

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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Issues of criminal law and procedure always consume considerable time and energy in the General Assembly and Indiana appellate courts. This year, however, saw considerably more activity in the courts than in the budget-strapped legislature. This survey reviews some of the most significant developments in both venues between October 1, 2002, and September 30, 2003.

I. A QUIET YEAR ON THE LEGISLATIVE FRONT

When a legislature is faced with tough economic times and budgetary shortfalls, it faces limited options. Enhanced penalties and the creation of new crimes becomes more difficult because more people spending more time in prison, especially when prisons are overcrowded, is not an insignificant budgetary concern.¹ The late-Governor Frank O'Bannon not only recognized this reality but vowed near the end of the 2003 session to veto legislation that significantly increased the number of prison inmates if the General Assembly did not appropriate money to pay for the legislation.² Thus, when the General Assembly passed an unfunded bill to stiffen penalties for battery of vulnerable adults, such as those suffering from mental illness or physical disability, O'Bannon vetoed it.³ When the General Assembly enacted legislation that would have increased sentences for acts of juvenile delinquency and resisting police, O'Bannon held true to his promise and issued another veto.⁴

Nevertheless, bills that either created new crimes, refined old ones, or imposed additional sanctions were enacted and signed into law. Legislators approved and O'Bannon signed legislation that re-classified public indecency offenses.⁵ What was once a Class A misdemeanor offense of public indecency⁶ was preserved for the more severe incidents in which a person appears in a state of nudity with the intent to arouse the sexual desires of himself or another or has the intent to be seen by a child under the age of sixteen.⁷ For seemingly less severe cases, the new offense of "public nudity," a Class C misdemeanor, was created to address instances of nudity without an intent to be seen, such as

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1. See Mary Beth Schneider, *Vetoed Bill Toughened Battery Penalties*, INDIANAPOLIS STAR, May 2, 2003, at B1.

2. *Id.*

3. *Id.*

4. Kevin Corcoran, *Governor Vetoes 5 More Bills*, INDIANAPOLIS STAR, May 10, 2003, at B1.

5. See Schneider, *supra* note 1, at B1 (noting that O'Bannon signed the act because it would not "increase the number of inmates in any significant way").

6. IND. CODE § 35-45-4-1 (Supp. 2002).

7. IND. CODE § 35-45-4-1 (2003).

urinating in public; a Class B misdemeanor for incidents in which the defendant intended to be seen, such as streaking or flashing; and a Class A misdemeanor for those appearing nude on school property, a public park, or Department of Natural Resources (DNR) property.⁸

Another area in which the General Assembly could—and did—act with minimal budgetary impact was in amending the domestic battery statute. The legislation was in apparent response to the Indiana Court of Appeals' decision in *Vaughn v. State*,⁹ which found the original statute unconstitutionally vague.¹⁰ The 2003 amendment delineated specific factors for the court to consider in determining whether a battered person was “living as if a spouse,” as required for the offense of domestic battery:

- (1) the duration of the relationship;
- (2) the frequency of contact;
- (3) the financial interdependence;
- (4) whether the two (2) individuals are raising children together;
- (5) whether the two (2) individuals have engaged in tasks directed toward maintaining a common household; and
- (6) other factors the court considers relevant.¹¹

This amendment seems not only to rectify the constitutional infirmity of the earlier version but also offers useful guidance to counsel, trial courts, and juries in domestic battery cases.

Of course, one legislative session would not be complete without some tough-on-drugs legislation. This year, like other recent ones, the vilified drug was methamphetamine. The statute was amended to criminalize the possession of more than ten grams of certain precursors (ephedrine, pseudoephedrine, phenylpropanolamine or salts, isomers, or combinations of these) as a Class D felony.¹² The offense is a Class C felony if the precursors are possessed while the defendant has a firearm or is within 1,000 feet of school property, a public park, family housing complex, or a youth program center.¹³ Exceptions were included for pharmacists, health care providers, retailers, etc., if the possession is in the usual course of their lawful business activities.¹⁴

However, the session was not entirely tough on crime. For example, new procedures for reducing Class D felonies to Class A misdemeanors—alternative misdemeanor sentencing (AMS in criminal practice parlance)—were adopted. The basic requirements are pleading guilty, agreeing to all conditions, and securing prosecutorial consent.¹⁵ In addition, only certain D felony offenses are

8. *Id.* § 35-45-4-1.5.

9. 782 N.E.2d 417 (Ind. Ct. App. 2003).

10. *Id.* at 420-21.

11. IND. CODE § 35-42-2-1.3(b) (2003).

12. *Id.* § 35-48-4-14.5(b).

13. *Id.*

14. *Id.* § 35-48-4-14.5(d).

15. *Id.* § 35-38-1-1.5.

eligible; auto theft and receiving stolen auto parts are no longer ineligible offenses while possession of child pornography is ineligible.¹⁶ If all of the conditions are met, the conversion is required; however, the court has discretion not to convert the offense if the defendant violates or fails to perform a condition.¹⁷ Conversion is prohibited if the defendant commits a new offense prior to conversion.¹⁸

Further easing the burden on Indiana's prisons and jails, the home detention statute was amended to allow participation by those convicted of sex offenses under section 35-46-1-3 of the Indiana Code if the offender is supervised by a court-approved home detention program and the conditions include twenty-four-hour-per-day supervision.¹⁹ Finally, legislation was approved to create a new fifteen-member committee to study the classifications of all crimes and correction issues, submitting a final report by November 1, 2004.²⁰ This is likely to lead to recommendations that some offense classifications be lessened, while others be increased. A systematic review of all offenses—rather than the piecemeal tinkering that occurs each year—is long overdue and certainly worth the minimal cost.

II. PLENTY OF ACTION IN THE APPELLATE COURTS

The Indiana Supreme Court and Court of Appeals issued opinions addressing a wide variety of issues. Some resolved old conflicts while others created new ones.

A. *Death Penalty Redux*

As discussed in last year's survey, Indiana's death penalty statute and recent Indiana Supreme Court authority are in a bit of disarray.²¹ It is a risky endeavor to anticipate what the United States Supreme Court might do in a case—even after it has heard oral argument—but the Indiana Supreme Court took the risk in *Saylor v. State*²²—and got it wrong.²³ Within a few months of the mistake coming to light, the Court signaled its apparent openness to rectifying *Saylor* by taking the highly unusual step of holding oral argument on a petition for rehearing in November of 2002.²⁴ However, nearly a year later as the survey period ended, the court had not issued an opinion on rehearing in *Saylor*. Because Indiana's death penalty statute remains riddled with problems and

16. *Id.* § 35-50-2-7.

17. *Id.* § 35-38-1-1.5.

18. *Id.*

19. *Id.* § 35-38-2.5-5.7.

20. 2003 Ind. Acts 1055, Pub. L. 140-2003 § 1.

21. See Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 36 IND. L. REV. 1003, 1003-13 (2003).

22. 765 N.E.2d 535 (Ind. 2002).

23. Schumm, *supra* note 21, at 1008.

24. *Id.* The oral argument can be accessed on the Indiana Supreme Court's website.

Indiana decisional law remains at odds with clear United States Supreme Court precedent,²⁵ one might have expected a decision within a few months—or at least within a year. The Court has not squared *Ring v. Arizona*²⁶ with its opinions or the Indiana statute, and thus trial courts, prosecutors, and defense attorneys around the State have little idea how to instruct juries and sentence defendants consistent with *Ring*.

If the United States Supreme Court, with nine members and plenty of healthy egos, can routinely issue opinions on issues of considerable complexity and importance within a few months of argument, one is left to wonder the source of delay at the Indiana Supreme Court. There is arguably more harmony and collegiality at the Indiana Supreme Court, and unanimous decisions—a rarity with the Big Court in DC—are quite common.²⁷ Nevertheless, there is no reason to believe that collegiality would be diminished if the court, like the Supreme Court, heard and decided cases within, for example, an October to June term. The benefits to litigants, practitioners, and trial court judges, especially in this area, would be considerable.²⁸

Although the Court did not venture into the murky waters of *Ring*, it did address the death penalty in a few other contexts. It issued unanimous opinions ordering a new trial for a defendant who had invoked his right to remain silent during a videotaped interview with police that was played in its entirety for the jury²⁹ and affirmed a rare grant of post-conviction relief for a death-row inmate who was convicted by a jury with a member who later admitted that she lied during voir dire.³⁰

The court was not always in agreement on issues regarding the death penalty, and issues relating to mental retardation and DNA testing provoked some disagreement. The two July death penalty decisions were 3-2, with Justices Boehm and Rucker dissenting in both. This may signal a developing trend in which the two newest members of the Court are the most skeptical of cases in which a death sentence is imposed.³¹

1. *Mental Retardation*.—After Howard Allen's death sentence had been affirmed on direct appeal and on appeal from the denial of his petition for post-

25. *Id.* at 1009-13.

26. 536 U.S. 584 (2002).

27. See generally Kevin W. Betz & P. Jason Stephenson, *Supreme Court Review: An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 2002*, 36 IND. L. REV. 919 (2003).

28. Arguably a defendant charged with a capital crime or currently under a death sentence would benefit from delay that, at a minimum, continues his or her life. The psychological effects of being in that situation, however, are not insignificant but are well beyond the scope of this Article. Oddly enough, Indiana statutory law specifically provides for expedited appeals in capital cases. See IND. CODE § 35-50-2-9(j) (2003).

29. *Kubsch v. State*, 784 N.E.2d 905 (Ind. 2003).

30. *Dye v. State*, 784 N.E.2d 469 (Ind. 2003).

31. See also *Daniels v. State*, 741 N.E.2d 1177, 1191-95 (Ind. 2001) (Boehm, J., joined by Rucker, J., dissenting).

conviction relief, he requested permission to litigate the additional post-conviction claim that he is a mentally retarded person whose execution is prohibited by *Atkins v. Virginia*.³² The three-justice majority denied Allen's request, finding that "the trial court adequately considered the evidence of mental retardation" when it was addressed as a possible mitigating circumstance at sentencing.³³ The majority reasoned that *Atkins*, applied to Indiana's sentencing scheme, requires that "the mitigating circumstance of mental retardation necessarily outweighs any death-eligible aggravating circumstance."³⁴

Justice Boehm, joined by Justice Rucker, dissented. He reasoned that "both the sentencing judge and the fact-finder in a pre-*Atkins* regime were confronted with different considerations in evaluating mental retardation as a mitigating circumstance as opposed to a complete bar to execution."³⁵ In his view, the Eighth Amendment, under *Atkins*, presents Indiana courts "with a binary decision: either Allen is or is not mentally retarded."³⁶ In 1996 the trial court addressed a different issue of the balancing of aggravating and mitigating circumstances, and its findings did not adjudicate the Eighth Amendment issue or make findings that met Eighth Amendment standards.³⁷

2. *DNA Evidence*.—Days before his scheduled execution, Darnell Williams filed a "Petition For the Consideration of New Evidence Pursuant to Indiana Code 35-50-2-9(k)."³⁸ That statute, enacted effective July 1, 2003, applies to death penalty cases involving "previously undiscovered evidence" after the completion of post-conviction review.³⁹ Of particular note, Williams requested that DNA testing be performed on blood spots on the shorts he was wearing when arrested.⁴⁰ However, because the issue was addressed at length in a June 27 order and therefore not "previously undiscovered," the court rejected Williams' claim.⁴¹ Justice Sullivan wrote the majority's opinion and was joined by the Chief Justice and Justice Dickson.⁴²

Justice Boehm and Justice Rucker each filed dissenting opinions. Justice Boehm reasoned that DNA analysis of the blood found on Williams' shorts had not been performed and, if performed, would therefore "obviously be undiscovered."⁴³ He noted that the blood on the shorts was cited at trial as evidence that Williams was in the room and close to at least one of the victims

32. 536 U.S. 304 (2002); see *Allen v. State*, 49S00-0303-SD-122, 2003 Ind. LEXIS 581 (Ind. July 15, 2003).

33. *Allen*, 2003 Ind. LEXIS 581, at *14.

34. *Id.* at *12.

35. *Id.* at *17.

36. *Id.* at *16.

37. *Id.* at *17.

38. See *Williams v. State*, 793 N.E.2d 1019, 1021 (Ind. 2003).

39. *Id.* (quoting IND. CODE § 35-50-2-9(k) (2003)).

40. *Id.* at 1024.

41. *Id.*

42. *Id.*

43. *Id.* at 1030 (Boehm, J., dissenting).

when the shots were fired. Because Williams was jointly charged with a co-defendant, proof that Williams had the victim's blood on his clothing would be "powerful in tipping th[e] balance" in favor of a death sentence because it establishes far more than his accomplice liability as a participant in a felony murder.⁴⁴ The best available blood test at the time of trial confirmed that the blood was consistent with that of the victims and 41% of the population at large.⁴⁵ But modern DNA technology would "establish beyond any reasonable doubt that the blood was or was not from the victims," and Justice Boehm concluded that testing should be allowed because "the cost to the public in either expense or delay seems minimal in relation to the benefit of confidence in the verdict."⁴⁶

Justice Rucker agreed that if the blood on Williams' clothing proved not to be from the victims he would remand for a new penalty phase.⁴⁷ He noted that at trial both the State and defense "put a great deal of credence on what has been characterized as the 'blood evidence,'" and that the trial court considered the evidence "significant" in imposing the death sentence.⁴⁸ He similarly pointed to "confidence in the judicial system" as a reason for postponing the execution, succinctly noting that "[d]eath is different."⁴⁹

The Indiana Supreme Court's opinion in *Williams* was issued on July 25. Four days later in "an unprecedented move," Governor O'Bannon issued a stay of execution to allow for DNA testing.⁵⁰ Acknowledging that the case had been reviewed by Indiana and federal courts, the Governor's statement observed that the stay was necessary "[i]n the unique circumstances of this case" and would "permit all potentially relevant evidence to be discovered."⁵¹

Indeed, death is different, and the pair of July decisions in *Allen* and *Williams*, coupled with the unanimous opinions mentioned above, suggests that the Court—or at least two of its members in particular—may be taking a harder look at death penalty cases. The *Ring* concerns loom, however, and it seems possible that Indiana's death row may continue to shrink—not because of executions but because of judicial action by either the Indiana Supreme Court or federal court on habeas review.

B. Mens Rea for Child Molest

In a pair of decisions issued in November of 2002, the Indiana Supreme Court clarified the intent requirement for a child molesting conviction in two

44. *Id.* at 1031 (Boehm, J., dissenting).

45. *Id.* (Boehm, J., dissenting).

46. *Id.* at 1032 (Boehm, J., dissenting).

47. *Id.* at 1033 (Boehm, J., dissenting).

48. *Id.* (Rucker, J., dissenting).

49. *Id.* (Rucker, J., dissenting).

50. Fred Kelly, *Governor Stalls Execution; DNA Will Be Tested*, INDIANAPOLIS STAR, July 29, 2003, at A1.

51. *Id.*

important respects. First, in *Louallen v. State*,⁵² the court granted transfer to address the required level of mental culpability for a Class C felony child molesting (fondling) conviction. The defendant argued that the language of the statute, which required fondling or touching “with intent to arouse or to satisfy . . . sexual desires,” had the effect of requiring the fondling element be performed “intentionally”—and not merely “knowingly.”⁵³ Because the trial court instructed the jury that a conviction could be based on conduct performed “knowingly or intentionally,” the defendant asserted that the instruction constituted fundamental error.⁵⁴ He relied on section 35-41-2-2(d) of the Indiana Code, which mandates that the same level of mental culpability is required for all elements of an offense unless the statute specifically provides otherwise. But the supreme court held that the language of section 2(d) does not require an “intentional” mental culpability with respect to every element of child molesting:

[A]n “intentional” mental state is not required by the child molesting statute for commission of the offense, only for a single element of the offense. There is nothing in Ind. Code § 35-41-2-2(d) to suggest that the Legislature intended it to work in the opposite direction than it is written, i.e., nothing to suggest that the Legislature intended that if a kind of culpability is required for one (but only one) material element of the prohibited conduct, it is required for commission of the offense and every material element of it.⁵⁵

Therefore, the trial court committed no error in instructing the jury.⁵⁶

In *D’Paffo v. State*,⁵⁷ the court held that the State is not required to prove intent to arouse or satisfy sexual desires in order to obtain a conviction for child molesting by deviate sexual conduct. The child-molesting-by-fondling-or-touching statute⁵⁸ contains language requiring that the defendant perform or submit to conduct with “intent to arouse or satisfy the sexual desires” of defendant or the child, but that language is not found in the statute criminalizing child molesting by sexual intercourse or deviate sexual conduct.⁵⁹ In light of the statutory structure, the court declined to require the “intent to arouse the sexual desires” in any statutory crime in which the language was not expressly set forth.⁶⁰ Nevertheless, the court noted that if

the evidence warrants an inference that an alleged penetration of the sex organ or anus of a person by an object was in furtherance of a bona fide

52. 778 N.E.2d 794 (Ind. 2002).

53. *Id.* at 795-96.

54. *Id.* at 796.

55. *Id.* at 798.

56. *Id.*

57. 778 N.E.2d 798 (Ind. 2002).

58. See IND. CODE § 35-42-4-3(b) (2003).

59. *Id.*; see also *D’Paffo*, 778 N.E.2d at 800.

60. *D’Paffo*, 778 N.E.2d at 801.

medical or personal hygiene-related examination or procedure, we believe that defendant would be entitled to an appropriate instruction as to criminal intent.⁶¹

Because no such issue was presented in this case, the trial court did not err in failing to instruct the jury that the intent to arouse was required.

Louallen and *D'Paffo* certainly offer important guidance for counsel and trial courts in instructing juries. Considering the nature of child molesting trials, which are often credibility contests, it is unlikely that the opinions will make much practical difference, especially in light of the other significant instructional development discussed in Part II.C below.

C. *The Best Instructions Say the Least?*

Last year's survey noted a trend of simplifying jury instructions by prohibiting those that emphasize certain evidence and confuse or have the potential to confuse the jury.⁶² This year, yet another instruction was put on the supreme court's chopping block. As presaged by Justice Dickson's dissent from the denial of transfer last year in *Carie v. State*,⁶³ the supreme court in *Ludy v. State*⁶⁴ unanimously disapproved the future use of the following instruction: "A conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt."⁶⁵ Consistent with the reasoning of the dissent from denial of transfer in *Carie* just months earlier, the court found fault with the instruction on at least three grounds: (1) it unfairly focused the jury's attention on and highlighted a single witness's testimony; (2) it presented a concept used in appellate review that is irrelevant to the jury's fact-finding function; and (3) it may mislead or confuse the jury through the use of the technical term "uncorroborated."⁶⁶ The court disapproved several cases spanning twenty years⁶⁷ and held that the "new rule" would apply to cases pending on direct appeal in which the instructional error was preserved.⁶⁸ Nevertheless, the court affirmed Ludy's conviction because the instructional error was harmless, i.e., it did not affect his substantial rights.⁶⁹ Specifically, the testimony of the victim was not uncorroborated; it was corroborated by the testimony of another person and by physical injuries to the defendant, who had been beaten in his jail cell and anally penetrated with a bottle of "hot sauce."⁷⁰

61. *Id.* at 802.

62. *See* Schumm, *supra* note 21, at 1021.

63. 761 N.E.2d 385 (Ind. 2002).

64. 784 N.E.2d 459 (Ind. 2003).

65. *Id.* at 460.

66. *Id.* at 461.

67. *See id.* at 462 n.2.

68. *Id.* at 462.

69. *Id.* at 462 (citing IND. TRIAL R. 61).

70. *Id.* at 462-63.

In the weeks and months after *Ludy*, the court of appeals decided several cases in the appellate pipeline in which similarly worded instructions had been given. For example, in *Tinkham v. State*,⁷¹ the court reversed a conviction even though the instruction referred to the uncorroborated testimony of a “witness” rather than “alleged victim.”⁷² The instruction was not cured by other instructions, and the error was not harmless because the victim’s testimony was not corroborated by any other testimony or physical evidence.⁷³ Similarly, in *Anderson v. State*,⁷⁴ the court granted rehearing and reversed a child molesting conviction in a case decided the day before *Ludy* had been handed down. There, the child’s testimony had been corroborated only by people who recounted or repeated accounts of the incident told to them by the child.⁷⁵ Finally, in *Bayes v. State*,⁷⁶ the court reversed a conviction in a case in which the instruction highlighted the testimony of two witnesses rather than one.⁷⁷ The only bar to reversal—absent harmless error found in *Ludy* itself—was seemingly a failure to object to the instruction at trial.⁷⁸

D. Polygraphs Admonishment

Instructional fever continued, as the Indiana Court of Appeals offered useful guidance to trial courts confronted with a witness’ improper reference to polygraphs. Although the unreliability of polygraphs may be axiomatic, so is the infrequency of appellate reversal based on a claim that the trial court should have declared a mistrial. When a witness makes an oblique reference to a polygraph, the trial court’s decision not to declare a mistrial is usually affirmed on appeal in relatively short order. Although the court of appeals affirmed in *Glenn v. State*,⁷⁹ the opinion is nevertheless noteworthy because it offers a thoughtful suggestion for trial courts dealing with such issues in the future.

In the course of questioning a witness about her communications with the detective who investigated the murder with which Glenn was charged, defense counsel asked the witness to pinpoint the precise time she had given a recorded statement. The witness answered that it was the “second or third time” but continued with a reference to a “polygraph test” during the first statement.⁸⁰ The trial court dismissed the jury, and Glenn moved for a mistrial, arguing that no admonishment could correct the jury’s impression that the witness had taken and

71. 787 N.E.2d 440 (Ind. Ct. App. 2003).

72. *Id.* at 442.

73. *Id.* at 443.

74. 790 N.E.2d 146 (Ind. Ct. App. 2003).

75. *Id.* at 147.

76. 791 N.E.2d 263 (Ind. Ct. App. 2003).

77. *Id.* at 265.

78. *See* *Manuel v. State*, 793 N.E.2d 1215 (Ind. Ct. App. 2003).

79. 796 N.E.2d 322 (Ind. Ct. App. 2003).

80. *Id.* at 324.

passed a polygraph test.⁸¹ The trial court denied the motion for mistrial, admonished the witness that she was not to use the word “polygraph” or “lie detector” in her testimony, and after the jury was returned to the courtroom instructed the jurors to “disregard the witness’s last remark”⁸²

In affirming the convictions, the court of appeals reiterated the long-standing principle that “a mistrial is an extreme remedy used only when no other curative measure will rectify the situation.”⁸³ Here, the court found that Glenn “may have invited the error” when defense counsel asked the witness to pinpoint the time she had given the statement to police.⁸⁴ In addition, the court agreed with the trial court’s finding that the witness’s remark “was not intentional and that there was no mention of the test results.”⁸⁵ Finally, the comment did not make specific reference to a particular case, and the jury was aware that the witness had several cases pending for other offenses.⁸⁶

Although the court found the trial court’s general admonishment sufficient, it observed that “juries may be more likely to adhere to an admonishment or limiting instruction if the trial judge would go one step further and inform them of the reason for disregarding the inadmissible evidence.”⁸⁷ Therefore, the court of appeals suggested that trial judges give the following admonishment when the issue arises in the future:

A suggestion has been made that the witness took a polygraph examination, yet there has been no suggestion as to what the subject matter of the polygraph test was. Because scientific research has found that polygraph tests are not reliable, they are inadmissible. I would ask that you disregard the last comment made by the witness.⁸⁸

Acknowledging that no instruction is “fail-safe,” the court aptly noted that this specific admonishment may serve to mitigate the harmful effect of a polygraph reference in future cases. Although seemingly bucking the less-is-better instructional trend of the Indiana Supreme Court, the court of appeals’ opinion is a useful one that trial courts will hopefully heed in the future.

E. Jury Nullification

Perhaps the most significant—or at least the most fundamental—development in the instructional realm was the supreme court’s decision regarding the meaning of the seemingly straightforward language of article I, section 19 of the Indiana Constitution, which allows juries to determine not only

81. *Id.*

82. *Id.*

83. *Id.* at 325.

84. *Id.*

85. *Id.*

86. *Id.* at 324-25.

87. *Id.* at 325.

88. *Id.* at 326.

the facts but also “the law” in Indiana.⁸⁹ In *Holden v. State*,⁹⁰ the court considered the propriety of an instruction that told juries this provision “does not entitle you to return false verdicts, it does allow you the latitude to refuse to enforce the law’s harshness when justice so requires.”⁹¹ In a seven-paragraph opinion, the court upheld the trial court’s refusal of the instruction. Citing two Indiana cases and several law review articles, the court concluded

Although there may be some value in instructing Indiana jurors that they have a right to “refuse to enforce the law’s harshness when justice so requires,” the source of that right cannot be found in Article I, Section 19 of the Indiana Constitution. This Court’s latest pronouncement on the subject is correct: “[I]t is improper for a court to instruct a jury that they have a right to disregard the law. Notwithstanding Article I, Section 19 of the Indiana Constitution, a jury has no more right to ignore the law than it has to ignore the facts in a case.”⁹²

The decision, especially in light of its authorship, was a bit of a surprise. Just four years earlier, then-Judge Rucker of the Indiana Court of Appeals had written a law review article taking a far more expansive view of article I, section 19.⁹³ In the article, he opined that “an instruction telling the jury that the constitution intentionally allows them latitude to ‘refuse to enforce the law’s harshness when justice so requires’ would be consistent with the intent of the framers and give life to what is now a dead letter provision.”⁹⁴ His unanimous opinion for the court just four years later, however, seems to have effectively shut that door.

Although the opinion makes clear that trial courts need not instruct jurors that they may “disregard” or “refuse to enforce the law’s harshness,” it appears to leave open the possibility that an instruction that otherwise highlights the juror’s ability to decide the law, without explicitly telling them that they may disregard it, may be upheld under section 19.⁹⁵ Indeed, the court quotes the language of an instruction approved over a century ago:

You, gentlemen, in this case, are the judges of law as well as of the facts. You can take the law as given and explained to you by the court, but, if you see fit, you have the legal and constitutional right to reject the same, and construe it for yourselves.⁹⁶

It would appear that defendants could tender instructions with this language or

89. IND. CONST. art. I, § 19.

90. 788 N.E.2d 1253 (Ind. 2003).

91. *Id.* at 1254.

92. *Id.* (citing *Bivins v. State*, 642 N.E.2d 928, 946 (Ind. 1994)).

93. See Honorable Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 VAL. U. L. REV. 449 (1999).

94. *Id.* at 481 (footnote omitted).

95. *Holden*, 788 N.E.2d at 1254.

96. *Id.* (citing *Blaker v. State*, 29 N.E. 1077 (Ind. 1892)).

some variation between it and the *Holden* instruction. Concerns also loom about the extent to which a jury's role in deciding "the law" may be mentioned during voir dire or closing argument, which means the issue is likely to resurface on the appellate docket.

F. Waiver? What, When, and How . . .

The appellate courts in Indiana have long used the term "waiver" in a number of different contexts certain to engender some degree of confusion. The Indiana Supreme Court confronted two of these in *Bunch v. State*.⁹⁷ Bunch was convicted of several counts of dealing cocaine. One of his convictions was vacated on appeal, but he did not raise any sentencing claims. He later filed a petition for post-conviction relief, which was denied; it raised no sentencing claims. Finally, he secured permission to file a successive petition for post-conviction relief that alleged the trial court had improperly weighed the aggravating and mitigating circumstances in sentencing him, and that petition was denied as well. Although the State had filed a response asserting the affirmative defense of waiver, it did not raise the issue at the post-conviction hearing or attempt to establish the defense "either by evidence or by requesting judicial notice of the issues presented in Bunch's direct appeal."⁹⁸ Because of the State's inaction, and in light of longstanding precedent and Trial Rule 8(C), the supreme court held that the State was not entitled to a finding of waiver "as a matter of right."⁹⁹

Nevertheless, the court affirmed the denial of post-conviction under a different species of the "waiver" beast: procedural default. The court acknowledged that it has often used the term "waiver" to explain "the discretionary judicial doctrine that forecloses an issue on appeal" and is more appropriately described as "procedural default" or "forfeiture."¹⁰⁰ This type of "waiver" may be invoked *sua sponte* by an appellate court to find an issue foreclosed "under a variety of circumstances in which a party has failed to take the necessary steps to preserve the issue."¹⁰¹ In light of long-standing precedent that "claims available on direct appeal but not presented are not available on post-conviction review," the court held that Bunch was foreclosed from raising his sentencing challenge in a post-conviction proceeding.¹⁰²

Bunch is significant because it clarifies the confusion often surrounding the seemingly ubiquitous term "waiver." Although the use of the terms "procedural default" or "forfeiture" would be desirable in the future, the court appears unwilling to mandate such a change.

Citing *Bunch*, the court of appeals broke new and dangerous ground in

97. 778 N.E.2d 1285 (Ind. 2002).

98. *Id.* at 1289.

99. *Id.*

100. *Id.* at 1287.

101. *Id.*

102. *Id.* at 1289.

Taylor v. State,¹⁰³ when it held that a defendant who pleads guilty must challenge his sentence on direct appeal and may not wait to raise the claim in a petition for post-conviction relief. The key difference between the two cases is that the defendant in *Bunch* was convicted after a trial and Taylor pleaded guilty. The court acknowledged the distinction but found it not to be significant.

Taylor admits that he filed no direct appeal, and we can discern no difference between this situation and one in which a defendant does file a direct appeal, but fails to present an issue to the court. The fact remains that the sentencing issue *could have been* presented upon direct appeal but was not.¹⁰⁴

Although the court of appeals approach is certainly legally supportable, significant concerns surround its practical effect. Trial courts are not required to advise criminal defendants who plead guilty of their right to appeal their sentences. However, if the court of appeals' opinion stands, one would expect counsel (or trial courts) to advise defendants who plead guilty¹⁰⁵ that they should appeal their sentences or face the possibility of waiver down the road. This would lead to a large increase in the number of direct appeals, which would not only burden the court of appeals docket but would also cost counties a great deal of money to pay for appellate counsel and transcripts.¹⁰⁶

Moreover, if defendants do not pursue a direct appeal of their sentence immediately after their guilty pleas, it is quite likely that they could do so later in a manner that would cause further delay and cost. If a sentencing issue were discovered in the course of investigating post-conviction relief issues, petitioners could dismiss their petition without prejudice and pursue a belated direct appeal.¹⁰⁷ After the resolution of the direct appeal, the petitioner could then reinstitute the post-conviction relief petition. The net result would be considerable delay and two separate appeals instead of one. Because the issues surrounding the guilty plea offer the possibility of greater relief—vacating an entire conviction rather than reduction of a sentence—it seems preferable that the conviction-based issues be pursued sooner rather than later in the process.

There may be a silver lining in the seemingly dark cloud of *Taylor*. The court concludes its opinion with Taylor's contention that it is improper to impose the doctrine of waiver on him because the trial court was not required to advise

103. 780 N.E.2d 430 (Ind. Ct. App. 2002).

104. *Id.* at 435 (emphasis in original).

105. This discussion is limited to defendants who plead guilty pursuant to a plea agreement that gives the trial court discretion at sentencing. Plea agreements that require a specific term of years would preclude any appellate challenge to the sentence imposed.

106. The Appellate Division of the Marion County Public Defender Agency joined the Lake County Public Defender Agency in filing an amicus brief in support of transfer in *Taylor*. They opined that the increase in direct appeals of discretionary sentences likely to occur as a result of *Taylor* could easily double their already over-extended budgets.

107. *See* IND. POST-CONVICTION R. 2.

him of his right to appeal his sentence.¹⁰⁸ The court rejected this argument because Taylor was advised of his right to appeal his sentence.¹⁰⁹ Therefore, in a future case in which there was no appeal advisement, the court might find *Taylor* distinguishable and not apply waiver.

Whether or not the court refines *Taylor* in light of the advisement provided at sentencing, concerns will persist. What should a trial judge do after accepting a guilty plea that grants some discretion at sentencing? What should defense counsel do?

Although there are certainly differences around the state, the usual practice of trial courts, consistent with the Benchbook, appears to be to advise defendants who plead guilty that they are waiving their right to appeal a *conviction*. If the trial court also were to advise these defendants of their right to appeal the sentence, it is likely that the number of sentencing appeals would skyrocket. However, if no advisement were offered, the court of appeals might distinguish *Taylor* and allow the sentencing claim to be raised on post-conviction. There would remain considerable uncertainty, and trial courts and defense counsel may err on the side of full disclosure, advising all defendants of their right to appeal their sentences.

There should be consistent rules governing the timing of sentencing appeals instead of leaving the matter solely within the hands of trial judges based on the advisement given at sentencing. A better course might be one similar to the approach adopted in the ineffective assistance of counsel context in *Woods v. State*.¹¹⁰ Give defense counsel the primary role in the process. In *Woods*, the Indiana Supreme Court held that a claim of ineffective assistance may be raised on direct appeal but would then be foreclosed in a post-conviction proceeding; if it is not raised on direct appeal—and the court strongly counseled against raising all but clear claims supported by the record on direct appeal—then the issue may still be developed and raised on post-conviction relief.¹¹¹ Similarly, in the *Taylor* context, if there appears to be a meritorious sentencing claim, counsel should advise the client of the right to appeal and pursue it immediately. If the sentencing issue is not pursued on direct appeal (regardless of what advisement(s) may have or have not been provided), it should nevertheless remain available on post-conviction.

G. Still No Issues?

Criminal defendants are doing well if they bat about .150 in the Indiana Court of Appeals.¹¹² There are a variety of plausible explanations: a defendant's

108. *Taylor*, 780 N.E.2d at 435.

109. *Id.*

110. 701 N.E.2d 1208 (Ind. 1998).

111. *Id.*

112. In 2002, the Indiana Court of Appeals affirmed 86% of direct criminal appeals and 83.1% of post-conviction relief appeals. See INDIANA COURT OF APPEALS 2002 ANNUAL REPORT 38, available at <http://www.in.gov/judiciary/appeals/docs/2002report.pdf>.

right to an appeal at public expense encourages appeals regardless of their merit, the appellate standards of review and doctrines of waiver and harmless error make reversal difficult, trial courts and attorneys are doing a great job at trial—leaving little to challenge on appeal, and so on.

The practical reality is that appellate public defenders will sometimes be faced with a record seemingly devoid of reversible error. For decades, most have made the best of the situation with some innovation rather than resignation. Chances are that something went wrong either at trial or sentencing—or both, under existing Indiana law; moreover, well-established rules could also be challenged in light of precedent from other states. If all else fails, the old standby of sufficiency of the evidence is usually a viable option, although it rarely proves successful.

In *Packer v. State*,¹¹³ the court of appeals signaled a potential beginning of a new era with different rules and uncertainty for appellate public defenders, their clients, and the court itself. In *Packer*, the public defender in a probation revocation appeal briefed two “issues,” oddly phrased as his inability to “construct a non-frivolous argument” as to each issue.¹¹⁴ The brief concluded with a statement that “a prayer for relief seems out of place” because of the inability to construct any non-frivolous argument.¹¹⁵

The Appellant’s Brief in *Packer* drew the ire of the court of appeals, which noted that there was no suggestion that counsel had discussed the positions to be taken in the brief with his client.¹¹⁶ Moreover, the positions taken raised concerns under the Indiana Rules of Professional Conduct, specifically the rules concerning competence¹¹⁷ and zealous advocacy.¹¹⁸ The court *sua sponte* adopted an alternative approach for counsel faced with a similar situation in the future:

“[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel’s brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel’s request to withdraw and dismiss the appeal On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the

113. 777 N.E.2d 733 (Ind. Ct. App. 2002).

114. *Id.* at 736.

115. *Id.*

116. *Id.*

117. IND. PROF’L CONDUCT R. 1.1.

118. IND. PROF’L CONDUCT R. 1.3.

assistance of counsel to argue the appeal.”¹¹⁹

This so-called *Anders* briefing has been a staple of federal appellate practice for a quarter of a century, and some states have employed similar approaches.¹²⁰

However, *Anders* was never adopted as a matter of Indiana state law, and some precedent—unmentioned by the court of appeals in *Packer*—and practical considerations suggests that there may be good reason for this. The court of appeals rejected the *Anders* approach for post-conviction proceedings as early as 1972 in *Dixon v. State*,¹²¹ where the court instead adopted the ABA Standards.¹²² Five years later, the court of appeals, citing *Dixon*, denied counsel’s motion to withdraw in a direct appeal.¹²³ These opinions are seemingly consistent with article VII, section 6 of the Indiana Constitution, which affords “in all cases an absolute right to one appeal.”¹²⁴ If the right belongs to the client, it is presumably the client—not the attorney—who must waive it.

Although *Packer* makes much of the Rules of Professional Conduct, the rules taken as a whole suggest that *Anders* briefing may not be the best course. First, Rule 3.3(a) requires candor toward the tribunal but this relates only to prohibitions against making false statements of law or fact, failing to disclose binding “directly adverse” authority, and offering evidence known to be false.¹²⁵ The more salient rules—competent and zealous representation, as discussed above—coupled with the scope of representation¹²⁶ seem to far outweigh any concerns under Rule 3.3(a), which pose little obstacle to diligent and innovative counsel. Perhaps most troubling are the post-conviction relief concerns raised by following an *Anders* approach. A petitioner in a post-conviction relief proceeding is precluded from raising issues known and available on direct appeal.¹²⁷ Filing an *Anders* brief seems to doubly seal a defendant’s fate, both on the direct appeal and on post-conviction relief.

Packer was essentially decided sua sponte without the benefit of arguments from either the Defendant or State in the case—or the broader defense and prosecution bar through amicus briefs. It does not purport to limit itself to probation revocation appeals, and the *Anders* preference would seemingly apply to criminal direct appeals and juvenile appeals. Finally, because transfer was not sought, the Indiana Supreme Court has not had an opportunity to consider the merits of *Anders* briefing in Indiana.

It seems unlikely that a re-examination of *Packer* will come anytime soon.

119. *Packer*, 777 N.E.2d at 737 (quoting *Anders v. California*, 386 U.S. 738, 744 (1967)).

120. See generally Martha C. Warner, *Anders in the Fifty States: Some Appellants’ Equal Protection is More Equal than Others’*, 23 FLA. ST. U. L. REV. 625 (1996).

121. 284 N.E.2d 102 (Ind. Ct. App. 1972).

122. *Id.* at 105-06.

123. *Smith v. State*, 363 N.E.2d 1295 (Ind. Ct. App. 1977).

124. IND. CONST. art. VII, § 6.

125. IND. PROF’L CONDUCT R. 3.3(a).

126. IND. PROF’L CONDUCT R. 1.2.

127. See generally *Bunch v. State*, 778 N.E.2d 1285 (Ind. 2002).

There is simply no mechanism for a defendant to challenge the merits of *Packer*. Moreover, it seems unlikely that the court of appeals would issue an opinion criticizing counsel for not filing a *Packer* brief. There will almost always be a plausible, non-frivolous challenge available in any appeal; it might be something as basic as a sentencing irregularity or a trial error that ultimately proves harmless, but there will be something. If the Indiana Supreme Court wishes to give its seal of approval to *Anders* briefing, it could easily do so—but to date has not. The court could, as it did with the Post-Conviction Relief Rules, adopt a provision for counsel to withdraw when an appeal has no merit.¹²⁸ Moreover, the court could—and should if it wants to bless the *Packer* approach—amend the appellate rules to offer an alternative to the rule governing the “Appellant’s Brief,”¹²⁹ which proscribes that the brief include “contentions why the trial court . . . committed reversible error.”¹³⁰ In any event, *Anders* briefing would impose no small burden on the appellate court, which must engage in a “full examination of all the proceedings” for arguable legal points.¹³¹ Upon further reflection, other panels of the court may see the wisdom of the time-tested approach in which counsel raises the best claims he or she can find and advance in each appeal.

H. Appellate Sentence Review

This year’s survey ends, as has become a tradition, with a discussion of substantive appellate sentence review.¹³² As was suggested last year, the amendment of Appellate Rule 7(B), effective January 1, 2003, to allow the revision of “inappropriate” rather than “manifestly unreasonable” sentences appears to have been a “significant relaxing of the standard . . .”¹³³ The court of appeals began applying the relaxed standard in January,¹³⁴ and its application spawned thirty-five cases in the first nine months of 2003 alone. Reviewing all of these cases could be a survey article in itself. Therefore, this survey will review only a handful of the cases, paying particular attention to the most significant ones.

As summarized last year, in *Hildebrandt v. State*,¹³⁵ the court of appeals noted that article VII of the Indiana Constitution “authorizes independent appellate review and revision of a sentence imposed by the trial court,”¹³⁶ but 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*

128. *See* IND. POST-CONVICTION R. 1(9)(c).

129. IND. APP. R. 45(B).

130. IND. APP. R. 46(A).

131. *Anders v. California*, 87 S. Ct. 1396, 1400 (1967).

132. *See generally* Schumm, *supra* note 21, at 1024.

133. *Id.* at 1032.

134. *Kien v. State*, 782 N.E.2d 398, 416 n.12 (Ind. Ct. App. 2003) (applying the amended rule even though the sentence was imposed in 2002).

135. 770 N.E.2d 355 (Ind. Ct. App. 2002).

136. *Id.* at 360.

court's consideration of the sentence which is appropriate for the crime committed."¹³⁷ 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 be reviewed by the trial court at sentencing "and then reviewed again if at issue on appeal."¹³⁸ This emphasis on the presumptive sentence factored heavily in review under the amended rule as well.

The first thorough discussion of the amended rule did not come until April. In *Rodriguez v. State*,¹³⁹ Judge Riley, writing for a panel that included Judges Baker and Mathias, provided a detailed account of the history of the 1970 constitutional amendment that gave Indiana's appellate courts the power to review and revise sentences, the appellate rule that has been amended over the years to implement the provision, and the interplay between the constitution, the rule, and the sentencing statute that governs the considerations for trial courts in imposing sentences.¹⁴⁰ The court then applied a two-tier review similar to that employed by the Indiana Supreme Court in *Carter v. State*¹⁴¹ and other cases. It first reviewed the propriety of the trial court's finding of aggravating and mitigating circumstances; second, it reviewed the aggregate effect of the properly found aggravating and mitigating circumstances under Rule 7(B).¹⁴² In the latter stage, the court relied on *Hildebrandt* in noting that the appellate court, like the trial court, should begin with the presumptive sentence.¹⁴³ The presumptive can be adjusted upward or downward based on the proper aggravating and mitigating circumstances, but the maximum sentence is generally appropriate only for "the worst offenders."¹⁴⁴

Rodriguez had no criminal record, expressed remorse for his offense, accepted responsibility by pleading guilty, and possessed prior stable employment.¹⁴⁵ However, the trial court appropriately found the facts and circumstances of his offense as an aggravating circumstance. He had not merely operated a vehicle while intoxicated resulting in death; he was intoxicated at nearly three times the legal limit and was driving in a congested area during afternoon rush-hour traffic.¹⁴⁶ After engaging in what appears to be a *de novo* review of "the single proper aggravator and four significant mitigators," the court concluded that the maximum sentence of eight years was inappropriate and reduced the sentence to three and one-half years.¹⁴⁷

137. *Id.* at 361 (emphasis added).

138. *Id.*

139. 785 N.E.2d 1169 (Ind. Ct. App. 2003).

140. *Id.* at 1174-77.

141. 711 N.E.2d 835 (Ind. 1999).

142. *Rodriguez*, 785 N.E.2d at 1177-80.

143. *Id.* at 1179.

144. *Id.* at 1180.

145. *Id.*

146. *Id.*

147. *Id.*

A week later, the same panel that decided *Rodriguez* affirmed a maximum sentence of fifty years for voluntary manslaughter in *Flammer v. State*.¹⁴⁸ Although Flammer also did not have a prior criminal history and pleaded guilty to the offense, the court found that his character and his crime to be among “the very worst,” justifying the maximum sentence.¹⁴⁹ Specifically, it noted that he had repeatedly told his children that he was going to kill his wife with various weapons, killed her while his youngest child was only a few feet away, solicited his children’s help in disposing of the body, and intimidated his children into lying to police about their mother’s whereabouts.¹⁵⁰ In addition, the court also seemed to use Flammer’s mental illness against him, even though the trial court had found it to be a mitigating circumstance; Flammer had refused to take his medication, and it was likely that he would commit another crime.¹⁵¹

As initial forays into sentence review under the amended rule, *Rodriguez* and *Flammer* are significant because they represent a serious and thorough review of the sentence imposed, rather than the cursory review that often occurred in earlier cases.¹⁵² They suggest that the amended rule has relaxed the standard by allowing an essentially *de novo* review of the length of the sentence imposed by the trial court (as in *Rodriguez*) or even aggravating and mitigating circumstances (as in *Flammer*). Although the cases mention the Rule 7(B) parlance of the “nature of the offense” and “character of offender,” the cases appear to place greater emphasis on the more detailed factors in the sentencing statute.

Weeks later, the same Riley-Baker-Mathias panel again reduced sentences, based at least in part on the principle that the maximum sentence “should be reserved for the very worst offenses and offenders,” in two more cases.¹⁵³ In *Jordan*, the court reduced a maximum sentence of twenty years for dealing in a schedule II controlled substance to fifteen years based on the defendant’s youth, extensive drug habit, the non-violent nature of his prior and present offense, and his request for drug treatment in lieu of retribution.¹⁵⁴ In *Westmoreland*, the court reduced the maximum sentence of twenty years for criminal deviate conduct to the presumptive term of ten years based on the limited nature of the defendant’s criminal history (non-violent misdemeanors and possession of marijuana) and his youthful age of seventeen at the time of the offense.¹⁵⁵ These four opinions suggest that, even in the nebulous realm of unique offenses and offenders, agreement is possible through the application of consistent principles.

148. 786 N.E.2d 293 (Ind. Ct. App. 2003).

149. *Id.* at 300.

150. *Id.*

151. *Id.* This was the primary issue when oral argument was heard on Flammer’s petition to transfer in the Indiana Supreme Court.

152. See generally Schumm, *supra* note 21, at 1026-27, 1030.

153. *Westmoreland v. State*, 787 N.E.2d 1005, 1011 (Ind. Ct. App. 2003); see also *Jordan v. State*, 787 N.E.2d 993, 997 (Ind. Ct. App. 2003).

154. 787 N.E.2d at 997.

155. 787 N.E.2d at 1012.

However, the court of appeals' opinion in *Bennett v. State*,¹⁵⁶ makes clear that not all members of the court are on the same page. In *Bennett*, Judge Robb, joined by Judge Friedlander, reduced an aggregate sentence of forty-four years to twenty-six years. The court evaluated the sentence imposed on each count, finding the twenty year sentence for robbery should be reduced to twelve, the fifteen year sentence for criminal confinement should be reduced to ten, the six year sentence for carrying a handgun without a license should be reduced to four, and the three year sentence for theft should be reduced to one and one-half.¹⁵⁷ However, it upheld the maximum sentence of three years for resisting law enforcement, noting that Bennett was involved in a car chase at 100 miles per hour, putting in danger the lives of police officers and the public at large.¹⁵⁸ Ordering this count to be served concurrently with the receiving stolen property and handgun counts but consecutively to the other counts, the court arrived at its twenty-six-year sentence.¹⁵⁹ Although any sentencing decision will necessarily have an element of arbitrariness,¹⁶⁰ the count-by-count review in *Bennett* seems especially arduous. Perhaps this is unavoidable because, unlike the four cases cited above, it did not involve a single count.

Bennett also adds another, more significant wrinkle—a dissent. Judge Vaidik, a former trial judge, would have affirmed the forty-four year sentence, noting that the appellate court's "principal role in promoting consistency is to review sentences to ensure that they are based on appropriate aggravators and mitigators and are within the minimum and maximum sentence prescribed by our legislature."¹⁶¹ She opined that Indiana would advance in the direction of consistency in sentencing "by maintaining our focus on the statutory parameters of sentencing established by our legislature, rather than second-guessing the trial court."¹⁶²

Judge Vaidik's view appears to be at odds with the language of Appellate Rule 7(B), which specifically authorizes the review of sentences "authorized by statute" and the purpose of the 1970 constitutional amendment of which the rule is an outgrowth. It is also inconsistent with the approach of every Indiana Supreme Court justice and virtually every other judge on the court of appeals,¹⁶³ each of whom have authored or concurred in opinions that have reduced statutorily authorized sentences in many cases. Giving trial judges a virtual blank check at sentencing is unlikely to bring about consistency in sentencing. Rather, careful appellate review in published opinions that are grounded in the consistent application of sentencing principles and precedent is more likely to offer the necessary guidance to allow trial judges to impose consistent sentences, or, if that

156. 787 N.E.2d 938 (Ind. Ct. App. 2003).

157. *Id.* at 950-51.

158. *Id.* at 951.

159. *Id.*

160. *See Carter v. State*, 711 N.E.2d 835, 843 (Ind. 1999).

161. *Bennett*, 787 N.E.2d at 953 (Vaidik, J., dissenting).

162. *Id.* (Vaidik, J., dissenting).

163. *See generally* Schumm, *supra* note 21, at 1025-29.

fails, allow litigants to effectively argue for that consistency on appeal.

Finally, the court also addressed the effect of Appellate Rule 7(B) on suspended sentences. In *Cox v. State*,¹⁶⁴ the court of appeals reviewed and revised a three-year sentence for theft. *Cox* is significant because it treats the three year sentence, two years of which were suspended, as a maximum sentence for purposes of review. Observing an absence of any prior distinction in Indiana decisional law between “maximum punishment and maximum sentences,”¹⁶⁵ the court expressed disagreement with another panel’s opinion a month earlier in *Beck v. State*.¹⁶⁶ The *Cox* majority observed that the Indiana Supreme Court had previously “used the phrases interchangeably as though synonymous.”¹⁶⁷

Treating a partially suspended sentence as a maximum sentence is important because it may lead to application of the appellate courts’ oft-cited principle that maximum sentences should generally be reserved for worst offenses and worst offenders.¹⁶⁸ Although the majority in *Cox* did not cite or apply that principle, it did reduce the sentence after finding that the sole aggravating circumstance cited by the trial court was improper. Left with only two mitigating circumstances, the court revised the sentence to one year, six months of which was suspended.¹⁶⁹

If the *Cox* approach is followed in future cases, it is likely that more sentencing challenges will be brought and will be successful because lengthy suspended sentences will require a hard look by the appellate court on direct appeal. However, because the suspended time may ultimately be ordered executed (in the event of a probation violation), this approach appears to be the proper one, as highlighted below.

In *McKnight v. State*,¹⁷⁰ the defendant-probationer challenged the imposition of a sentence of eighty-four of the previously suspended ninety-one months as “excessive.”¹⁷¹ The lengthy suspended sentence had been imposed on a burglary charge in 1999 and revoked in 2002 based on the defendant’s commission of the Class C misdemeanor offense of minor consumption of alcohol, his failure to report and falsification of the report to his probation officer about the new charge, and a two and a half month lapse in reporting to his probation officer.¹⁷²

According to statute, the trial court may order a defendant who has violated probation to be sentenced to the previously suspended sentence.¹⁷³ The court of

164. 792 N.E.2d 878 (Ind. Ct. App. 2003).

165. *Id.* at 883 n.5.

166. 790 N.E.2d 520 (Ind. Ct. App. 2003).

167. 792 N.E.2d at 883 n.5.

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

169. *Cox*, 792 N.E.2d at 883.

170. 787 N.E.2d 888 (Ind. Ct. App. 2003).

171. *Id.* at 892.

172. *Id.* at 893.

173. *See* IND. CODE § 35-38-2-3(g)(3) (2003) (allowing the trial court to “order execution of the sentence that was suspended at the time of initial sentencing”). Although not raised by the State or the court, the language of this provision does not mention the possibility of imposing a sentence

appeals reaffirmed that as long as the trial court adheres to the “proper procedures” in conducting a revocation hearing it does not abuse its discretion in ordering the execution of any amount of the suspended sentence upon a finding of a violation.¹⁷⁴

Although the revocation in this case was based on several violations of conditions of probation, it is possible that a defendant could face a very lengthy sentence based simply on a relatively minor violation such as missing a couple of appointments with his or her probation officer, a new arrest for a petty offense, or testing positive for marijuana. If the length of the sentence is to be challenged, it appears necessary for the claim to be appealed immediately, as in *Cox*, even though the defendant may be pleased with the imposition of a suspended sentence. If not, a challenge to the length of the sentence upon revocation of probation—no matter what the basis—seems almost certain to fail.

shorter than the originally suspended sentence.

174. *McKnight*, 787 N.E.2d at 892 (quoting *Goonen v. State*, 705 N.E.2d 209, 212 (Ind. Ct. App. 1999)).