# RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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The General Assembly and Indiana's appellate courts confronted new issues and revisited old ones during the survey period. Rather than separating the efforts of each branch of government, this Article takes a topical approach to exploring some of the most significant developments between October 1, 2001, and September 30, 2002.

The bookends—arguably the most significant issues this year—are the death penalty and appellate sentence review. The Article begins with the death penalty issue, in which both the General Assembly and the Indiana Supreme Court took fairly bold action in light of recent United States Supreme Court developments. The Article then explores in less depth other issues both of old vintage, such as double jeopardy, jury instructions, and double enhancements, as well as new issues such as Internet child solicitation and anti-terrorism legislation. The Article concludes, as it has for the past two years, with a discussion of the far-reaching and evolving issue of appellate sentence review.

## I. DEATH PENALTY DISARRAY IN INDIANA

The United States Supreme Court's death penalty jurisprudence in the 2002 term was arguably the most significant since the death penalty was found unconstitutional three decades ago in *Furman v. Georgia*.[1] In *Atkins v. Virginia*,[2] the Court held that the Eighth Amendment prohibited the execution of mentally retarded individuals. That decision had no practical effect in Indiana or the majority of other states that had already banned execution of mentally retarded individuals.[3] Indeed, the Indiana amendment predated *Atkins* by eight years.[4]

Much farther reaching, however, was the boost to the role of juries in capital sentencing as the result of the Supreme Court's opinion in *Ring v. Arizona*[5] and the 2002 amendments to the Indiana death penalty statute that seemingly anticipated it. Since its adoption in 1977, the Indiana death penalty statute has required the State to prove at least one of the delineated aggravating factors for the imposition of the death penalty; however, it expressly limited the jury's role to making a non-binding "recommendation" to the trial court and allowed the trial court to make the ultimate decision regarding the sentence to impose.[6]

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1. 408 U.S. 238 (1972).
2. 536 U.S. 304 (2002).
3. *Id.* at 314-15.
4. *See* IND. CODE § 35-36-9-6 (Supp. 1994).
5. 536 U.S. 584 (2002).
6. IND. CODE § 35-50-2-9(d) & (e) (1998).

### *A. Presaging* Ring

In 2000, the United States Supreme Court held in *Apprendi v. New Jersey*[7] that "[o]ther than the fact of a prior conviction, any facts that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[8] Although *Apprendi* addressed an enhancement to a term of years sentence based on the defendant's use of a handgun, its impact on capital sentencing became an immediate topic of discussion throughout the nation. Specifically, the Court would have to address the continued viability of its seemingly conflicting 1990 opinion, *Walton v. Arizona*,[9] which had upheld the power of judges to find an aggravating circumstance to support the imposition of a death sentence. The wait was a short one, as the Supreme Court granted certiorari and set *Ring v. Arizona* for oral argument on April 24, 2002.

In anticipation of the Supreme Court's opinion in *Ring*, the General Assembly and the Indiana Supreme Court took fairly bold but divergent action. The General Assembly amended the death penalty statute to provide that trial courts "shall instruct the jury that they must find at least one aggravating circumstance beyond a reasonable doubt and shall provide a special verdict form for each aggravating circumstance alleged."[10] The statute was further amended to provide "[i]f the jury reaches a sentencing recommendation, the court shall sentence the defendant accordingly," while retaining the long-standing language that allowed the trial court to "proceed as if the hearing had been to the court alone" if the jury was unable to reach a unanimous sentencing recommendation.[11]

With this backdrop of legislative action to address future cases and in wake of speculation about how the Supreme Court might affect pending ones under *Ring*, the Indiana Supreme Court issued opinions in two death penalty opinions while *Ring* was pending. First, on March 20, the court upheld the denial of post-conviction relief in a death penalty case in *Saylor v. State*.[12] A month later, relying heavily on *Saylor*, the court reversed a trial court's dismissal of a death penalty count based on a facial challenge to the statute on *Apprendi* grounds in *Barker v. State*.[13]

In 1992 Benny Saylor was convicted of murder, felony murder, robbery, and confinement in the stabbing death of a Madison County woman.[14] Although the jury recommended against the imposition of death, the trial court overrode the recommendation and sentenced him to death, which was affirmed on direct

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7. 530 U.S. 466 (2000).
8. *Id.* at 490.
9. 497 U.S. 639 (1990).
10. IND. CODE § 35-50-2-9(d) (Supp. 2002).
11. *Id.* § 35-50-2-9(f) (1998).
12. 765 N.E.2d 535 (Ind. 2002).
13. 768 N.E.2d 425 (Ind. 2002).
14. *Saylor*, 765 N.E.2d at 544.

appeal.[15] He raised several issues in a petition for post-conviction relief, which was denied by the trial court and then automatically appealed to the Indiana Supreme Court.[16] Among the issues addressed in the post-conviction appeal was the effect of *Apprendi* on Indiana's death penalty statute in general and Saylor's death sentence in particular.

In an opinion written by Justice Rucker and joined by Chief Justice Shepard and Justice Dickson, the court found no constitutional infirmity in the statute or Saylor's sentence.[17] The court began by acknowledging *Apprendi*'s holding that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[18] However, the court found no *Apprendi* violation for two reasons. First, the court noted that *Apprendi* had not overruled *Walton v. Arizona*,[19] which addressed a sentencing scheme similar to Indiana's. In Arizona, the trial judge finds the existence of aggravating and mitigating circumstances and can impose a sentence of death only if it finds the existence of an aggravating circumstance and no mitigating circumstances substantial enough to warrant leniency.[20] The Court in *Walton* upheld the statute, finding it was well settled that judges—rather than juries—may find the existence of an aggravating circumstance that renders a defendant eligible for a death sentence.[21] In *Apprendi*, the Court specifically cited *Walton*, seemingly with approval, although a concurring and dissenting opinion suggested that *Walton* would have to be revisited,[22] at a minimum, if it had not been effectively overruled.[23] Nevertheless, the Indiana Supreme Court in *Saylor* concluded "in light of *Walton*, Saylor's *Apprendi*-based challenge to Indiana death penalty statute must fail."[24]

In addition to its reliance on *Walton*, the supreme court found Saylor's challenge unavailing based on its construction of Indiana's death penalty statute. It noted that the statutory maximum for the crime in *Apprendi* was ten years and a "totally separate statute" provided for an "extended term of imprisonment" based on a trial court finding that a defendant committed a hate crime.[25] In contrast, the court found that Indiana's sentencing scheme for murder "provides that the maximum sentence is death."[26] It reached this seemingly strained conclusion by looking not only to the term of years sentence provided for by Indiana Code section 35-50-2-3, but also the death penalty provision found in

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15. *Id.* (citing Saylor v. State, 686 N.E.2d 80 (Ind. 1997)).
16. *See* IND. APP. R. 4(A).
17. *Saylor*, 765 N.E.2d at 562-64.
18. *Id.* at 562 (quoting *Apprendi*, 530 U.S. at 490).
19. 497 U.S. 639 (1990).
20. *Saylor*, 765 N.E.2d at 562 (citing *Walton*, 497 U.S. at 644).
21. *Id.* at 563 (citing *Walton*, 497 U.S. at 647-48).
22. *Apprendi*, 530 U.S. at 523.
23. *Id.* at 538.
24. *Saylor*, 765 N.E.2d at 563.
25. *Id.* at 564 (citing *Apprendi*, 530 U.S. at 468-69).
26. *Id.*

section nine.[27] It reasoned that "when construing a statute, all sections of the same act should be viewed together."[28]

Justice Boehm wrote an opinion concurring in the result reached by the majority. First, he questioned whether *Apprendi* would even apply because Saylor's appeal was from a collateral proceeding in light of the "new rule" doctrine of *Teague v. Lane*.[29] At least five federal circuit courts of appeal have held that *Apprendi* does not apply retroactively in initial petitions for habeas corpus.[30]

However, the retroactivity issue did not need to be addressed in his view because Saylor was on probation at the time of the crime for which he received his death sentence. Justice Boehm opined that Saylor's probationary status caused him to fall within the *Apprendi* exception that excludes "the fact of a prior conviction" from those that must be found by a jury.[31] "Both are established by judicial records and require none of the fact-finding we expect of a jury."[32] For these reasons, Justice Boehm agreed that Saylor's death sentence should be affirmed.

Expressing the view that the trial court's override of the jury's recommendation against a death sentence violated *Apprendi*, Justice Sullivan dissented.[33] As an initial matter, like the majority he "assume[d] for purposes of this opinion that the holding in *Apprendi* is retroactive to Saylor's case."[34] Then, in his detailed opinion, Justice Sullivan opined that Indiana's death penalty statute is not facially unconstitutional but is unconstitutional in two instances: "where the jury recommends a term of years or makes no sentencing recommendation."[35]

In those cases in which the jury has made a recommendation for death or life without parole, the trial court may, consistent with *Apprendi*, impose a death sentence because inherent in the jury's recommendation is a finding that the State has proven beyond a reasonable doubt the existence of at least one death penalty eligibility factor.[36] The imposition of a death sentence is also permissible when the jury has made written findings as to death eligibility (even if it recommends a term of years)[37] or in cases in which the jury's verdict in the guilt phase constitutes a finding of death eligibility.[38] A verdict of guilty to two or more murders is the paradigmatic example of a guilt phase verdict that also establishes

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27. *See id.* at 564 (citing IND. CODE § 35-50-2-9(k)(1), (2)).
28. *Id.*
29. 489 U.S. 288 (1989).
30. *Saylor*, 765 N.E.2d at 568 (Boehm, J., concurring).
31. *Id.*
32. *Id.*
33. *Id.* at 568 (Sullivan, J., dissenting).
34. *Id.* at 569.
35. *Id.* at 574.
36. *Id.*
37. *Id.* at 575 (citing Holsinger v. State, 750 N.E.2d 354, 360 (Ind. 2001)).
38. *Id.* (citing Pope v. State, 737 N.E.2d 374, 381 (Ind. 2000)).

death eligibility under the capital sentencing statute.[39]

In Justice Sullivan's view, *Apprendi* precludes the imposition of a death sentence for Saylor because the jury had recommended a term of years, had not made written eligibility findings, and its guilt phase verdict did not constitute an eligibility finding.[40] Accordingly, he would have reversed the denial of post-conviction relief and set aside Saylor's death sentence.[41]

Another death penalty case came quickly on the heels of *Saylor*, but it was easily resolved by a unanimous court. *State v. Barker*,[42] unlike *Saylor*, was an appeal from a finding of facial unconstitutionality and was before the court on direct (interlocutory) rather than collateral review. In a per curiam opinion, the court simply stated, "We addressed the effect of *Apprendi* in *Saylor*, and concluded that Indiana death penalty statute remains constitutional."[43] The only possible light shed into the court's unanimous conclusion in *Barker*—as opposed to the fractured reasoning of its members in *Saylor*—comes from Justice Sullivan's dissent in *Saylor*:

> I believe that *Apprendi* requires that a jury make a determination beyond a reasonable doubt that one or more of the death eligibility factors set forth in Ind. Code § 35-50-2-9 (b) have been proven beyond a reasonable doubt by the State in order for a person to be eligible to be sentenced to death in Indiana. However, I believe that in most circumstances the Indiana statute complies with the *Apprendi* mandate. For this reason, I disagree with the conclusion of Judge Hawkins in *State v. Barker*, that Apprendi renders Ind. Code § 35-50-2-9 (b) unconstitutional on its face.[44]

### *B. The Main Event:* Ring v. Arizona

Caught between a rock (*Apprendi*) and hard place (*Walton*), the Supreme Court aptly acknowledged that the two were irreconcilable in *Ring v. Arizona* [45] and chose to overrule *Walton*: "Capital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[46]

The Arizona statute at issue in *Ring* vested the trial judge with the sole responsibility of conducting a "separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances . . . for the

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39. *See id.* (citing IND. CODE § 35-50-2-9(b)(8)).
40. *Id.* at 576.
41. *Id.* at 577.
42. 768 N.E.2d 425 (Ind. 2002).
43. *Id.* at 426.
44. *Saylor*, 765 N.E.2d at 574 (Sullivan, J., dissenting) (internal citation removed).
45. 536 U.S. 584 (2002).
46. *Id.* at 589.

purpose of determining the sentence to be imposed."[47] The maximum punishment for first-degree murder based on the jury's verdict was life imprisonment, and the death sentence could be imposed only if one of these aggravating circumstances was proved beyond a reasonable doubt to the trial judge.[48] Because these enumerated factors "operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment required that they be found by a jury."[49] In a final salvo, the Court reiterated the importance of the Sixth Amendment right to a jury trial, which would be "senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death."[50]

### *C. The Aftermath of* Ring

The majority opinion in *Saylor* appears to be irreconcilable with *Ring*. Saylor filed a petition for rehearing, and the supreme court took the highly unusual step of hearing oral argument on the petition in November of 2002. By that time, the court had issued an opinion and order in two separate cases, which suggest that it is likely to re-evaluate *Saylor* in light of *Ring*.

In August of 2002, the supreme court first uttered the *Ring* word, and it did so *sua sponte*. Amy Bostick was convicted of three counts of murder arising out of the death of her children, ages one, two, and four, who were locked in their room during a house fire.[51] After reciting the holding of *Apprendi*, which had been distinguished away in *Saylor*, the court acknowledged that *Ring* "made it clear that *Apprendi* applied to capital sentencing schemes."[52]

> Contrary to *Apprendi* and *Ring*, the defendant's sentences to life without parole pursuant to Ind. Code § 35-50-2-9, were based on facts extending the sentence beyond the maximum authorized by the jury's verdict finding her guilty of murder. Because of the absence of a jury determination that qualifying aggravating circumstances were proven beyond a reasonable doubt, we must therefore vacate the trial court's sentence of life without parole.[53]

The court did not engage in harmless error analysis, despite the nature of the guilt phase verdicts, i.e., the murder of three children that were indisputably well under the age of twelve—the alleged aggravating circumstance.[54] Rather, the

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47. *Id.* at 592 (quoting ARIZ. REV. STAT. ANN. § 13-703(C) (West Supp. 2001)).

48. *Id.* at 597.

49. *Id.* at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19) (internal citation removed).

50. *Id.*

51. Bostick v. State, 773 N.E.2d 266, 267 (Ind. 2002).

52. *Id.* at 273.

53. *Id.*

54. *See* IND. CODE § 35-50-2-9(b)(12). For reasons unclear in the court's opinion, the State did not allege the b(8) aggravator of multiple killings, which would seemingly have obviated reversal on *Ring* grounds.

court noted that the State could elect not to pursue its request for a life without parole sentence, in which case the trial court could resentence the defendant to a term of years, or, if the State elected to proceed with its original request, the trial court would be required to convene a new penalty phase jury and conduct further proceedings pursuant to Indiana Code section 35-50-2-9.[55] Justice Dickson, writing for a four-justice majority on the issue, cited extensive precedent for the proposition of allowing a new jury to be convened in a variety of circumstances, including a penalty phase.[56] However, Justice Sullivan dissented on this issue, reasoning that there is "no statutory authority to convene a new penalty phase jury once the original jury has been unable to reach a recommendation."[57] The language of the statute, which applies to a jury's "recommendation" rather than a verdict, provides that in cases in which unanimity is not achieved, the trial court "shall discharge the jury and proceed as if the hearing had been to the court alone."[58]

Finally, two months after *Bostick*, the supreme court addressed the effect of *Ring* in an order denying a motion to file a successive petition for post-conviction relief. In *Wrinkles v. State*,[59] the court found it unnecessary to address whether *Ring* applies retroactively because "*Ring* is not implicated in petitioner's case under any view that the Court might find plausible."[60] The court relied on three specific grounds. First, Wrinkles was found eligible for the death sentence based on the commission of multiple murders; therefore, the jury's guilt-phase verdict finding him guilty of three murders necessarily established the capital aggravator of having committed more than one murder.[61] In addition, the penalty phase instruction—requiring the jury to find the existence of the charged aggravating circumstance beyond a reasonable doubt and that the aggravating circumstance outweighed the mitigating circumstances—proves that the jury "necessarily determined the fact of the multiple murders beyond a reasonable doubt."[62] Finally, the court noted that Wrinkles had made "some of the same arguments" on this subject in his direct appeal, and "to the extent the claims now presented are the same claims made and rejected in prior proceedings, the claims are *res judicata*."[63]

### *D. Issues Remain*

In light of *Ring*, as explained in *Bostick*, it would seem very likely that the court will grant rehearing in *Saylor*, although the result may well remain the

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55. *Bostick*, 773 N.E.2d at 274.
56. *Id.* at 274 n.5.
57. *Id.* at 275 (Sullivan, J., dissenting).
58. *Id.* at 274 (quoting IND. CODE § 35-50-2-9(f)).
59. 776 N.E.2d 905 (Ind. 2002).
60. *Id.* at 907.
61. *Id.*
62. *Id.* at 907-08.
63. *Id.* at 908.

same if the court addresses non-retroactivity. Neither rationale relied upon by the *Saylor* majority appears sound after *Ring*: (1) *Walton* is not controlling; indeed, it was overruled. *Apprendi* now reigns supreme—and requires that an aggravating circumstance that enhances the sentence to death be proved beyond a reasonable doubt to a jury. (2) The strained construction of the Indiana statute is at odds with the Supreme Court's reasoning in *Ring*, which found that under the statutory scheme in Arizona, the maximum sentence for murder was indeed elevated by the separate death penalty provision. Indeed, the Indiana Supreme Court's opinion in *Bostick* suggests that it realizes the non-viability of *Saylor*'s reasoning as a means to uphold a death sentence under the Indiana statute, as it found that the life sentences there were based on facts that "extend[ed] the sentence beyond the maximum authorized by the jury's verdict finding her guilty of murder."[64] In addition to the viability of *Saylor*, several significant questions will need to be sorted out in future opinions.

Broadly stated, the court will need to address how wide the effects of *Ring*/*Apprendi* will reach. Not surprisingly, the defense community and prosecutors have very different views, as the former suggest that every death penalty case is impacted while the Attorney General suggests at most only six cases are affected.[65] The defense position is a bit untenable in view of the inapplicability of *Apprendi*/*Ring* to cases in which the aggravating factor was the fact of a prior conviction. As Justice Boehm suggested in his concurring opinion in *Saylor*, this same reasoning arguably applies to death penalty aggravators such as probationary or parole status, which are proven by judicial records and do not require factfinding in the traditional sense by a jury.[66] Similarly, *Ring* would appear not to be implicated in cases in which the guilt phase verdict inherently proved the death penalty aggravator,[67] including the most commonly charged death penalty aggravator of the commission of multiple murders.[68]

Each of these factors suggest that *Ring* will have a limited impact in Indiana, but an even broader consideration is retroactivity. For whatever reason, the *Saylor* majority did not address the issue of retroactivity but implicitly assumed that challenges under *Apprendi*/*Ring* could be raised in a collateral proceeding.[69] Similarly, although the supreme court refused to authorize the filing of a successive petition for post-conviction relief in *Wrinkles*, it nevertheless predicated its decision on the merits (or, better stated, the lack of merit) of the claims asserted rather than finding it procedurally barred under a theory on non-retroactivity.[70] It is possible that the court could continue to sidestep the issue by ruling on the merits of collateral *Ring* claims without explicitly holding that

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64. *Bostick*, 773 N.E.2d at 273.

65. Denise G. Callahan, *State's Death Penalty Cases to be Debated Again*, IND. LAW., July 3, 2002, at 8.

66. *Saylor*, 765 N.E.2d at 568 (Boehm, J., concurring).

67. *See id.* at 575 (Sullivan, J., dissenting).

68. *See* IND. CODE § 35-50-2-9(b)(8) (Supp. 2002).

69. *See Saylor*, 765 N.E.2d at 535.

70. 776 N.E.2d at 907-08.

*Ring* applies retroactively, but to date the court has taken this approach only in cases in which the death row defendant is denied relief. The rehearing in *Saylor* will likely require the court to address the issue squarely, because it will be dispositive of whether or not Saylor's death sentence can stand. If *Ring* is held not to apply retroactively, then Saylor will lose as quickly as the court explains its non-retroactivity rationale. If, however, *Ring* does apply retroactively, then Saylor would appear to prevail under the reasoning in Justice Sullivan's dissent and in light of the implicit rejection of the majority's reasoning by *Ring*, as recognized by *Bostick*. If, however, Justice Boehm can convince at least two of his colleagues that Saylor's status as a probationer is similar to a prior conviction—the only explicit exception to the *Apprendi* doctrine—then Saylor may well lose regardless of retroactivity.

Although the court will likely decide the important issue of retroactivity soon, it is nearly impossible to predict how it will be resolved. Citing a number of federal circuit court of appeals' decisions, Justice Boehm opined in *Saylor* that *Ring* does not apply retroactively—at least under the federal standard of *Teague v. Lane*.[71] However, Justice Sullivan, citing a number of district court opinions, expressed the opposite view while also noting that the issue of retroactivity was one to be decided under state law.[72] The willingness of the other justices to address the *Apprendi*/*Ring* issue on its merits in *Saylor* (and all of the justices in *Wrinkles*) rather than taking the easy way out with retroactivity suggests that they may well decide not to bar claims on collateral review. Regardless of the resolution of retroactivity, however, it would seem that few cases will ultimately be impacted by *Ring*, even on collateral review, because most death penalty cases include at least one of the following: a unanimous recommendation for death, a guilty phase verdict of multiple murders, or imposition of the death penalty is based on the fact of a prior conviction.

Beyond the retroactivity and other concerns raised by *Saylor*, the Indiana Supreme Court and General Assembly will soon be called upon to resolve other apparent problems that persist with the death penalty statute, even as amended in 2002. The most significant problem is the lingering language of subsection (f), which allows the trial court to sentence a defendant to death if the jury is unable to reach a unanimous recommendation.[73] In the absence of a special verdict form, there is no basis to conclude that the jury has unanimously found that the aggravator was proved beyond a reasonable doubt, which therefore would violate *Ring*.[74] This defect could be easily corrected by striking the language of subsection (f) and making it clear that a death sentence can only be imposed when the jury unanimously finds the existence of an aggravating circumstance beyond a reasonable doubt.[75]

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71. *Id.* at 568 (Boehm, J., concurring in result).

72. *Id.* at 569.

73. *See* IND. CODE 35-50-2-9(f) (Supp. 2002).

74. Except in those cases in which the guilt phase verdict makes it clear, as noted above.

75. Subsection (d), however, is not problematic because *Ring* would not apply if a defendant waives the right to a jury trial by pleading guilty or being tried to the bench.

The applicability of *Ring* to the jury's finding of aggravating circumstances under the Indiana statute is straightforward; the thornier issue is the effect of *Ring* on mitigating circumstances, or more specifically the weighing of aggravators and mitigators. Subsection (k) specifically requires not only that the jury find the existence of an aggravating circumstance but also requires the jury to find that the aggravators outweigh the mitigators.[76] One could argue that this required weighing is "a fact" under *Apprendi*/*Ring*, which would therefore require that the jury unanimously find its existence beyond a reasonable doubt. This would create a substantial wrinkle in the conventional thinking, including that espoused by Justice Sullivan in his dissenting opinion in *Saylor*, which suggests that a special verdict form finding the existence of an aggravating circumstance would be sufficient to satisfy *Ring*.[77] Again, however, a requirement of a unanimous "recommendation" of death, after instructing the jury of both requirements of subsection (k), would clearly satisfy *Ring*. On the other hand, a guilt phase verdict of multiple murders or the fact of a prior conviction (or probationary status under the Boehm approach) would not necessarily satisfy *Ring* because the weighing with the mitigators would not have been considered.

In addition, despite the 2002 amendment that presaged *Ring*, the legislature did not alter the language throughout section nine that refers to the decision made by the jury as merely a "recommendation."[78] Language added to subsection (e) makes it clear that the trial court "shall" sentence the defendant according to the jury's recommendation in those cases in which a unanimous recommendation is reached. However, other language in the statute could be clarified—and, more importantly, instructions to the jury could be modified—to make it clear that the jury's decision is much more than a "recommendation," which would in turn eliminate the risk that the jury will approach its task with a diminished sense of responsibility that could undermine the reliability of its penalty phase verdict—not recommendation.

Finally, what should a trial judge do in the face of a hung jury? Subsection (f) tells the judge to "discharge the jury and proceed as if the hearing had been to the court alone,"[79] but this raises grave *Ring* concerns as discussed above. Although Justice Sullivan's dissent in *Bostick* suggests that the judge must order a term of years sentence based on this provision,[80] the remaining members of the supreme court seem to authorize, if not encourage, trial judges to order a new penalty phase if the State elects to persist in its request for a death or life without

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76. *Id.* § 35-50-2-9(k) (Supp. 2002).

77. 765 N.E.2d at 574. Further, he specifically states that cases in which the jury found that the mitigating circumstances were not outweighed by the aggravating circumstances "would not violate *Apprendi*," presumably because only proof of the aggravating circumstance is required. *Id.* at 574-75.

78. IND. CODE § 35-50-2-9.

79. *See* IND. CODE § 35-50-2-9(f).

80. *See supra* notes 57-58 and corresponding text.

parole sentence.[81] Although not necessary in light of the majority opinion in *Bostick*, the General Assembly could alleviate any confusion by amending subsection (f) if it believes that retrials are appropriate under the statute.

In sum, issues surrounding the death penalty in Indiana will likely remain, as they should, on the front burner of both the Indiana Supreme Court and the General Assembly as each sorts through the nuanced effects of *Ring*. The General Assembly would appear to be best positioned to resolve many of the issues by some fairly modest amendments to the statute, although the supreme court will surely need to become involved at some point in deciding issues such as retroactivity and harmless error.[82]

## II. OTHER DEVELOPMENTS

The death penalty drew a lot of attention on both the judicial and legislative front, but the appellate courts and legislature tackled a wide variety of other issues as well. A "survey" of the hundreds of cases addressing issues of criminal law and procedure necessarily requires a severe winnowing. Below is a summary of cases that resolved (or brought clarification to) a significant issue or created confusion that will need to be resolved.

### *A. Legislative Action*

The talk of the 2002 session in Indiana, as in much of the country, was the state's fiscal woes. Nevertheless, despite their likely fiscal impact, several bills were passed to create new offenses, add new enhancements, and alter procedural aspects of criminal law.[83] In the wake of the September 11, 2001, terrorist attacks, House Speaker Gregg offered a comprehensive bill criminalizing all sorts of activities relating to explosives and destructive devices as the first bill of the session. House Enrolled Act 1001 criminalized the possession, manufacture, transport, and distribution of a "destructive device."[84] A rather broad list of items is included within the definition, but the statute also contains exclusions for such things as guns and devices not designed to be used as weapons.[85] Existing statutes were amended to provide for enhanced penalties when a person disrupts a food processing facility,[86] misappropriates another person's identifying information,[87] disrupts airport security,[88] or launders money with a terrorist

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81. *See supra* notes 55-56 and corresponding text.

82. In *Ring*, the Court declined to address the State's harmless error argument, citing *Neder v. United States*, 527 U.S.1, 25 (1999), for the proposition that it "ordinarily leaves it to lower courts to pass on the harmlessness of error in the first instance."

83. The significant amendments to the death penalty and child solicitation statutes are discussed elsewhere. *See* Part I, *supra*, and II.B, *infra*.

84. *See* IND. CODE § 35-47.5-5-2 (Supp. 2002).

85. *See id.* § 35-47.5-2-3.

86. *See id.* § 35-43-1-2.

87. *See id.* § 35-43-5-3.6.

88. *See id.* § 35-45-1-3 (disorderly conduct).

motive.[89] The Senate also got in on the action, approving a bill criminalizing the entry into a secured area of an airport,[90] using force or threat of violence to disrupt or hijack an aircraft in flight,[91] as well as enhancing the offense of criminal confinement when committed on an aircraft.[92] The self-defense statute was also amended to allow the use of reasonable, including deadly, force to stop another person from hijacking an aircraft in flight.[93]

Outside of the terrorism realm, the new offenses of "fondling in the presence of a child"[94] and "malicious mischief"[95] were criminalized, while other statutes were amended to provide for more severe penalties for child exploitation through use of a computer,[96] leaving the scene of a boating accident,[97] cruelty to animals,[98] and criminal mischief to a railroad crossing.[99] Although it is not surprising that legislators would seek to criminalize the possession of anything that smacks of child pornography, the expansion of the definition of child pornography to include "digitized images"[100] will likely be the first, if not the only, of the amendments to go down in constitutional flames.

Before the 2002 session began, the United States Supreme Court heard oral argument in *Ashcroft v. Free Speech Coalition*,[101] a challenge to the federal Child Pornography Prevention Act of 1996 (CPPA), which extended the federal prohibition against pornography to include "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct."[102] The prohibition did not "depend at all on how the image is produced" and thus extended to "computer-generated images, sometimes called 'virtual child pornography.'"[103] After an exhaustive review of precedent and detailed rejection of the Government's contentions, the Court held that section 8(B) of CPPA "abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional."[104] If an eager Indiana prosecutor decides to bring a child pornography charge based on "digitized images" under the Indiana statute, one would expect the same result.

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89. *See id.* § 35-45-15-5.
90. *See id.* § 35-47-6-1.4.
91. *See id.* § 35-47-6-1.6.
92. *See id.* § 35-42-3-3.
93. *See id.* § 35-41-3-2.
94. *See id.* § 35-42-4-5.
95. *See id.* § 35-45-16.
96. *See id.* § 35-42-4-4.
97. *See id.* § 14-15-4-4.
98. *See id.* § 46-3-12.
99. *See id.* § 35-43-1-2.
100. *See id.* § 35-42-4-4.
101. 535 U.S. 234 (2002).
102. *Id.* at 241 (quoting 18 U.S.C. § 2256(8)(B) & (D)).
103. *Id.*
104. *Id.* at 256.

Finally, the death penalty statute was amended to specifically allow a victim representative to make a statement in the presence of the defendant "regarding the impact of the crime on family and friends."[105] Although such statements have long been common at sentencing hearings in general and death penalty ones in particular, the amendment is significant because it specifically provides that the victim impact statement is to be given *after* the court pronounces sentence.[106] Although victims are unlikely to feel that their voice was truly heard—or that it made any difference because of its untimeliness—the amendment appears certain to eliminate any possibility of future claims that a trial court improperly considered victim impact evidence.[107]

### *B. Online Child Solicitation*

Since 1996, Indiana has criminalized the solicitation of a child over a computer network.[108] However, a solicitation over a computer network is punished as a Class C felony whereas a face-to-face solicitation is merely a D felony.[109] Surprisingly, the thorny issues surrounding an online child solicitation did not surface in an Indiana appellate court opinion for a half decade after the amendment. During the survey period, two appellate opinions and some significant legislative action clarified the law regarding online child solicitations.

In *Kemp v. State*,[110] a man drove over 150 miles from Madison County to Clark County to meet "Brittney4u2," a detective who was posing as a fourteen-year-old girl, for sex after conversing in an Internet chat room. Kemp was charged with child solicitation and attempted child molesting, but the trial court dismissed all counts on the basis that there was no actual child victim as required for each offense.[111] The State appealed, and the court of appeals affirmed.

As regards the online solicitation, the court relied on the test set forth in *Ward v. State*[112] in finding that the conduct alleged in the charging information did not "rise to the level of child solicitation."[113] The *Ward* test requires, among other things, that the solicitation take the form of urging and urge the "immediate commission" of the crime.[114] The alleged solicitation failed for both of these reasons. Although Kemp engaged in a sexually explicit dialogue with the detective, he did not urge him to engage in any conduct, and Kemp's planned sexual activity would not have been "immediately committed" as required by

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105. *See* IND. CODE § 35-50-2-9(e) (Supp. 2002).
106. *See id.*
107. *See, e.g.*, Bivins v. State, 642 N.E.2d 928, 956-57 (Ind. 1994).
108. *See* IND. CODE § 35-42-4-6 (Supp. 1996).
109. *Id.*
110. 753 N.E.2d 47 (Ind. Ct. App. 2001).
111. *Id.* at 49.
112. 528 N.E.2d 52, 54 (Ind. 1988).
113. *Id.* at 52.
114. *Id.* at 51 (citing *Ward*, 528 N.E.2d at 54).

*Ward*.[115]

The court could have ended the opinion at this point, and it would have generated little attention or controversy because police could alter their conduct in the future to be sure that the suspect—and not the detective—did the urging and an immediate meeting was arranged. But the court continued with a paragraph of dicta that garnered considerable public attention and drew a swift legislative response:

> We recognize the many challenges the Internet poses in preventing the commission of criminal acts against children, along with the difficulty in monitoring the cyber world. Indiana legislators may wish to consider a somewhat more expansive definition of child solicitation in circumstances where a computer network is involved. In the current version of the statute, a defendant's act of solicitation must be directed only toward a "child." Our General Assembly could revise the statute to contain language similar to the Florida version, which permits a defendant to be found guilty of committing the offense if a child or another person "believed by the defendant to be a child" is solicited. Amendment to the statute might very well permit the State to prosecute offenders for Child Solicitation in situations such as the one presented in the instant case.[116]

Within a few months the General Assembly amended the child solicitation statute in a several significant ways, presumably in response to *Kemp* and in anticipation of another case that was in the appellate pipeline. First, a broad definition of the term "solicit" was added to the statute; it means "to command, authorize, urge, incite, request, or advise" a person to engage in prescribed sexual activity through any medium.[117] Second, the statute was amended to criminalize not only the solicitation of a child under fourteen, but also the solicitation of "an individual the person believes to be a child under fourteen (14) years of age."[118] Additional language was also added to mention the possibility of prosecuting "attempted solicitation," and, perhaps most significantly, the General Assembly appears to have legislatively abolished part of the *Ward* test: "the State is not required to prove that the person solicited the child to engage in an act described in subsection (b) at some immediate time."[119]

Several weeks after the statute was amended, the court of appeals issued its opinion in *Laughner v. State*,[120] which suggested that at least some of the legislative action was not necessary. Laughner, who was in Indianapolis,

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115. *Id.* at 52.

116. *Id.* (internal citation and footnote omitted).

117. IND. CODE § 35-42-4-6(a) (Supp. 2002).

118. *Id.* § 35-42-4-6(b).

119. *Id.* § 35-42-4-6(c).

120. 769 N.E.2d 1147 (Ind. Ct. App. 2002). The author served as co-counsel for Mr. Laughner on appeal. Every effort has been made to present an objective summary of the case and its future implications in this Article.

engaged in an online sexual dialogue with a detective in Evansville who was pretending to be a thirteen-year-old boy. One afternoon Laughner asked "u wanna get off?," and the two arranged to meet in Evansville, where Laughner was arrested.[121] He was charged with and convicted of the offense of attempted child solicitation; he raised several issues of first impression on appeal.

The court began by finding that the crime of attempted child solicitation does indeed exist in Indiana.[122] Although double inchoate liability has been greeted with disfavor in some states[123] and criminal law treatises,[124] the court of appeals looked to the Indiana statutes, noting that the child solicitation statute is "a specific one," while the attempt statute is one of general applicability.[125] "No statutory language forbids there being an attempt offense in the case of the crime of solicitation."[126]

Next, the court found it of no consequence that an actual child was not involved because the offense was charged as an attempted—not actual—solicitation.[127] The court reasoned that the Indiana Supreme Court had found it "clear" that language in Indiana's attempt statute[128] had "reject[ed] the defense of impossibility" in *Zickefoose v. State* over two decades earlier.[129] *Zickefoose* did not discuss whether there is a distinction between factual and legal impossibility, and the court of appeals' opinion suggests there is not.[130] *Kemp* implicitly recognizes legal impossibility as a defense, and other court of appeals' authority suggests the issue has not been resolved.[131] *Laughner*—and the 2002 amendment—appear to have laid this issue to rest in the realm of child solicitations, however.

As to other issues, the court found that the more severe penalty for online—as opposed to face-to-face—solicitations "somewhat troubling" but not a violation of the Proportionality Clause of the Indiana Constitution.[132] The legislature may have found that the dangers of the Internet require greater

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121. *Id.* at 1152.

122. *Id.* at 1153-55.

123. *See, e.g.*, Brown v. State, 550 So.2d 142, 144 (Fla. Dist. Ct. App. 1989) ("When a statutory offense [solicitation] is itself an attempt to complete an act, there is no separate crime of an attempt to commit the offense."); SEO v. Austintown Township, 722 N.E.2d 1090, 1093 (Ohio Ct. App. 1998).

124. *See, e.g.*, CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 693 at 584 (15th ed. 1996) ("There can be no attempt to commit a crime which is itself an attempt . . . .").

125. *Laughner*, 769 N.E.2d at 1154.

126. *Id.*

127. *Id.* at 1155.

128. *See* IND. CODE 35-41-5-1(b).

129. *Laughner*, 769 N.E.2d at 1155 (quoting Zickefoose v. State, 388 N.E.2d 507, 510 (Ind. 1979).

130. *See id.*

131. *See* King v. State, 469 N.E.2d 1201, 1205 (Ind. Ct. App. 1984) (Conover, J., dissenting).

132. *Laughner*, 769 N.E.2d at 1156.

vigilance or that Internet use lessens inhibitions.[133] Finally, the court found venue proper in Vanderburgh County (Evansville) because Laughner had taken "action directed at" that county, even though the solicitation occurred online from his computer in Marion County.[134]

Although *Kemp* signaled difficulties in future prosecutions of Internet child solicitations, the 2002 amendment resolved most—if not all—of these. In addition, the court of appeals' rejection of several novel claims in *Laughner* leaves limited room for future attacks on such prosecutions. As suggested by both *Kemp* and *Laughner*, most Internet solicitations do not allow for the "immediate commission" of sexual conduct, as the perpetrator is often counties—if not states—away. The stringent *Ward* test seemingly would have presented an obstacle to such prosecutions, but the 2002 amendment appears to have closed that loophole. Although the amendment's implicit overruling of *Ward* may be challenged in the future, *Ward* appears not to have been grounded in any constitutional provision such that a challenge would be fruitful.

### *C. Confessions*

Is the murder confession of a mentally retarded individual with an IQ of 67 rendered involuntary when the police misstate or exaggerate information such as producing a fabricated fingerprint card and a police report that erroneously stated that the victim died of natural causes? Not in Indiana under well-settled precedent.[135] However, in *Miller v. State*[136] the supreme court broke new ground, not in holding that the confession was admissible, but in reversing the conviction because the trial court refused to allow a defense psychologist to testify about police interrogation techniques and false confessions.

Despite the trial court's ruling that the statement was voluntary and admissible, the supreme court reiterated that the defendant could still "challenge its weight and credibility" before the jury.[137] The trial court's ruling is a "preliminary factual determination," but the jury "remains the final arbiter of all factual issues under Article I, Section 19 of the Indiana Constitution."[138] If the jury finds that a statement was involuntarily given, it should disregard it in determining the defendant's guilt or innocence.[139]

In reversing the trial court's exclusion of the expert testimony, the supreme court found it unimportant that "the content of the interrogation was not in dispute" in light of the defense trial strategy to challenge the voluntariness of his

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133. *Id.*

134. *Id.* at 1157.

135. *See generally* Henry v. State, 738 N.E.2d 663, 665 (Ind. 2000) (finding no error in the admission of a confession in which the officers falsely told the defendant that his fingerprints were found at the crime scene and that a witness had identified him as the person who killed the victim).

136. 770 N.E.2d 763 (Ind. 2002).

137. *Id.* at 772.

138. *Id.*

139. *Id.* at 773.

statement to police.[140] Because the proffered testimony would have assisted the jury in understanding the psychological aspects of police interrogation and the interrogation of mentally retarded suspects—topics outside its common knowledge and experience—the testimony's complete exclusion deprived the defendant of the opportunity to present a defense.[141] Finally, the court concluded that the error was not harmless because of the prominence of the defendant's statement in the State's case, especially the prosecutor's great emphasis on it which included replaying a portion during closing argument.[142]

The significance of *Miller* remains to be seen. Perhaps it is an anomaly based on the unique set of facts of police deception of a mentally retarded suspect. However, language in the opinion suggests broader applicability as the court reasoned that "relevant aspects of police interrogation" was a proper subject for expert testimony because it is a topic outside of the jury's knowledge.[143] Allowing the defendant to present expert testimony is not particularly controversial, but thornier issues arise when defendants who plan to challenge the voluntariness of their confessions desire the appointment of an expert at public expense. Although the appointment of experts in cases in which a defendant asserts insanity is mandated by statute,[144] a variety of other defenses and trial strategies may now warrant expert testimony and the attendant monetary and time costs. The circumstances under which such testimony will be allowed and under which an expert may be hired at public expense will need to be fleshed out in future cases.

### *D. Double Enhancements*

Two years ago, the supreme court placed an important restriction on the use of double enhancements for the crime of carrying a handgun without a license. In *Ross v. State*,[145] the court held that a misdemeanor handgun conviction cannot be both elevated to a felony and then used as a felony for purposes of the general habitual offender statute.[146] That opinion was decided based on principles of statutory construction and the rule of lenity.[147]

Not surprisingly, other defendants have since tried to use *Ross* to limit the applications of enhancements in other contexts. In *State v. Downey*,[148] the supreme court granted transfer to address the propriety of enhancing an A misdemeanor marijuana possession charge to a D felony and then using the

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140. *Id.*

141. *Id.* at 774.

142. *Id.*

143. *Id.* at 774.

144. *See* IND. CODE § 35-36-2-2 (1998).

145. 729 N.E.2d 113 (Ind. 2000).

146. *Id.* at 117. *See generally* Joel M. Schumm, *Recent Development in Indiana Criminal Law and Procedure*, 34 IND. L. REV. 645, 662 (2001).

147. *Ross*, 729 N.E.2d at 113.

148. 770 N.E.2d 794 (Ind. 2002).

felony offense as part of the basis of the general habitual substance offender enhancement. Relying heavily on *Ross*, the court of appeals found the double enhancement improper.[149] After providing a detailed and thoughtful explanation of the different types of habitual offender enhancements and precedent applying them, the supreme court reversed and found the enhancement proper.[150]

Although *Downey* involved the same general principle at issue in *Ross*, the court reached a different result based on the presence of clear statutory language that was not present in *Ross*. First, the court noted the general rule that "absent explicit legislative direction, a sentence imposed following conviction under a progressive penalty statute may not be increased further under either the general habitual offender statute or a specialized habitual offender statute."[151] Although that general rule applies to both general and specialized habitual offender enhancements, unlike with the general habitual offender statute in *Ross*, there is explicit legislative direction in the habitual substance offender statute, which applies to "substance offenses," including "a Class A misdemeanor or felony in which the possession . . . of . . . drugs is a material element of the crime."[152] This was the hook on which the court hung its holding: "By its specific inclusion of drug possession misdemeanors and felonies in the category of offenses that are subject to habitual substance offender enhancement, we find the Legislature intended to authorize such an enhancement notwithstanding the existence of the drug possession progressive penalty statute."[153]

*Downey* is significant for at least two reasons. First, its analysis and synthesis of prior precedent offers clear direction to courts confronted with similar challenges to "double enhancements" in the future. Second, the case provides legislators and those who draft statutes for them of an example of how to draft a statute to allow double enhancements in the future. In light of the increasing number of progressive penalty statutes, one can hope greater specificity, as in the statute at issue in *Downey*, will obviate—or at least reduce—the need for judicial interpretive intervention in the future. As previously noted, "double enhancement" decisions have been based on the application of principles of statutory construction and not alleged violations of constitutional provisions such as disproportionate sentences;[154] therefore, future legislative efforts at permitting double enhancements, if that is desired, can be easily achieved.[155]

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149. *Id.* at 795.

150. *Id.* at 795-98.

151. *Id.* at 798.

152. *Id.*

153. *Id.*

154. *See* Schumm, *supra* note 146, at 663.

155. As noted in a footnote in *Downey*, however, the General Assembly responded to *Ross* not by amending the statute to allow double enhancements for handgun offenses but rather making it clear that they were not permitted. *Downey*, 770 N.E.2d at 797 n.5. *See also* Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 35 IND. L. REV. 1347, 1349-50 (2002) (discussing the 2001 statutory amendment).

### *E. Jury Instruction Simplicity*

At least some members of the Indiana Supreme Court appear to have developed a heightened resolve to simplify jury instructions by eliminating those that emphasize certain pieces of evidence or parts of the trial. As discussed in last year's survey, a majority of the court banned future use of the flight instruction in *Dill v. State*[156] in 2001.[157] The court reasoned that the instruction was confusing, unnecessarily emphasized certain evidence, and had the potential to mislead the jury.[158] Potentially on the chopping block this year is the frequently used but often maligned instruction that tells jurors they may convict upon "the uncorroborated testimony of the victim." The instruction is often tendered by the State in trials involving sex crimes against children in which the child victim may offer the only direct evidence against the accused.

Although one or two justices often vote to grant transfer in cases that fail to garner the required three votes, rarely do they feel so strongly about their vote to draft and publish a formal explanation of their view. In *Carie v. State*,[159] however, Justice Dickson provided a thorough explanation of his disagreement with the instruction in a dissent from the denial of transfer. He opined that the supreme court should grant transfer to express its disapproval of the future use of such instructions because they improperly refer to the State's witness as "the victim," improperly emphasize a single piece of evidence and may suggest that the jury ignore other evidence, use the legal term "uncorroborated" that may be confusing or misleading to the jury, and import a standard of appellate review that is inappropriate for jury consideration.[160] He concluded that, although the court had "allowed similar instructions to survive appellate review" in the past, he believed that "the Court today" would find such instructions improper.[161]

Relying on *Carie* and cases holding that instructions that direct the jury to give special scrutiny and attention to the testimony of a particular witness should not be given, the court of appeals in *Scott v. State*[162] suggested that the instruction was "improper" despite other cases upholding similar instructions.[163] Although the court noted that Justice Dickson's dissent from the denial of transfer "seems to be a warning of an impending change" in the propriety of such instructions, it concluded that "even if this instruction is later found to be improper, its use in this case was harmless" based on the testimony presented at trial.[164]

Barring the future use of this instruction is significant in its own right, but

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156. 741 N.E.2d 1230 (Ind. 2001).
157. *See* Schumm, *supra* note 155, at 1361-62.
158. *Dill*, 741 N.E.2d at 1232.
159. 761 N.E.2d 385 (Ind. 2002).
160. *Id.* at 385-86.
161. *Id.* at 386-87.
162. 771 N.E.2d 718 (Ind. Ct. App. 2002).
163. *Id.* at 728.
164. *Id.* at 729.

Justice Dickson's opinion and *Carie* is also significant because of the trend that it both recognizes and espouses. Instructions that emphasize a "particular evidentiary fact, witness, or phase of the case"[165] have largely disappeared, and there is powerful ammunition to attack any remaining vestiges.

### *F. Non-constitutional Double Jeopardy*

Any discussion of significant developments in the realm of criminal law would not be complete without a discussion of the morass that Indiana Double Jeopardy law became during this Survey period. Granted, double jeopardy is generally viewed as a constitutional issue, and the supreme court's seemingly landmark opinion in *Richardson v. State*[166] in 1999 made clear, or at least it appeared to make clear at the time, that the protection against multiple punishments in Indiana was grounded in article I, section 14 of the Indiana Constitution and greater than that afforded by the Federal Constitution. However, the few short years of the repeated application of a well-intentioned but less than ideally phrased constitutional test of *Richardson* make clear that a square peg will never fit in a round hole—and now the source of Double Jeopardy protection in Indiana is anyone's guess.

As noted in this issue's survey article on state constitutional law, there have been significant developments regarding the Double Jeopardy Clause of the Indiana Constitution.[167] Rather than recounting those here, this section will briefly explain the problems surrounding the actual evidence test of *Richardson*, why the Indiana Constitution may no longer protect against multiple punishments, and the implications of the confusion in double jeopardy law for the future.

The *Richardson* "actual evidence test"[168] was widely applied in its infancy to reduce convictions in many cases under a variety of different circumstances.[169] The supreme court appeared willing to bend the language of the actual evidence test to apply it to situations such as cases in which one conviction was enhanced based on an element for which the defendant was separately punished by another conviction by phrasing the test as whether the same evidence used to establish the essential elements of one offense "was included among the evidence" establishing the essential elements of the second offense.[170] This formulation was seemingly consistent with the views expressed in the concurring opinions of

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165. *Carie*, 761 N.E.2d at 385 (Dickson, J., dissenting from the denial of transfer).

166. 717 N.E.2d 32 (Ind. 1999).

167. *See* Jon Laramore, *Indiana Constitutional Developments: The Wind Shifts*, 36 IND. L. REV. 961, 974-79 (2003).

168. *See Richardson*, 717 N.E.2d at 53. *Richardson* also recognized a "statutory elements" test, which essentially mirrors the federal constitutional test of *Blockburger v. United States*, 284 U.S. 299 (1932) and is therefore not useful to criminal defendants in Indiana.

169. *See* Schumm, *supra* note 146, at 663 n.151.

170. *See, e.g.*, Spears v. State, 735 N.E.2d 1161, 1165 (Ind. 2000); Lowrimore v. State, 728 N.E.2d 860, 869 (Ind. 2000); Wise v. State, 719 N.E.2d 1192, 1201 (Ind. 1999).

Justices Sullivan and Boehm in *Richardson*, offered more protection than that afforded under the Federal Constitution, and seemingly generated little controversy or confusion within or outside the appellate courts.

Without much explanation, however, the court retreated from this approach in 2001 in *Redman v. State*,[171] where the court unanimously held:

> it is not sufficient merely to prove that the same evidence may have been used to prove a *single element* of two offenses. Rather, it is necessary to show a possibility that the same evidentiary facts were used to prove the *body of essential elements* that comprise each of two or more of the offenses resulting in convictions.[172]

This clarified formulation raised significant questions about the enhancement cases in which the double jeopardy concern arises not from the "body of essential elements" of two offenses but from the body of elements of one offense and the enhancing element of the other offense.

The gap of protection created by *Redman* appeared to be at least partially filled by *Pierce v. State*,[173] in which the supreme court sua sponte addressed a defendant's constitutional double jeopardy claim under "a series of rules of statutory construction and common law that are separate and in addition to the protections afforded by the Indiana Double Jeopardy Clause." *Pierce* was the first of what has become a growing line of cases in which the supreme court sua sponte addressed a defendant's constitutional double jeopardy claim under the rules of statutory construction and common law espoused in the concurring opinions of Justices Sullivan and Boehm in *Richardson*.[174]

Six months after *Pierce*, however, in *Guyton v. State*[175] the supreme court cast grave doubt on the continued vitality of *Richardson* when it addressed a claimed double jeopardy violation by quoting the actual evidence test of *Richardson* but then addressing the claim solely under the categories espoused in Justice Sullivan's concurring opinion in *Richardson*.[176] *Guyton* is significant not because of what it says, but rather for what it leaves unsaid, which is best highlighted by its concurring opinions. Expressing his view of the continued vitality of *Richardson*, Justice Dickson noted that the majority did not address the constitutional claim but instead discussed only the "related" claim that is "separate from and additional to the constitutional claim."[177] In contrast, Justice Boehm noted "widespread confusion reflected in the Court of Appeals cases attempting to apply *Richardson*" and opined that the court "owe[s] an explanation of this mystery [surrounding double jeopardy] because I believe we

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171. 743 N.E.2d 263 (Ind. 2001).

172. Redman v. State, 743 N.E.2d 263, 267 (Ind. 2001) (emphasis in original).

173. 761 N.E.2d 826, 829 (Ind. 2001).

174. *See, e.g.*, McAbee v. State, 770 N.E.2d 802, 806 (Ind. 2002); Henderson v. State, 769 N.E.2d 172, 178 (Ind. 2002).

175. 771 N.E.2d 1141 (Ind. 2002).

176. *Id.* at 112-43.

177. *Id.* at 1145 (Dickson, J., concurring in result).

have in effect abandoned *Richardson*, and should be explicit in doing this so future trial and appellate courts can follow a consistent methodology in reviewing double jeopardy claims."[178]

As Justice Boehm's concurring opinion pointedly suggests, the variety of approaches employed by the supreme court to double jeopardy claims raises serious questions that will need to be resolved. At the most basic level, the source of protection against multiple convictions in Indiana is no longer clear; it could be (as in *Richardson*) the Indiana Constitution, rules of common law and statutory construction, or both. This fundamental concern gives rise to other practical concerns. Should a defendant raise the claim under *Richardson* or *Guyton* or both? If a defendant cites only *Richardson* and the Indiana Constitution, must (or may) the appellate court review the claim under the other rules? Is it possible that different results could be reached under each?

Early indications suggest that the supreme court will continue to apply *Guyton*, which appears to offer fairly broad protection to criminal defendants, perhaps as a fallback after finding no *Richardson* violation.[179] If the supreme court does not revisit the issue, however, inconsistencies and confusion surrounding Indiana double jeopardy law may arise in the court of appeals or among the justices of the supreme court.

The panacea suggested by Justice Boehm's concurring opinion in *Guyton* would be an opinion that adopts a consistent methodology for future cases, while clarifying or disapproving prior cases inconsistent with that methodology. Until that happens, however, one would expect defendants to raise their claims under both the constitutional test of *Richardson* and the non-constitutional bases most recently applied in *Guyton*, which will in turn impose an additional burden on the State to respond to both and on the appellate courts to address both.

## III. APPELLATE SENTENCE REVIEW

As it has for the past two years, this Survey ends with a review of the developments surrounding substantive appellate sentence review in Indiana. The important purpose behind the constitutional amendment that allowed substantive sentence review in Indiana was to make the process more akin to that in England, where sentence review is "the main business" of the Court of Appeal (Criminal Division), which has developed sentencing principles designed to bring consistency to the inherently murky waters of sentencing.[180] Such consistency can be achieved only through the adoption and consistent application of sentencing principles as well as a greater reliance on the specifics of previous cases as precedent in addressing substantive sentencing claims. Although cases in which sentences have been reduced provide useful comparisons for litigants to argue and judges to consider in future cases, cases in which sentences have

178. *Id.* at 1149 (Boehm, J., concurring in result).

179. *See, e.g.*, Carrico v. State, 775 N.E.2d 312, 313-14 (Ind. 2002); Robinson v. State, 775 N.E.2d 316, 319-20 (Ind. 2002).

180. *See* Schumm, *supra* note 146, at 671.

survived challenges on appeal are equally important, not only for their comparative value, but also because of the principles applied in reaching that decision.

Since the 1970 constitutional amendment, Sections 4 and 6 of Article VII of the Indiana Constitution have granted the authority to revise sentences to both the Indiana Supreme Court and Court of Appeals. Appellate Rule 7(B) provides the specific standard and criteria employed for such revisions: "The Court shall not revise a sentence authorized by statute unless the sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender."[181]

### *A. Indiana Supreme Court Cases*

Although the court of appeals has become the primary arbiter of sentence review by virtue of its jurisdiction in all term-of-years appeals,[182] the supreme court remains crucial to the issue because of its transfer jurisdiction and, ideally, the guidance offered to the court of appeals and trial courts by its opinions. As discussed below, the justices on the supreme court have taken divergent approaches in addressing sentencing claims, which cast some doubt on the possibility of something that looks like consistency on a different issue ridden with unique offenses and offenders. The justices' consideration of and emphasis on the trial court's role, the relevant sentencing considerations, and the amount of detail and importance of prior sentencing cases as precedent are important, but the consistent application of principles, such as the one that purports to limit maximum sentences "to the very worst offenses and offenders,"[183] is arguably the most effective and easiest way in which to level the field of sentence disparity.

The approach taken by Justice Sullivan appears to meld the procedural review of aggravating and mitigating circumstances with the substantive appellate review standard. For example, in *McAbee v. State*,[184] Justice Sullivan, writing for the court, cited neither Article VII, Section 4 nor Appellate Rule 7(B) in addressing a claim that a sentence was manifestly unreasonable.[185] Rather, the opinion recounted the statutory provisions regarding the presumptive sentence and range of sentences as well as case law governing the propriety of consecutive sentences.[186] The court then recounted the aggravating and mitigating circumstances found by the trial court and held that it had "properly weighed the aggravating and mitigating circumstances and found that the aggravators far outweighed the mitigating circumstances. In light of the circumstances of the case, we do not find that the sentence is manifestly unreasonable."[187] In *Fredrick*

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181. IND. APP. R. 7(B) (2002).

182. *See* Schumm, *supra* note 146, at 669.

183. *See, e.g.*, Buchanan v. State, 699 N.E.2d 655, 657 (Ind. 1998).

184. 770 N.E.2d 802 (Ind. 2002).

185. *Id.* at 806-07.

186. *Id.* at 806.

187. *Id.* at 807.

*v. State*,[188] Justice Sullivan took a similar approach, addressing a claim of manifest unreasonableness by finding that the challenged aggravating circumstances were not improper and affirming the sentence.[189] However, in *Lander v. State*,[190] Justice Sullivan, writing for a unanimous court, reduced an aggregate sentence of eighty-five years for murder and conspiracy to commit robbery to sixty-five years—the maximum for murder.[191] Relying on the factors found by the trial court, he reasoned that "the nature of the Defendant's crime" did not warrant consecutive sentences: "Defendant was part of a botched robbery, after which he shot the victim in the arm. Defendant was also twenty years old and had never had a prior felony record."[192] Although these considerations bear a heavy resemblance to the "nature of the offense" and "character of the offender," the *Lander* opinion does not use the parlance of Appellate Rule 7(B) but rather speaks in terms of "aggravating" and "mitigating" circumstances—the language of the sentencing statute that is applied by trial courts.[193]

Justice Rucker has taken a similar Appellate Rule 7(B)-free approach at times. For example, in *Powell v. State*,[194] Justice Rucker, writing for the court, upheld the maximum sentence of sixty-five years imposed on an on-duty police officer who "entered a house on the pretext of serving a search warrant. While present he participated in killing the resident and seriously injuring two innocent bystanders. And he did so for the sake of stealing drugs and money."[195] In a single paragraph, which made no mention of the factors bearing on the "character of the offender," such as a prior criminal history, the court upheld the sentence because it was "not persuaded that a sixty-five years sentence for Powell's crime is manifestly unreasonable."[196] However, in *Lacey v. State*,[197] Justice Rucker did address the separate considerations of the nature of the offense and character of the offender in upholding an enhanced but non-maximum sentence of sixty years for murder. The court appears to have been most influenced by the nineteen-year-old defendant's fairly extensive juvenile record and status of being on bond for two other crimes when committing the murder.[198]

Justices Dickson and Boehm, however, have been steadfast in their reliance on the language and considerations of Appellate Rule 7(B). In *Corbett v. State*, Justice Dickson, writing for the court, upheld the maximum sentence of eighty-five years for murder and robbery. In *Corbett*, as in the cases discussed above,

188. 755 N.E.2d 1078 (Ind. 2001).
189. *Id.* at 1084.
190. 762 N.E.2d 1208 (Ind. 2002).
191. *Id.* at 1216.
192. *Id.* at 1217.
193. *See id.*; *see also* IND. CODE § 35-38-1-7.1 (1998).
194. 769 N.E.2d 1128 (Ind. 2002).
195. *Id.* at 1136.
196. *Id.*
197. 755 N.E.2d 576 (Ind. 2001).
198. *Id.* at 579.

the court makes no mention of the worst offense/worst offender principle. However, the facts recounted appear to place the case within its ambit. "[T]he defendant smashed Edwin Massengill's skull with repeated blows of a sledgehammer. As Massengill lay dying, the defendant rummaged through the house stealing a handgun, two rifles, and the victim's wallet. The defendant has prior convictions of burglary and grand theft."[199]

Similarly, Justice Boehm's opinion in *McCann v. State*[200] upheld a 100-year sentence for attempted murder, burglary, and attempted rape with relatively few words that addressed the considerations of Appellate Rule 7(B).

> The "nature of the offense" is breaking into a home to attack a pregnant woman in her bed and then shooting her boyfriend when he tried to come to her aid. Under "character of the offender," McCann had a lengthy criminal history including over fifteen arrests, one of which was for breaking into a woman's house and sexually assaulting her.[201]

Chief Justice Shepard, however, earned the brevity award in the realm of substantive sentence review. After reciting the defendant's contention and the language of Appellate Rule 7(B), the opinion in *Bailey v. State*[202] upheld the maximum sentence of eighty-five years for murder and aggravated battery in a single sentence: "In light of the brutal nature of Bailey's attacks on Hudson and Godsey, we cannot say that an eighty-five year sentence was manifestly unreasonable."[203] Similarly, after reciting the defendant's contention of manifest unreasonableness in *Brown v. State*[204] the court upheld another maximum sentence, noting "[i]n light of the nature of Brown's neglect and her stunning lack of remorse following the incident, a twenty-year sentence is hardly unreasonable."[205]

The exception to the varying degrees of terseness in these opinions, in which mostly maximum sentences were upheld, is *Buchanan v. State*.[206] Buchanan was convicted of molesting a five-year-old girl for whom he babysat in an episode in which he photographed her naked and "licked her private area."[207] The court, in an opinion written by Justice Dickson, began by noting that even when a trial court "may have acted within its lawful discretion in imposing a sentence, article 7, section 4 of the Indiana Constitution authorizes independent appellate review and revision of a sentence imposed by a trial court."[208] The court reiterated that "the maximum possible sentences are generally most appropriate for the worst

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199. *Id.* at 632.
200. 749 N.E.2d 1116 (Ind. 2001).
201. *Id.* at 1122.
202. 763 N.E.2d 998 (Ind. 2002).
203. *Id.* at 1005.
204. 770 N.E.2d 275 (Ind. 2002).
205. *Id.* at 282.
206. 767 N.E.2d 967 (Ind. 2002).
207. *Id.* at 969.
208. *Id.* at 972.

offenders"[209] and offered an explanation of what that means:

> This is not . . . a guideline to determine whether a worse offender could be imagined. Despite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario. Although maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the class of offenses and offenders that warrant the maximum punishment. But such class encompasses a considerable variety of offenses and offenders.[210]

The court then reviewed the relevant factors of the defendant's character and nature of the offense in some detail, noting that he was in a position of trust with the victim, had videotaped her nude, had been found to be a sexually violent predator, and had a significant criminal record.[211] However, the crime was a one-time occurrence and did not involve excessive physical brutality or the use of a weapon and did not result in physical injury. The offense was not part of a protracted episode of molestation but a one-time occurrence. The court noted that the presumptive sentence for A felony child molesting was thirty years, with a range of twenty to fifty years.[212] Because the defendant was "not within the class of offenders for whom the maximum possible sentence is appropriate," the court revised the sentence to forty years.[213]

*Buchanan* is arguably the most significant of these opinions, not because it reduced a sentence, but because it sheds important light on the court's reasoning for the reduction, which can be applied in future cases. It clearly signals that the appellate court's role is not simply to review what the trial court did and the statutory considerations prescribed for sentencing hearings in the trial court. Rather, Article VII mandates an "independent" appellate review of the sentence imposed by the trial court,[214] and Appellate Rule 7(B) dictates that the "nature of the offense" and "character of the offender" are the relevant criteria to be weighed in this review. Moreover, *Buchanan* teaches that it is not proper to envision hypothetical scenarios of hideous crimes or despicable criminals in addressing these.[215] Moreover, unlike the other opinions in which a maximum sentence was imposed, it recites and applies the principle that "the maximum possible sentences are generally most appropriate for the worst offenders."[216]

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209. *Id.* at 973. Two of the three cases cited in support of this proposition couch the principle in terms of the "worst offenses and worst offenders." *See* Buchanan v. State, 699 N.E.2d 655, 657 (Ind. 1998); Bacher v. State, 686 N.E.2d 791, 802 (Ind. 1997).

210. *Buchanan*, 767 N.E.2d at 973.

211. *Id.*

212. *Id.*

213. *Id.* at 974.

214. *Id.* at 972.

215. *Id.* at 973 ("Although maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the *class* of offenses and offenders that warrant the maximum punishment.").

216. *Id.*

It may have been clear that the offenders in the other cases fall within this class—or the defendants in those cases may not have urged the court to apply this principle—but the seemingly cursory treatment does give rise to the possibility for inconsistency if the court sometimes requires a sentence to be "manifestly unreasonable" and other times merely requires that the defendant be just short of "the worst offender."

### *B. Indiana Court of Appeals*

The court of appeals addressed several claims for substantive sentence review, but very few of these were found worthy of revision. As the decisions summarized below suggest, however, at least some progress was made in clarifying the appellate court's role in sentence revision and the standards to be applied. Agreement among panels of the court about this role, and the consistent application of standards or principles, however, still appears to be some distance away.

First, the court of appeals has taken a slightly different approach to the worst offense/worst offender principle. In *Brown v. State*,[217] the court of appeals upheld the maximum sentence of 130 years for a six-time-felon defendant who repeatedly molested a seven-year-old girl, infected her with a venereal disease, and expressed no remorse.[218] Although Brown argued the maximum sentence was not appropriate because he was not a worst offender nor had committed a worst offense, the court of appeals did not apply that principle but rather watered it down: "We should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character."[219] The court reasoned that a literal reading of the worst offense/worst offender principle would require it "to compare the facts of the case before us with either those of other cases that have been previously decided, or—more problematically—with hypothetical facts calculated to provide a "worst-case scenario" template against which the instant facts can be measured."[220] Under such an approach, the court concluded that the maximum sentence would never be justified because one could always envision a worse set of facts surrounding an offense.[221]

In applying its modified approach, the court noted that Brown was a "career criminal" who had repeatedly molested his victim, with whom he occupied a position of trust, and infected her with a venereal disease.[222] He expressed no remorse and was "involved in illegal drug usage" at the time of the offenses.[223]

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217. 760 N.E.2d 243 (Ind. Ct. App. 2002).
218. *Id.* at 247-48.
219. *Id.* at 247.
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.* at 247-48.

Although "one can imagine facts that might be worse," the court affirmed the maximum 130-year sentence because it was "not plainly, clearly, and obviously unreasonable."[224]

In *Hildebrant v. State*,[225] another child molesting case decided five months later, a different panel upheld the imposition of consecutive, twelve-year sentences in a case in which the trial court had found several aggravating and no mitigating circumstances. Although the court noted that Article VII of the Indiana Constitution "authorizes independent appellate review and review of a sentence imposed by the trial court,"[226] it placed a heavy emphasis on the sentencing statute as providing crucial guidance. First, it observed that the presumptive sentence is "the starting point for any court's consideration of the sentence which is appropriate for the crime committed."[227] The court said little else about how to assess the gravity of an offense beyond looking at the statute that defines the classification of the offense, e.g., a Class B felony in that case.[228] Notably, the court did not cite or mention *Brown* or its formulation as relevant to this inquiry. Rather, the court focused on the "character of the offender" and summarized the relevant criteria as the statutory factors, which are "an assortment of general and specific, mandatory and discretionary considerations" that must first reviewed by the trial court at sentencing "then reviewed again if at issue on appeal."[229]

In upholding the two twelve-year consecutive sentences for sexual misconduct with a minor, the court distinguished the case from *Walker v. State*,[230] in which consecutive forty-year sentences were ordered served concurrently "because the two separate counts of child molestation were identical, involved the same child, and there was no physical injury."[231] Instead, the court observed that Hildebrant's twelve-year sentences were "just two years more than the presumptive sentence of ten years" and not manifestly unreasonable "[i]n light of the well-documented aggravating circumstances and complete lack of mitigating circumstances in this case."[232]

In *King v. State*,[233] a fractured panel affirmed the maximum three-year sentence imposed on a defendant who stole twenty-two cartons of cigarettes while out on bond for another offense. Judge Mattingly-May, joined by Judge Baker, affirmed the sentence in relatively short order, recounting the defendant's extensive misdemeanor criminal history and applying a highly deferential standard for reduction, i.e., that the sentence imposed be "clearly, plainly, and

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224. *Id.* at 248.
225. 770 N.E.2d 355 (Ind. Ct. App. 2002).
226. *Id.* at 360.
227. *Id.* at 361.
228. *Id.*
229. *Id.*
230. 747 N.E.2d 536 (Ind. 2001).
231. *Hildebrandt*, 770 N.E.2d at 364.
232. *Id.*
233. 769 N.E.2d 239 (Ind. Ct. App. 2002).

obviously unreasonable."[234]

In a thorough and well-reasoned concurring opinion, Judge Najam traced the history of the "manifestly unreasonable" standard and recent supreme court authority applying it.[235] He recounted that the Indiana Constitution was amended in 1970 "to expand the role of appellate [sentence] review, not restrict it," and the 1997 amendment to Appellate Rule 17(B) (now 7(B)) further sought to allow "more meaningful" appellate review of sentences.[236] In his view, the "clearly, plainly, and obviously unreasonable" standard distorts the rule in light of the 1997 amendment and as a grammatical matter.[237] Moreover, he noted that the supreme court has not consistently applied that standard, as Chief Justice Shepard, and Justices Sullivan, Rucker, and former Justice Selby have never written an opinion using that standard.[238] Harkening back to the language of the rule, Judge Najam posited that "[t]he question is whether the sentence is excessive, that is, whether the punishment fits the crime and the criminal."[239] This "constitutional duty" of the appellate court requires it to "determine whether in our judgment the sentence is appropriate for the defendant under the circumstances of the case."[240] The three-year sentence imposed on King was neither excessive nor "manifestly unreasonable in light of the nature of the offense and the character of the offender"; therefore, he would affirm.[241]

In each of these three cases, different panels took quite different approaches in addressing, and ultimately rejecting, the sentencing claims. Standing alone, this is not a cause for concern, assuming that the same result is achieved regardless of the approach taken. However, applying the highly deferential "clearly, plainly, and obviously" unreasonable standard of *King* in one case while applying the undiluted worst offense/worst offender principle in another with similar facts will lead to different results at least some of the time. Beyond this, the variety of approaches presents challenges to appellate counsel, who must sort through the various approaches and fashion an argument without knowing which judges will be sitting on the panel.

One need not look any further than the cases in which a defendant's sentence was revised under Appellate Rule 7(B) to see what a difference the court's approach can make.[242] In *Borton v. State*,[243] a unanimous panel reduced a maximum fifty-year sentence for conspiracy to commit robbery to the

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234. *Id.* at 240.

235. *Id.* at 241 (Najam, J., concurring).

236. *Id.* (Najam, J., concurring).

237. *Id.* at 242.

238. *Id.* at 243.

239. *Id.*

240. *Id.*

241. *Id.*

242. Despite the language of the rule, which expressly allows the court to "revise" a sentence, the court of appeals will occasionally order remand to the trial court for resentencing after finding a violation of Rule 7(B). *See* Lewis v. State, 759 N.E.2d 1077, 1087 (Ind. Ct. App. 2001).

243. 759 N.E.2d 641 (Ind. Ct. App. 2002).

presumptive term of thirty years, citing the worst offense/worst offender principle.[244] The court based its decision on Borton's youthful age and his minimal criminal history, which was limited to nonviolent juvenile adjudications.[245] Similarly, although the aggregate sentence of 190 years in *Haycraft v. State*[246] was not the maximum sentence, the court of appeals nevertheless reduced it to 150 years because the defendant was "some distance from [having committed] the worst offense of [being] the most culpable offender."[247]

### *C. The Amended Rule*

Some of the concerns arising from the manner in which the supreme court and court of appeals address claims under Appellate Rule 7(B) may vanish or change in light of an amendment to that rule. In July 2002, the supreme court amended Rule 7(B), effective January 1, 2003. The amended rule eliminates the "manifestly unreasonable" language and appears to relax the standard by allowing revision "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."[248] Although the same factors—the nature of the offense and the character of the offender—remain the relevant inquiries, future cases will have to flesh out (1) what constitutes "due consideration of the trial court's decision," a factor not mentioned in the old rule, and (2) what makes a sentence "inappropriate."

By its specific reference to the consideration of the "trial court's decision," the amended rule arguably alters the calculus or suggests the trial court is entitled to greater deference. However, the court will have to define what it means by "decision": does this refer merely to the aggregate number of years imposed or to the trial court's reasoning, such as the finding and weighing of aggravating and mitigating circumstances? If it is the latter, one might expect trial courts to explain their decisions in more detail, possibly applying sentencing principles from case law or making analogies with those sentencing decisions. This may well lead to greater consistency at the trial level and reduce the need for appellate review in many instances.

However, the amended requirement that a sentence merely be "inappropriate" rather than "manifestly unreasonable" suggests a significant relaxing of the standard regardless of the sentence imposed by the trial court. The change would appear to put to rest the "clearly, plainly, and obviously unreasonable" standard that has been frequently applied and occasionally, as in Judge Najam's concurring opinion in *King*, maligned.[249] Nevertheless, it remains

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244. *Id.* at 648.

245. *Id.*

246. 760 N.E.2d 203 (Ind. Ct. App. 2001).

247. *Id.* at 214 (quoting *Walker v. State*, 747 N.E.2d 536, 538 (Ind. 2001)).

248. IND. APP. R. 7(B) (2003).

249. *See supra* notes 236-37.

to be seen what role sentencing principles, particularly the worst offense/worst offender principle, will play under the amended rule. If sentencing disparity is to be reduced, principles must be evenly and consistently applied, and factual comparisons between cases, such as the supreme court did extensively in its first foray into sentence revision in *Fointno v. State*,[250] must have a role.

The Indiana Constitution was amended over three decades ago to achieve some degree of consistency in sentencing around the state.[251] The road has not been an easy one, and the amended rule will surely present new challenges to the appellate courts, trial courts, and counsel. The laudable goal, however, remains both within reach and well worth the effort.

250. 487 N.E.2d 140 (Ind. 1986).

251. *See generally* Schumm, *supra* note 146, at 667, 669.