause the evidence reveals that [the juror] had knowledge of the case prior to trial, and was friendly with the victim's wife, who testified at trial," the court concluded that "the misconduct was gross and probably harmed the defendant."[63] Accordingly, the court reversed and remanded for a new trial.[64]

Judge Vaidik dissented, believing that the case should instead be remanded for an evidentiary hearing at which the trial court would consider whether the juror was biased.[65] The trial court's evidentiary hearing was inadequate because it heard testimony only from the juror, concluded that she was not biased, and then heard testimony from the defense witnesses as part of an offer of proof.[66] Based on the offer of proof testimony and the affidavits filed with the motion, the majority had concluded that the juror was biased and untruthful, a conclusion that Judge Vaidik asserted was reached by "reweigh[ing] the evidence and judg[ing] the credibility of the witnesses . . . . These are functions of a trial court not an appellate court."[67]

Although this issue is an important one, it is fortunately one that does not arise often. When it does, the better course would be to hear from all relevant witnesses and then rule on the issue, making an explicit finding about which ones are credible and which ones are not.

In *Jelks v. State*,[68] the court of appeals addressed the effect of a trial judge

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58. *See id.* at 242.
59. *Id.*
60. *See id.* at 240.
61. *See id.* at 241.
62. *Id.* at 242.
63. *Id.*
64. *See id.*
65. *See id.* at 242-43 (Vaidik, J., dissenting).
66. *See id.*
67. *Id.* at 243.
68. 720 N.E.2d 1171 (Ind. Ct. App. 1999).

engaging in a colloquy with a dissenting juror during polling. According to statute,

> When the jury has agreed upon a verdict, the verdict must be reduced to writing and signed by the foreman. When returned into court, the foreman shall deliver the verdict, and either party may poll the jury. If a juror dissents from the verdict, the jury shall be sent out to deliberate.[69]

In *Jelks*, after the jury's guilty verdict was read, the trial court polled the jury at Jelks' request. When asked if that was her verdict, a juror responded that it was not.[70] The trial court then asked the juror a series of questions regarding whether she believed the State had proven its case, her reasons for voting for guilty, and whether continued deliberations would be productive.[71] The trial court then sent the jurors back to the jury room to continue their deliberations. The jury later returned another guilty verdict.

On appeal Jelks contended that the trial court erred in engaging in a colloquy with the dissenting juror.[72] The court of appeals agreed and reversed his conviction, noting that

> [t]he statute clearly provides that the remedy for juror dissent that arises during the polling procedure is to return the jury for deliberations, not engage in an extended colloquy about the elements of the crime, the State's burden, or the role of a juror. By doing so, the trial court tainted further deliberations and placed the defendant in a position of grave peril.[73]

In *Baxter v. State*,[74] the supreme court was asked to consider the propriety of allowing jurors who smoke to separate from those who do not smoke during deliberations. During the alleged "separation," three jurors were allowed to go outside, where they remained within the sight but not hearing of the court's bailiff, while the remaining jurors remained inside with the bailiff.

The supreme court reiterated the well-established and strict rule regarding jury separation during deliberations. "Barring exigent circumstances, in a criminal trial the jury is to remain together throughout deliberations and until a verdict is returned."[75] If the jury is allowed to separate, the State is ordinarily required to "prove beyond a reasonable doubt that the verdict was not affected by the separation and that the verdict is clearly supported by the evidence."[76] The court noted that it had never before addressed the propriety of allowing jurors who smoke to be in one room while nonsmokers are in another room and

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69. IND. CODE § 34-36-1-9 (1998).
70. *See Jelks*, 720 N.E.2d at 1173-74.
71. *See id.* at 1173-74.
72. *See id.* at 1174.
73. *Id.*
74. 727 N.E.2d 429 (Ind. 2000).
75. *Id.* at 434.
76. *Id.*

declined to address the issue in this case because it was not preserved by a timely objection.[77] Thus, the propriety of allowing smoking and nonsmoking jurors to be separated in any way during deliberations remains an open question in Indiana.

In light of *Baxter*, some trial judges may forbid any separation, thus requiring jurors who smoke to go for hours without a cigarette. This could potentially lead jurors who smoke to expedite their deliberations. On the other hand, trial courts could also require that all jurors go outside to stand near the few who happen to smoke. Depending on weather conditions, however, this could create some ill will among jurors.

The issue is perhaps best resolved by an agreement between the parties allowing a limited separation supervised by the bailiff during which the nonsmoking jurors would remain in the jury room under strict instructions not to discuss the case. Although existing law clearly forbids a separation, a defendant's explicit acquiescence to it would foreclose the possibility of raising the issue as error on appeal.

C. Reasonable Doubt Instruction

Over four years ago, in *Winegeart v. State*,[78] a divided Indiana Supreme Court, acting under its "inherent and constitutional supervisory responsibilities,"[79] endorsed the Federal Judicial Center's reasonable doubt instruction for use by Indiana trial courts. That instruction provides:

> The government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you [should] find [him/her] guilty. If on the other hand, you think there is a real possibility that [he/she] is not guilty, you [should] give [him/her] the benefit of the doubt and find [him/her] not guilty.[80]

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77. *See id.* Baxter did not raise the issue until he filed a motion to correct error after trial. The court held that this was too late. *See id.* In a case in which the defendant does not learn of the separation until after trial, however, it would appear that the immediate filing of a motion raising the error would be sufficient to preserve the issue for appeal.

78. 665 N.E.2d 893 (Ind. 1996).

79. *Id.* at 902 (citing IND. CONST. art. VII, § 4).

80. *Id.* (brackets in original).

Justice Dickson, joined by Justices Sullivan and Selby, made it clear that the court was simply recommending, and not mandating, use of this instruction.

Justice DeBruler, joined by Chief Justice Shepard, wrote a concurring opinion in which he stated:

> I do not share the majority's perception of deep problems within this area, nor the belief that the [Federal Judicial Center's jury instructions] are the appropriate remedy. Specifically, I do not believe that "firmly convinced" equates to "beyond a reasonable doubt." Both objectively and subjectively, "firmly convinced" seems more similar to "clear and convincing" than to "beyond a reasonable doubt." I find the [current] Indiana Pattern Jury Instruction . . . more than adequate.[81]

The issue was not revisited for two years. In *Young v. State*,[82] the defendant challenged the trial court's refusal of his tendered instruction and the giving of an instruction that instead used the second paragraph of the *Winegeart* instruction. The court rejected the challenge, noting that the "two instructions are substantively similar" and "trial courts are not required to give instructions already covered by other instructions."[83]

The court further explained that the words "imagination or speculation" and "absolute certainty" were approved in *Winegeart* and that "the instruction sufficiently establishe[d] the requisite degree of certainty—it requires the jury to be 'firmly convinced' of the defendant's guilt based on the evidence."[84]

In the two years since *Young*, several other defendants have brought challenges to the supreme court based on the *Winegeart* instruction. Most of these challenges have been dismissed in relatively short order. For example, in *Williams v. State*,[85] the court noted

> Williams requested the trial court to give the instruction on the definition of reasonable doubt that now appears as Pattern Instruction 1.16. As the comments to that instruction observe, it was criticized in [*Winegeart*] and an alternative, which now appears as Instruction No. 1.15, was recommended by the majority of this Court. The trial court gave the reasonable doubt instruction that a majority of this Court recommended in *Winegeart*. It was not error to do so.[86]

Rather than attacking the entire instruction, other defendants have attempted to parse the instruction, arguing error based on certain sentences or phrases. These efforts have proved unsuccessful as well. For example, in *Ford v. State*,[87]

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81. *Id.* at 904-05 (DeBruler, J., concurring in result) (internal citations omitted).
82. 696 N.E.2d 386 (Ind. 1998).
83. *Id.* at 390.
84. *Id.* (quoting *Winegeart*, 665 N.E.2d at 902).
85. 714 N.E.2d 644 (Ind. 1999), *cert. denied*, 528 U.S. 1170 (2000).
86. *Id.* at 650 (internal citation omitted).
87. 718 N.E.2d 1104 (Ind. 1999).

the defendant challenged the use of the words "real possibility" asserting that "because the word 'real' is equated with 'very' in 'today's jargon,' the jury would have to find a 'significant or substantial doubt' before acquitting the defendant."[88] Justice Boehm, writing for a unanimous court and delivering a grammar lesson of sorts, noted:

> "Real" in this context seems fairly clearly to be the adjective meaning "actual," not the slang adverb which is a corruption of "really" as in "real big deal." Whether or not every juror would identify this grammatical point, we do not believe anyone would conclude that the term "real possibility" would have the connotation Ford urges. The trial court did not err in giving this instruction.[89]

Other challenges have transcended grammar and focused on alleged violations of constitutional rights. In *Dobbins v. State*,[90] the defendant argued that the *Winegeart* instruction impermissibly "shifted the burden of proof" to him.[91] The supreme court rejected this argument, noting simply, "Defendant recognizes that we approved the trial court's reasonable doubt instruction in *Winegeart*. We decline to reconsider the issue here."[92]

The court's most exhaustive analysis appears in *Williams v. State*,[93] in which the defendant challenged the final sentence of the *Winegeart* instruction as being at odds with the presumption of innocence. Specifically, Williams argued that "the benefit of the doubt is extended to all defendants, not only those whom the jury feels there is a 'real possibility' are not guilty."[94] He also contended that the instruction "tells the jurors if they believe the defendant is actually guilty, they should not apply the presumption of innocence and the requirement of proof beyond a reasonable doubt in rendering a verdict."[95]

The court rejected these challenges on the basis that (1) the first sentence of the instruction made clear that the State had the burden of proving the defendant guilty beyond a reasonable doubt; (2) the presumption of innocence was explained by other instructions; and (3) "Williams points to no case from any jurisdiction that has found it to undermine the presumption of innocence or otherwise deprive a defendant of his or her liberty without due process of law in violation of the Fourteenth Amendment."[96] Nevertheless, in a footnote, the court explained that "two federal cases have cautioned against the use of the words 'real possibility' in a reasonable doubt instruction"[97] and that the Hawaii Court

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88. *Id.* at 1105.
89. *Id.*
90. 721 N.E.2d 867 (Ind. 1999).
91. *Id.* at 874.
92. *Id.* at 875.
93. 724 N.E.2d 1093 (Ind. 2000).
94. *Id.* at 1095.
95. *Id.*
96. *Id.* at 1096.
97. *Id.* at 1096 n.2 (citing United States v. Porter, 821 F.2d 968, 973 (4th Cir. 1987); United

of Appeals "has also expressed disapproval of this language, and found an instruction similar to the one in this case to be reversible error based on the 'firmly convinced' language."[98]

Since *Williams*, the supreme court has considered and rejected several other challenges to the *Winegeart* instruction.[99] The specific bases of these challenges are not always clear. In *Wright v. State*,[100] however, it was clear that the defendant was challenging the instruction under the state constitution.[101] Specifically, Wright asserted that the trial court's reasonable doubt instructions, including the *Winegeart* instruction, violated article I, section 19 of the Indiana Constitution.[102] Because Wright did not object to the instructions at trial, the supreme court purportedly considered only whether the instructions were fundamentally erroneous.[103] Nevertheless, the language of the opinion rather explicitly finds no state constitutional violation.

> Instructions 15 and 21 do not violate Article I, section 19. The instructions inform the jurors that if they conclude beyond a reasonable doubt that the defendant is guilty, they should return a verdict of guilty. The instructions are hardly offensive to any of our fundamental precepts of criminal justice; indeed, we have approved of them in several previous cases.[104]

Thus, based on *Wright*, the state constitutional issue, at least under article I, section 19, is now settled and raising it in future cases will prove futile.

Thus, it would appear that the *Winegeart* instruction is here to stay, as challenges based on both the federal and state constitution have been raised and rejected. However, no defendant has yet asked the supreme court simply to revisit its recommendation in *Winegeart* and consider either to "unrecommend" the Federal Judicial Center pattern instruction or to recommend a better alternative. The potential success of such an argument would appear somewhat dubious in light of the court's consistent refusal to revisit the issue. Nevertheless, the composition of the current court is quite different from the court that decided *Winegeart*. Although Justices Dickson and Sullivan of the

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States v. McBride, 786 F.2d 45, 51-52 (2d Cir. 1986)).

98. *Id.* (citing State v. Perez, 976 P.2d 427, 441-42 (Haw. Ct. App. 1998), *cert. granted on other grounds by* 976 P.2d 379 (Haw. 1999)).

99. *See* Maul v. State, 731 N.E.2d 438, 441 (Ind. 2000); Wright v. State, 730 N.E.2d 713, 716 (Ind. 2000); McGregor v. State, 725 N.E.2d 840, 842 (Ind. 2000); Warren v. State, 725 N.E.2d 828, 832 (Ind. 2000); Turnley v. State, 725 N.E.2d 87, 89 (Ind. 2000).

100. 730 N.E.2d at 713.

101. *Id.* at 716. In an earlier case, *Childers v. State*, the court found that any claim under the state constitution was forfeited on appeal because it was not raised in the trial court. 719 N.E.2d 1227, 1232 (Ind. 1999).

102. *See Wright*, 730 N.E.2d at 716.

103. *See id.*

104. *Id.* (citing Barber v. State, 715 N.E.2d 848, 851 (Ind. 1999); Winegeart v. State, 665 N.E.2d 893, 895 (Ind. 1996)).

majority remain, so does Chief Justice Shepard, who opposed the recommendation from the beginning. Furthermore, Justices Boehm and Rucker have joined the court since *Winegeart*.

Although the loudest grumblings about the *Winegeart* instruction come from the criminal defense bar, dissatisfaction also appears to be present among some trial judges who continue to give the pre-*Winegeart* pattern instruction. Moreover, the committee of the Indiana Judges Association responsible for the Pattern Instructions has proposed a new reasonable doubt instruction to replace the one recommended in *Winegeart*. The proposed instruction reads:

> The burden is upon the State to prove beyond a reasonable doubt that the defendant is guilty of the crime(s) charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt. But it does not mean that a defendant's guilt must be proved beyond all possible doubt.
>
> A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after you have weighed and considered all the evidence.
>
> A defendant must not be convicted on suspicion or speculation. It is not enough for the State to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The State does not have to overcome every possible doubt.
>
> The State must prove each element of the crime(s) by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance.
>
> If you find that there is a reasonable doubt that the defendant is guilty of the crime(s), you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration.[105]

Although this proposed instruction is somewhat lengthy, it does not suffer from some of the alleged defects noted above. It eliminates the "real possibility" language and adds considerable language explaining the gravity of the State's burden. However, the proposed pattern instruction maintains the "firmly convinced" language, which was the source of concern in the *Winegeart* concurrence written by Justice DeBruler.[106] Nevertheless, the instruction appears to be a palatable alternative to the *Winegeart* instruction. If ultimately adopted, it is likely that many defendants will tender this instruction and many trial judges will be inclined to move away from the *Winegeart* recommendation based on the new instruction's status as a pattern instruction.

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105. *Proposed Criminal Instruction Amendments*, RES GESTAE, June 2000, at 21.

106. *See Winegeart*, 665 N.E.2d at 904 (DeBruler, J., concurring in result).

D. Material Variance

In *Allen v. State*,[107] the supreme court addressed a claim of material variance in a manner that raises several questions that will likely resurface in future cases. "A variance is an essential difference between the pleading and the proof."[108] Not all variances are material or fatal.[109] In determining whether a variance is material, courts consider:

> (1) was the defendant misled by the variance in the evidence from the allegations and specifications in the charge in the preparation and maintenance of his defense, and was he harmed or prejudiced thereby; (2) will the defendant be protected in [a] future criminal proceeding covering the same event, facts, and evidence against double jeopardy?[110]

In *Allen*, the defendant was charged with several counts including criminal deviate conduct, which is defined by statute as "an act involving: (1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object."[111] Count IV alleged that the act involved Allen's sex organ and the victim's anus.[112] The State's physician testified at trial that the "injury [was] an injury of forcible sexual assault caused by a forcible penetration into the anus [by] a blunt object."[113] There was also testimony that the injury was "sexual in nature" and that the profuse bleeding could have washed away any sperm.[114] Although sperm was found on the victim's shorts, none was found in her anus.[115] The State did not elicit any direct testimony that Allen's sex organ was the cause of the injury.[116]

On appeal Allen argued that a material variance existed because he was charged with criminal deviate conduct involving his sex organ while the evidence at trial indicated that the act was committed by a blunt object.[117] The State responded that the physician's testimony of penetration by a "blunt object" and the presence of sperm on the victim's shorts was evidence from which the jury could infer that the defendant committed the offense with his sex organ.[118]

The supreme court noted that the statute defines the offense alternatively as

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107. 720 N.E.2d 707 (Ind. 1999).
108. Mitchem v. State, 685 N.E.2d 671, 677 (Ind. 1997).
109. *See id.*
110. *Id.*
111. IND. CODE § 35-41-1-9 (1998).
112. *Allen*, 720 N.E.2d. at 714.
113. *Id.* at 713.
114. *Id.*
115. *Id.*
116. *See id.*
117. *See id.* at 712.
118. *Id.* at 714.

penetration by a "sex organ" or "object," and that the State charged the former.[119] Although the State could have elicited testimony that the penetration was by a sex organ, it did not. The court reversed the conviction and remanded that count for a new trial, noting that the conviction made a "fifty-year difference" in the defendant's sentence and thus "the State should provide evidence that plainly matches the charge."[120]

Allen was a 3-2 decision, written by Chief Justice Shepard who was joined by Justices Sullivan and Rucker. Justice Dickson dissented, noting that "the State did not assert anal penetration by any 'blunt object' other than the defendant's 'sex organ.' The defendant was not charged with one criminal act and confronted at trial with evidence of a different act. He was not misled."[121] Justice Boehm also dissented. He noted:

> The jury was properly instructed on the elements of criminal deviate conduct and also instructed to rely on the common sense that it had gained from day-to-day living. It heard evidence that semen was found in the victim's shorts. In my view, this was sufficient to support the inference that a penis was the blunt object.[122]

The majority's opinion in *Allen* suggests a rather strict application of the material variance doctrine. It requires the State to prove its case by "evidence that plainly matches the charge."[123] This appears to be a higher standard than the well-established one of merely determining whether the defendant was misled by the variance in the preparation of his defense. Such a strict rule would likely lead to greater success by defendants raising the issue on appeal. However, the court appears to limit its holding to cases involving lengthy sentences. Thus, a defendant appealing a variance in a misdemeanor or D felony case may not achieve the same success as did the defendant in *Allen*, who was challenging an A felony count on which he received a fifty year sentence.

Allen also raises additional questions about waiver and remedy, both areas that will likely need to be addressed in future cases. A footnote in *Allen* states that the court addressed the issue "on the merits, as the State has not claimed that Allen waived it."[124] No further explanation is provided. Errors are waived, or forfeited, in a number of ways, and in the context of material variance there is authority requiring that the issue "be raised by an objection specifically pointed out to the trial court at the time it arises."[125] Thus, it would appear that Allen did not object when the State elicited testimony about penetration with a blunt object. Indeed, had Allen objected when the State's physician testified about penetration by a blunt object, the State surely would have asked the witness if the

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119. *Id.*

120. *Id.*

121. *Id.* at 716 (Dickson, J., concurring in part and dissenting in part).

122. *Id.* (Boehm, J., concurring in part and dissenting in part).

123. *Id.* at 714.

124. *Id.* at 713 n.4.

125. Madison v. State, 130 N.E.2d 35, 46 (Ind. 1955) (Arterburn, J., concurring).

blunt object could have been Allen's sex organ, which would have resolved the issue and left nothing for Allen to appeal. Thus, if the appellate courts continue not to apply waiver when waiver is not raised by the State on appeal, defendants have a powerful incentive not to object at trial.[126]

Finally, the supreme court in *Allen* "reverse[d] Allen's conviction on Count IV and remand[ed] that count for a new trial."[127] Allen did not petition for rehearing, and thus one might infer that he believed retrial, rather than acquittal, to be the proper remedy. Indeed, other supreme court cases that have found a material variance have similarly stated that the remedy is a new trial.[128] However, the court of appeals has routinely ordered discharge, acquittal, or reduction to a lesser offense upon a finding of material variance.[129] Interestingly enough, a number of these conflicting opinions are cited in *Allen* with the parenthetical "all reversing convictions on the basis of material variance" but no explanation is offered for the disparate treatment.[130]

In simple challenges to the sufficiency of the evidence to support a conviction, it is clear that a defendant cannot be retried, i.e., the State does not get a second chance to prove what it failed to prove the first time.[131] In material variance cases, however, the State has usually proved all the material elements of a crime, but it just happens to be a different crime than the one charged. Thus, the issue remains whether the State should get a second bite of the apple. The issue will likely be raised in a future case, and the court of appeals or supreme court, with the benefit of far more analysis than is available here, will be called upon to resolve the inconsistencies.

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126. It is not uncommon for the supreme court to find issues waived, despite the failure of the State to assert waiver. *See, e.g.*, Dye v. State, 717 N.E.2d 5, 13 & n.6 (Ind. 1999), *cert. denied*, 121 S. Ct. 379 (2000); Kindred v. State, 540 N.E.2d 1161, 1169 (Ind. 1989).

127. *Allen*, 720 N.E.2d at 714.

128. *See, e.g.*, Kirk v. State, 235 N.E.2d 684 (Ind. 1968); Ferrell v. State, 219 N.E.2d 804 (Ind. 1966); Tullis v. State, 103 N.E.2d 353 (Ind. 1952);

129. *See, e.g.*, Miller v. State, 616 N.E.2d 750, 757 (Ind. Ct. App. 1993) (remanding "to the trial court with instructions to sentence [the defendant] for the lesser included offense, Criminal Confinement as a class D felony"); Waye v. State, 390 N.E.2d 700, 702 (Ind. Ct. App. 1979) (finding that "there was a fatal variance between the information and the proof at trial and the trial court erred in overruling Waye's motion for judgment on the evidence."); Wilson v. State, 330 N.E.2d 356, 362 (Ind. Ct. App. 1975) (remanding "with directions that an acquittal be entered as to Count I and that appellant Wilson be discharged as to that count only"); Hochman v. State, 300 N.E.2d 373, 375 (Ind. Ct. App. 1973) (reversing judgment and ordering defendant discharged); *but see* Bailey v. State, 314 N.E.2d 755, 758 (Ind. Ct. App. 1974) (reversing and remanding case to the trial court).

130. *Allen*, 720 N.E.2d at 714 n.5.

131. *See, e.g.*, Vest v. State, 621 N.E.2d 1094, 1096-97 (Ind. 1993).

E. Double Enhancements

In *Ross v. State*,[132] the supreme court granted transfer to address the propriety of double enhancements in a handgun case. In that case, the defendant was convicted of carrying a handgun without a license, a class A misdemeanor. Based on a prior felony conviction, Ross's A misdemeanor conviction was enhanced to a Class C felony under the handgun statute. Then, Ross was adjudicated a habitual offender under the general habitual offender statute because he had two prior unrelated felony convictions.[133] Ultimately, Ross was sentenced to eighteen years, eight for the C felony enhanced by ten for the habitual offender adjudication, for what otherwise began as a misdemeanor with a maximum sentence of one year.[134]

Applying well-settled principles of statutory construction, the supreme court held that the trial court erred in enhancing the handgun offense a second time.[135]

> In light of the statutory construction favoring more specific statutes as opposed to more general ones and because of the Rule of Lenity, a misdemeanor conviction under the handgun statute, once elevated to a felony due to a prior felony conviction, should not be enhanced again under the general habitual offender statute.[136]

Although the *Ross* court settled the issue of double enhancements in cases involving the enhancement of a handgun charge and the general habitual offender statute, the larger concern seems to be the potentially far-reaching effect of the case. At an October 2000 meeting of the Criminal Law Study Commission, the executive director of the Indiana Prosecuting Attorneys Council voiced concern that *Ross* may call into question a range of other criminal statutes that include an intermediate enhancement for second-time offenders.[137] There are more than thirty statutes with intermediate enhancements.[138] Application of *Ross* to these cases could result in a significant curtailment of current prosecutorial charging practice and a significant reduction in sentencing ranges.

Three months after *Ross*, the court of appeals in *Wood v. State*[139] addressed the propriety of further enhancing a C felony charge of operating a vehicle after lifetime suspension under the general habitual offender statute. The court relied in part on *Ross* but largely followed the supreme court's earlier precedent in *Stanek v. State*,[140] in which the court held that because the habitual traffic

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132. 729 N.E.2d 113 (Ind. 2000).

133. *See id.* at 114.

134. *See* Rick Thackeray, *Prosecutors Troubled by Habitual Offender Ruling*, IND. LAW., Oct. 25, 2000, at 3. The supreme court's opinion does not provide the length of Ross's sentence.

135. *See Ross*, 729 N.E.2d at 117.

136. *Id.*

137. *See* Thackeray, *supra* note 134, at 3.

138. *See id.*

139. 734 N.E.2d 296 (Ind. Ct. App. 2000).

140. 603 N.E.2d 152 (Ind. 1992).

offender statute is a discrete, separate, and independent habitual offender statute, convictions under that statute are not subject to further enhancement under the general habitual offender statute.[141]

In response to *Ross*, prosecutors have vowed to work during the 2001 session to insert language into the general habitual offender statute that will make it clear that a defendant whose conviction has been enhanced once is still eligible for habitual offender enhancement.[142] Such a change in the statute would appear to the resolve the issue, as *Ross* is based on statutory construction and not a violation of the Indiana constitutional prohibition against disproportionate sentences[143]

F. Double Jeopardy Revisited

As explained in last year's Survey,[144] in October 1999 the supreme court issued *Richardson v. State*,[145] in which it "formulated a new methodology for analysis of claims under the Indiana Double Jeopardy Clause."[146] The court in *Richardson* explained the "actual evidence test"[147] as follows:

> Under this inquiry, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.[148]

In addition to the evidence presented at trial, the reviewing court may also look at the court's instructions to the jury and the closing arguments of counsel.[149]

Under the actual evidence test of *Richardson*, defendants now have a much easier path to relief than previously available under the federal Double Jeopardy Clause.[150] Thus, it should come as no surprise that during the first year after

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141. *See Wood*, 734 N.E.2d at 298 (citing *Stanek*, 603 N.E.2d at 153-54).

142. *See* Thackeray, *supra* note 134, at 3.

143. *See* IND. CONST. art. I, § 16.

144. *See* Joel M. Schumm & James A. Garrard, *Recent Developments in Indiana Criminal Law and Procedure*, 33 IND. L. REV. 1197, 1226-28 (2000).

145. 717 N.E.2d 32 (Ind. 1999).

146. Taylor v. State, 717 N.E.2d 90, 95 (Ind. 1999).

147. The court in *Richardson* also adopted a statutory elements test. *See* Schumm & Garrard, *supra* note 144, at 1226. However, that test provides no additional protection beyond the Federal Constitution. *See id.* at 1227.

148. *Richardson*, 717 N.E.2d at 53.

149. *See id.* at 54 n.48; *see also* Lowrimore v. State, 728 N.E.2d 860, 868 (Ind. 2000).

150. *See* Schumm & Garrard, *supra* note 144, at 1232.

Richardson, convictions were vacated or reduced in many cases.[151]

Likewise, it should come as no surprise that the Attorney General has been less than enthusiastic about *Richardson* and its progeny. One example of this is *Spears v. State*,[152] in which the State raised several "novel" responses to the defendant's claim that his dual convictions for murder and robbery as a Class A felony violated the Indiana Double Jeopardy Clause.[153] Two are worthy of mention here: one that was settled and another that is certain to resurface in future cases.

First, the court rejected the State's contention that the proper remedy for a double jeopardy violation was remand for retrial.[154] The court noted that the State cited no double jeopardy precedent in support, nor did the court find any. "To the contrary, both before and after *Richardson*, the remedy for double jeopardy violations has routinely been to reduce or vacate one of the convictions."[155] The court concluded that the State "was given one opportunity to try Spears on the charges it selected, the evidence it presented, and the closing argument it chose to make. It is not entitled to a second bite of the apple."[156]

The State also argued in *Spears* that the case "should be remanded to the trial court 'for the trial court's ruling on whether the two crimes are the same for double jeopardy purposes.'"[157] It contended that this "intensely factual determination" would best be made by the trial court, and then could be reviewed by the appellate court for an abuse of discretion.[158] The State asserted that the issue was similar to the existence of a "serious evidentiary dispute" in the context of instructions on lesser included offenses, an area in which the court defers to trial court's findings.[159]

The court noted that it had not "expressly ruled on the standard of review in double jeopardy cases," but acknowledged that the determination of the "reasonable possibility" component of *Richardson* "turns on an analysis of the evidence."[160] However, the trial court in *Spears*, which was tried before *Richardson* was issued, made no findings. "Even if we were to adopt a standard of review analogous to that applied to the instruction issue, de novo review is

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151. *See, e.g.*, Grace v. State, 731 N.E.2d 442, 445-46 (Ind. 2000); Logan v. State, 729 N.E.2d 125, 136 (Ind. 2000); *Lowrimore*, 728 N.E.2d at 863; Marcum v. State, 725 N.E.2d 852, 864 (Ind. 2000); Wise v. State, 719 N.E.2d 1192, 1200-01 (Ind. 1999); Hampton v. State, 719 N.E.2d 803, 808 (Ind. 1999); Noble v. State, 734 N.E.2d 1119, 1125-26 (Ind. Ct. App. 2000); Sanders v. State, 734 N.E.2d 646, 651-52 (Ind. Ct. App. 2000); Davies v. State, 730 N.E.2d 726, 741 (Ind. Ct. App. 2000); Belser v. State, 727 N.E.2d 457, 462 (Ind. Ct. App. 2000).

152. 735 N.E.2d 1161 (Ind. 2000).

153. *Id.* at 1165.

154. *See id.* at 1166.

155. *Id.*

156. *Id.*

157. *Id.* at 1165-66.

158. *Id.* at 1166.

159. *Id.* (citing Brown v. State, 703 N.E.2d 1010, 1019 (Ind. 1998)).

160. *Id.*

appropriate where the trial court made no finding."[161]

Thus, in light of *Spears*, it is likely that defense counsel (or, possibly even prosecutors) will begin to argue the double jeopardy issue to the trial court with the hope of securing a factual determination that will aid their case on appeal. Considering the frequency with which such claims arise, it is likely that the court of appeals and supreme court will soon be called upon to decide whether deference is to be given to such findings.

G. Appellate Review of Sentences

Claims of sentencing error are among the most frequently issued raised on appeal in criminal cases. As the Indiana Supreme Court has made increasingly clear in recent cases, there are two basic types of sentencing error: (1) procedural challenges to the sentencing statement as relying on improper aggravating circumstances or overlooking significant mitigating circumstances and (2) substantive challenges to the length of the sentence as manifestly unreasonable.[162] These are two separate inquiries reviewed under different standards.[163]

As to the first type of error, it is well settled that when a trial court relies on aggravating or mitigating circumstances to deviate from the presumptive sentence, it must "(1) identify all of the significant mitigating and aggravating circumstances, (2) state the specific reason why each circumstance is considered to be mitigating or aggravating, and (3) articulate the court's evaluation and balancing of the circumstances to determine if the mitigating circumstances offset the aggravating ones."[164] If the trial court merely imposes the presumptive sentence, it need not delineate the aggravating and mitigating circumstances and weigh them.[165]

Successful claims of procedural sentencing error generally result in remand for a new sentencing statement. For example, in *Dowdell v. State*,[166] the trial court failed to find the defendant's lack of criminal history as a mitigating circumstance. The court reiterated that an "allegation that the trial court failed to find a mitigating circumstance requires [the defendant] to establish that the mitigating evidence is both significant and clearly supported by the record."[167] The court noted the significance of this mitigating circumstance and the State's concession of error in holding that remand for "resentencing on this record" was

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161. *Id.*

162. *See* Noojin v. State, 730 N.E.2d 672, 678 (Ind. 2000) (citing Hackett v. State, 716 N.E.2d 1273, 1276 n.1 (Ind. 1999)).

163. *See id.*

164. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999) (citing Hammons v. State, 493 N.E.2d 1250, 1254 (Ind. 1986)).

165. *See* Jackson v. State, 728 N.E.2d 147, 154 (Ind. 2000).

166. 720 N.E.2d 1146 (Ind. 1999).

167. *Id.* at 1154.

required.[168]

Claims of improper aggravating circumstances, however, do not always result in remand. The court has sometimes declined to consider claims of improper aggravators, noting that it "need not address these contentions because a single aggravating circumstance may be sufficient to support an enhanced sentence. If the trial court improperly applies an aggravator, but other valid aggravators exist, a sentence enhancement may still be upheld."[169] However, in some cases in which the trial court relied on one or more improper aggravating circumstances, the court has remanded for a new sentencing hearing because it was unable to conclude that the trial court would have imposed the same sentence had it not relied on the improper aggravating circumstances.[170] Finally, the supreme court has, in some recent cases, simply ordered a reduction of the sentence to the presumptive when the trial court erred in its sentencing statement.[171] Nevertheless, remand appears to remain the usual remedy.[172]

Unlike claims of procedural sentencing error, substantive challenges to the length of sentence imposed have proven to be more difficult both for advocates to advance and for appellate courts to address. In many states, even today the length of a statutorily authorized sentence is unassailable on appeal.[173] This was also true in Indiana before 1970 when the Indiana Constitution was amended to give both the supreme court[174] and court of appeals[175] the power to review and

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168. *Id.* at 1155.

169. Willey v. State, 712 N.E.2d 434, 446 (Ind. 1999) (internal citations omitted); *see also* Gibson v. State, 702 N.E.2d 707, 710 (Ind. 1998).

170. *See* Wooley v. State, 716 N.E.2d 919, 933 (Ind. 1999); *see also* Angleton v. State, 686 N.E.2d 803, 817 (Ind. 1997).

171. *See* Meagher v. State, 726 N.E.2d 260, 267 (Ind. 2000) ("Because the trial court found no significant aggravating or mitigating circumstances, we conclude that the imposition of presumptive sentences for each guilty offense is appropriate."); Marcum v. State, 725 N.E.2d 852, 864 (Ind. 2000) ("Here, however, because the trial court found the aggravating and mitigating circumstances to be in balance, there is no basis on which to impose consecutive terms. Accordingly, this case is remanded to the trial court with direction to impose concurrent sentences on all counts.").

172. *See, e.g.*, Stone v. State, 727 N.E.2d 33, 38 (Ind. Ct. App. 2000).

173. *See, e.g.*, Sinkfield v. State, 669 So. 2d 1026, 1028 (Ala. Crim. App. 1995) ("This court will not disturb a sentence on appeal where the trial court imposes a sentence within the statutory range."); Abbott v. State, 508 S.W.2d 733, 735-36 (Ark. 1974) ("[R]eview of sentences which are not in excess of statutory limits is not within the jurisdiction of this court because the exercise of clemency is a function of the executive branch of the government under Art. 6, Sec. 18 of the Arkansas Constitution, and this court is not at liberty to reduce a sentence within statutory limits, even though we might think it unduly harsh."); Quillen v. State, 929 P.2d 893, 902 (Nev. 1996) ("[A] sentence will be upheld if it is within the district judge's authority to assess."); Sampayo v. State, 625 S.W.2d 33, 35 (Tex. Crim. App. 1981) ("The law is well-settled in Texas that a sentence will not be disturbed if the penalty is within the prescribed limits set by the legislature.").

174. IND. CONST. art. VII, § 4.

175. IND. CONST. art. VII, § 6.

revise sentences.[176] According to the Report of the Judicial Study Commission, "[t]he proposal that the appellate power in criminal cases include the power to review sentences is based upon the efficacious use to which that power has been put by the Court of Criminal Appeals in England."[177]

Although neither the court of appeals nor the supreme court reduced a sentence for over a decade,[178] the supreme court, and to a lesser extent the court of appeals, have been far more receptive to reducing sentences in recent years. The authority to reduce a sentence, although grounded in the Indiana Constitution, is prescribed in greater detail by Rule 7(B) (formerly Rule 17(B)) of the Indiana Rules of Appellate Procedure, which provides the courts may not revise statutorily authorized sentences unless they are "manifestly unreasonable in light of the nature of the offense and the character of the offender."[179] Many cases have noted that the court's review under this rule[180] is "very deferential" to the trial court: "The issue is not whether in our judgment the sentence is unreasonable, but whether it is clearly, plainly, and obviously so."[181]

During the survey period, the supreme court reduced sentences in four cases on direct appeal:[182] (1) a fourteen-year-old defendant who committed several crimes, including the rape and murder of a sixty-nine year-old woman (from 199 to ninety-seven years);[183] (2) a sixteen-year-old defendant convicted of murder and conspiracy to commit murder (from ninety-five to sixty-five years);[184] (3) a sixteen-year-old defendant without a significant criminal history convicted of

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176. Indiana's constitutional amendment came at a time when the issue was receiving national attention. For example, in 1968 the American Bar Association observed of sentencing in the United States that "in no other area of our law does one man exercise such unrestricted power. No other country in the free world permits the condition to exist." AMERICAN BAR ASS'N, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 1-2 (1968). In light of the availability of the appellate process to civil litigants, the irony was striking: "Consider that a civil judgment of $2,000 is reviewable in every state at least once, possibly on two appellate levels. Then consider the unreviewability of a sentence of twenty years in prison and a fine of $10,000." JACK M. KRESS, PRESCRIPTION FOR JUSTICE: THE THEORY AND PRACTICE OF SENTENCING GUIDELINES 43 (1980) (citing M.E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 76-77 (1972)).

177. Report of the Judicial Study Commission at 5.

178. The court of appeals first reduced a sentence in *Cunningham v. State*, 469 N.E.2d 1, 9 (Ind. Ct. App. 1984), and the supreme court did so two years later in *Fointno v. State*, 487 N.E.2d 140, 149 (Ind. 1986).

179. Spears v. State, 735 N.E.2d 1161, 1168 (Ind. 2000).

180. Before the amendments that took effect January 1, 2001, the Rule appeared as Appellate Rule 17(B).

181. *E.g.*, *Spears*, 735 N.E.2d at 1168 (quoting Bunch v. State, 697 N.E.2d 1255, 1258 (Ind. 1998)).

182. The supreme court also granted transfer and reduced the sentence in *Evans v. State*, 725 N.E.2d 850 (Ind. 2000), as explained *infra* notes 203-04.

183. *See* Trowbridge v. State, 717 N.E.2d 138 (Ind. 1999).

184. *See* Brown v. State, 720 N.E.2d 1157 (Ind. 1999).

murdering and attempting to rob a ninety-year-old man (from 115 to sixty-five years);[185] and (4) a defendant with an "uncertain criminal history" who was convicted of murder for his participation as the driver of a car from which a passenger shot and killed a woman who had shouted a racial epithet (from sixty-five to fifty-five years).[186] In the first three of these cases, the court's opinions are based in large part on the "character of the offender," namely the defendant's youth and, to a lesser degree, lack of a significant criminal history. In the fourth case, the court seemingly relies on both the defendant's character and the nature of the crime in which he was not the key perpetrator. Reducing sentences in cases involving youthful defendants or defendants with no or minimal criminal histories is nothing new.[187] In addition, consideration of the nature of the crime has also been relied upon in the past as a reason to reduce a sentence. All of this is consistent with the language of Appellate Rule 7(B), which specifically mentions the "nature of the offense" and "character of the offender."

Unlike the supreme court, the court of appeals has historically been less inclined to reduce sentences. Two recent cases highlight the divergence of views in that court regarding its role under article VII, section 6. In *Bluck v. State*,[188] Judge Najam, joined by Judge Kirsch, noted that they had "struggled with the issue" of the proper role of an appellate court in reviewing a sentence and suggested (but declined to address because the case had to be remanded for resentencing due to procedural sentencing errors) that the sentence imposed was manifestly unreasonable.[189] Judge Garrard dissented, observing that although the supreme court "as the final arbiter of state law sentencing questions" has the authority to reduce sentences, two of three judges on a given panel of the fifteen-member court of appeals "should not exercise that authority absent the adoption of objective criteria governing the result."[190]

Two months later in *Allen v. State*,[191] Judge Garrard's view was quoted in a majority opinion authored by Senior Judge Hoffman and joined by Judge Garrard. The majority held that the statutory maximum sentence of nineteen years for reckless homicide, failure of driver to fulfill duties following an accident, and criminal recklessness was not "clearly, plainly, and obviously" unreasonable.[192] Judge Bailey dissented, observing "[w]hile it may be comfortable to rubber stamp every sentence supported by the [']objective criteria' of one remaining valid aggravating circumstances, such a dispassionate, complacent approach constitutes an abdication of the solemn constitutional

185. *See* Cherrone v. State, 726 N.E.2d 251 (Ind. 2000).

186. *See* Baxter v. State, 727 N.E.2d 429, 436 (Ind. 2000).

187. *See, e.g.*, Carter v. State, 711 N.E.2d 835 (Ind. 1999) (reducing sentence of fourteen-year-old defendant); Willoughby v. State, 660 N.E.2d 570 (Ind. 1996) (reducing sentence for defendant who lacked a criminal history).

188. 716 N.E.2d 507 (Ind. Ct. App. 1999).

189. *Id.* at 515.

190. *Id.* at 517 (Garrard, J., dissenting).

191. 719 N.E.2d 815, 820 (Ind. Ct. App. 1999).

192. *Id.*

responsibility imposed upon this court under Indiana's criminal justice system."[193]

There is only one published court of appeals opinion from the survey period in which a sentence was reduced as being manifestly unreasonable. In *Redmon v. State*,[194] the court reduced the maximum sentence of twenty years for burglary imposed on a fifteen-year-old who broke into the home of his mother and step-father to the presumptive term of ten years.[195] The court noted that the burglary did not cause personal injury to anyone, caused little, if any, damage to the dwelling, and did not result in any appreciable cost to the victims.[196] Moreover, in looking at the character of the offender, the court noted that Redmon was only fifteen at the time of the offense and Indiana Supreme Court precedent holding that "[a] defendant's young age is to be given considerable weight as a mitigating circumstance,"[197] especially when the offender is younger than sixteen.[198]

Considering the rather dramatic change in membership of the court of appeals in the past few years, one might suspect that court to become more receptive to exercising its power under article VII, section 6 in the future. Judge Hoffman and Judge Garrard, both of whom served on the court for decades, are now senior judges who participate in relatively few cases. Judge Mathias, who had been on the court for less than six months, authored *Redmon*, and Judge Bailey, who had been on the court for only two years, wrote the strongly worded *Allen* dissent.

The receptiveness of the court of appeals to entertain claims of manifestly unreasonable sentences assumes new significance beginning in 2001. In November 2000, voters approved a constitutional amendment that will greatly reduce the mandatory jurisdiction of the supreme court. Before the amendment, the supreme court heard all criminal appeals in which the sentence imposed was greater than fifty years on any single count. After the amendment, all term-of-years appeals will now go to the court of appeals, and the supreme court will hear, on direct appeal, only death penalty and life without parole cases. Thus, if substantive sentence review is to take place in the future, it will have to be, at least in the first instance, in the court of appeals. With its dramatically reduced mandatory caseload, however, the supreme court now will have considerably more time to grant transfer in sentencing cases.

Regardless of whether the case is being heard in the court of appeals or the supreme court, substantive appellate review of sentences will likely continue to be a difficult issue. To some extent, this is unavoidable because sentencing decisions, which feature unique crimes and unique criminals, often, if not always, defy quantification.[199] Nevertheless, it is important that opinions strive for some

193. *Id.* at 820-21 (Bailey, J., dissenting).

194. 734 N.E.2d 1088 (Ind. Ct. App. 2000).

195. *See id.* at 1095.

196. *See id.* at 1094.

197. *Id.* (quoting Brown v. State, 720 N.E.2d 1157, 1159 (Ind. 1999)).

198. *See id.* (citing Carter v. State, 711 N.E.2d 835, 842 (Ind. 1999)).

199. *See generally Carter*, 711 N.E.2d at 841.

degree of consistency to guide trial judges and advocates at both the trial and appellate levels, as well as to ensure that those defendants with similar backgrounds who commit similar offenses are treated similarly. As the cases discussed above highlight, both the supreme court and court of appeals have been especially receptive to reductions in cases of youthful defendants.[200] In addition, there is already considerable case law explaining when a defendant's mental illness should lead to a reduction of a sentence.[201] Along the same lines, one would hope that case law will continue to develop, drawing upon previous cases, in explaining when a reduction is appropriate and when it is not. Indeed, Indiana could look to other states that have developed an extensive body of sentencing law for guidance.[202]

Questions will continue to surface, however. For example, what amount of deference, if any, should the supreme court give to the court of appeals' review of a sentence? The two courts review sentences under similarly worded, yet separate, provisions of the Indiana Constitution. If the court of appeals affirms a sentence under article VII, section 6, the defendant may nonetheless ask the supreme court to review the sentence under article VII, section 4. Thus, defendants have two opportunities for sentence review, and both courts have the opportunity to improve upon the recent efforts to make the process of appellate sentence review more consistent and predictable.

The best predictor of this may be the supreme court's recent opinion in *Evans v. State*,[203] in which the defendant, who was sentenced to the maximum term of fifty years for dealing in cocaine, sought transfer after the court of appeals affirmed his sentence. The supreme court granted transfer and reduced the sentence to the presumptive term of thirty years, relying on the defendant's youthful age, lack of a violent criminal history, and the fact that the defendant had sold a relatively small amount of drugs to a police informant who sought him out.[204] There was no mention of deference to the court of appeals' holding that the sentence was not manifestly unreasonable, and thus it would appear that defendants have two chances to have their sentence reviewed by each court

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200. Other cases have made it clear that youth generally ceases to be a mitigating circumstance at age eighteen. *See, e.g.*, Sensback v. State, 720 N.E.2d 1160 (Ind. 1999).

201. *See, e.g.*, Weeks v. State, 697 N.E.2d 28, 31 (Ind. 1998); Archer v. State, 689 N.E.2d 678, 685-86 (Ind. 1997); Gambill v. State, 675 N.E.2d 668, 677-78 (Ind. 1996); Mayberry v. State, 670 N.E.2d 1262, 1271 (Ind. 1996); Barany v. State, 658 N.E.2d 60, 67 (Ind. 1995); Walton v. State, 650 N.E.2d 1134, 1137 (Ind. 1995); Christopher v. State, 511 N.E.2d 1019, 1023 (Ind. 1987).

202. *See, e.g.*, Susanne Di Pietro, *The Development of Appellate Sentence Review in Alaska*, JUDICATURE, Oct.-Nov. 1991, at 152-53 (noting that the Alaska Court of Appeals "routinely reduces excessive sentences to bring them in line with sentences given in comparable cases and has created an extensive body of case law articulating appropriate sentencing principles, establishing benchmark terms for many classes of offenses, . . . establishing standards for the extent to which sentences can be increased in aggravated cases . . . [and] regulating the total aggregate terms that may be imposed for offenders who are sentenced consecutively").

203. 725 N.E.2d 850 (Ind. 2000).

204. *See id.* at 851-52.

applying the same standard.

Another issue that may surface is whether the highly deferential "manifestly unreasonable" standard is consistent with the original purpose of the 1970 amendment, which purported to be modeled after the efficacious use to which that power has been put by the Court of Criminal Appeals in England. Clearly, appellate sentence review in Indiana is far less extensive than in England, but this is at least partially explained by the very different sentencing structures in each.

England has no criminal code and trial courts are free to choose any sentence (imprisonment, probation, commitment to a mental hospital, custodial training for young offenders, etc.) for any crime except murder, which is punishable only by an indefinite sentence of life imprisonment, and three rare offenses punishable by death.[205] If the trial court chooses imprisonment, it has a great deal of discretion as there are no mandatory minimum sentences (except for murder) and the maximum fixed by statute is "for the most part so much higher than what is normally considered appropriate for those offences that the process of fixing the length of imprisonment seldom involves any consideration of the statutory provision."[206]

The Court of Appeal (Criminal Division) has jurisdiction to review sentences upon application by the defendant. According to statute, the appellate court may intervene "if it considers that the appellant should be sentenced differently for any offence for which he was dealt with by the court below" and may substitute for that sentence "such sentence . . . as it thinks appropriate for the case."[207] Not surprisingly, appellate review of sentences is "the main business" of the Court of Appeal.[208]

Although the Court of Appeal has developed many sentencing principles that are worthy of consideration by Indiana's appellate courts,[209] the wholesale, seemingly de novo review of sentences performed there has not, to date, been advocated here.[210] Such an activist role of the judiciary would appear to be unnecessary in light of the active role of the legislature in sentencing matters. Indeed, the ABA Standards for Sentencing advocate that reviewing courts "make effective the legislature's public policy choices regarding sentencing."[211] The current statutory scheme in Indiana requires that judges must adhere to somewhat

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

206. *Id.* at 195; *see also* D.A. Thomas, *Sentencing in England*, 42 MD. L. REV. 90, 113 ("With the exception of a few offences for which the maximum sentence is set at a level which is lower than many judges would wish, the majority of sentences imposed are far below the permitted maximum sentence.").

207. Thomas, *supra* note 206, at 196 (quoting Justice Act 1967, ch. 80, 97(7) (Eng.)).

208. *Id.*

209. *See id.* at 202-16.

210. *See generally* Hardebeck v. State, 656 N.E.2d 486, 489-90 (Ind. Ct. App. 1995).

211. AMERICAN BAR ASS'N, CRIMINAL JUSTICE SENTENCING STANDARDS, 18-8.2 (3d ed. 1994).

narrow sentencing ranges for each class of offense[212] and prohibits suspension of a sentence below the minimum for certain offenses[213] or certain offenders.[214] Statutory law provides a non-exhaustive list of circumstances to consider in imposing sentence.[215] Trial courts must impose consecutive sentences in certain circumstances,[216] have the discretion to do so in other circumstances,[217] but must adhere to specific limitations on the aggregate number of years.[218]

Nevertheless, one could question whether the highly deferential "manifestly unreasonable" standard currently applied is that which was envisioned at the time of the adoption of the 1970 amendment. Ultimately, this is an issue that can only be addressed by the supreme court if it decides to amend the appellate rules.

CONCLUSION

In short, the legislation and decisional law of the Survey period provided a few answers but also left several questions unresolved. The General Assembly (with some help from the supreme court) corrected a technical, yet far-reaching, problem with the drunk driving statute and clarified a relatively obscure venue provision. In addition, the supreme court appears to have resolved long-standing confusion and inconsistency regarding the proper standard of review in challenges to confessions.

Nevertheless, important questions remain. Discontent over the seemingly unpopular yet constitutionally supportable *Winegeart* reasonable doubt instruction may lead to a call for reconsideration of the supreme court's 1996 "recommendation" in light of the numerous challenges and the soon-to-be adopted alternative pattern instruction. Questions will also continue to loom regarding what constitutes a material variance, whether that determination is influenced by the severity of the charge at issue, and whether remand for retrial or vacation of the conviction is the appropriate remedy. In the double jeopardy context, the court of appeals or supreme court will likely be asked to decide whether or not to defer to a trial court's determination of whether two offenses violate the Indiana Double Jeopardy Clause under *Richardson*'s actual evidence

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212. *See* IND. CODE §§ 35-50-2-3 (1998) (presumptive sentence for murder is 55 years; range is 45 to 65 years), 35-50-2-4 (presumptive sentence for a Class A felony is 30 years; range is 20 to 50 years), 35-50-2-5 (presumptive sentence for a Class B felony is 10 years; range is six to 20 years), 35-50-2-6 (presumptive sentence for a Class C felony is four years; range is two to eight years), 35-50-2-7 (presumptive sentence for a Class D felony is one and a half years; range is six months to three years).

213. *See id.* § 35-50-2-2.

214. *See id.* §§ 35-50-2-2(b)(1)-(3), 35-50-2-2.1.

215. *See id.* § 35-38-7.1.

216. *See id.* § 35-50-1-2(d)-(e).

217. *See id.* § 35-50-1-2(c).

218. *See id.* ("[E]xcept for crimes of violence, the total consecutive terms of imprisonment . . . shall not exceed the presumptive sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.").

test.

Finally, beginning in 2001, the future of substantive appellate sentence review becomes even less certain as the supreme court, which has been fairly proactive in reducing sentences, loses its mandatory caseload of all term-of-years criminal appeals. These cases will now be heard by the court of appeals, which has historically been less receptive to sentence reductions but has recently shown signs of changing course. Regardless of whether substantive sentence review occurs in the court of appeals on direct appeal or is shaped through the grant of transfer by the supreme court, either court is well-positioned to develop sentencing principles that will not only aid litigants and trial judges in future sentencing cases but also ensure greater fairness and consistency, i.e., that similar defendants who commit similar crimes are treated similarly.