

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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Indiana's appellate courts tackled many significant issues during the survey period October 1, 2003, to September 30, 2004. Although many opinions addressed the standard fare of such issues as search and seizure law and sentence review, others entered uncharted territory, at least partially in response to two landmark United States Supreme Court decisions issued in 2004.¹ This Article seeks not only to summarize the significant opinions of the past year but also to offer some perspective on their likely future impact.

I. SEARCH & SEIZURE

Several cases during the survey period addressed challenges to searches and seizures, either under the Fourth Amendment or Indiana's nebulous analog, article I, section 11 of the Indiana Constitution. Since Chief Justice Shepard's 1989 article² encouraged the bar to revivify the Indiana Constitution, individual rights have not been widely or deeply expanded beyond the protections of the United States Constitution.³ Because of the intensely fact-centered nature of claims regarding unreasonable searches and seizures—and the broadly worded standard that looks only to whether police conduct was reasonable,⁴ many claims under section 11 are brought and, not infrequently, succeed.

Bringing claims under both constitutions is usually of critical importance to defendants. However, the court of appeals affirmance of the grant of a motion to suppress in *State v. Hanley*⁵ brought the point home to the State as well. There, the defendant challenged a search based on both the Fourth Amendment and section 11, and the trial court granted the motion based on the latter.⁶ Oddly, though, the State limited its appeal to the Fourth Amendment issue, saying nothing of section 11.⁷ Reiterating that the Fourth Amendment provides only the "minimum amount of protection a state may provide for its citizens," the court found the State had not met its burden under the separate analysis of the Indiana

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1. See *Crawford v. Washington*, 541 U.S. 36 (2004); *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

2. Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

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

4. See generally *Baldwin v. Reagan*, 715 N.E.2d 332, 337 (Ind. 1999); *Brown v. State*, 653 N.E.2d 77, 78 (Ind. 1995).

5. 802 N.E.2d 956 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 802 (Ind. 2004).

6. *Id.* at 957-58.

7. *Id.* at 958.

Constitution to show that the intrusion was reasonable.⁸

A. Indiana Supreme Court Cases

In *State v. Bulington*,⁹ the defendant moved to suppress evidence in the trial court based on both the Fourth Amendment and section 11, but the Indiana Supreme Court addressed only the section 11 claim because it entitled him to relief.¹⁰ The methamphetamine scourge in Indiana apparently led Lafayette police to convince Meijer employees to report any customers who purchased more than three boxes of cold medicine, which is a methamphetamine precursor.¹¹ Bulington entered the store with another man and each picked up three boxes of antihistamines at separate checkout counters.¹² Store camera showed the men unite in the same truck in the parking lot, where they emptied the boxes of pills into Meijer bags.¹³ Police were called and stopped Bulington's vehicle as it was pulling out of the parking lot.¹⁴ Bulington gave his consent to search, and police found hundreds of loose pills and other items commonly used to manufacture methamphetamine.¹⁵ The trial court granted Bulington's motion to suppress, holding the traffic stop improper and that consent to search was not voluntarily given.¹⁶ The court of appeals reversed in a 2-1 decision.¹⁷ In an unusual vote alignment, the Indiana Supreme Court granted transfer and affirmed the trial court.¹⁸

Justice Sullivan, writing for Justices Dickson and Rucker, reviewed recent decisions concerning pretextual stops,¹⁹ stops to ensure seatbelt compliance,²⁰ and sobriety checkpoints,²¹ before concluding "where there is no reason to believe a violation of law has occurred or is occurring, a traffic stop is reasonable only if designed and implemented on neutral criteria that safely and effectively targets a serious danger specific to vehicular operation."²² Placing a high premium on the protection of the "private areas" of Hoosiers' lives and out of a

8. *Id.* at 958-59.

9. 802 N.E.2d 435 (Ind. 2004).

10. *Id.* at 438. This certainly creates a certiorari-proof decision but differs from other search and seizure cases in which the court appeared somewhat reticent to resolve matters under the state constitution. *See, e.g., Middleton v. State*, 714 N.E.2d 1099 (Ind. 1999).

11. *Bulington*, 802 N.E.2d at 436.

12. *Id.*

13. *Id.*

14. *Id.* at 437.

15. *Id.*

16. *Id.*

17. *State v. Bulington*, 783 N.E.2d 338 (Ind. Ct. App. 2003).

18. *Bulington*, 802 N.E.2d at 437.

19. *See Mitchell v. State*, 745 N.E.2d 775 (Ind. 2001).

20. *See Baldwin v. Reagan*, 715 N.E.2d 332 (Ind. 1999).

21. *See State v. Gerschoffer*, 763 N.E.2d 960 (Ind. 2002).

22. *Bulington*, 802 N.E.2d at 439.

concern for “official arbitrariness, discretion, and discrimination” by police, the majority held the stop invalid under section 11.²³ Nevertheless, reviewing precedent from other states, the court suggested that stops are supported by reasonable suspicion under the Fourth Amendment if a customer “(1) purchases a combination of methamphetamine precursors from one store; (2) purchases a combination of precursors from several stores; (3) purchases of [sic] one precursor and then commits a traffic violation warranting a traffic stop; and (4) purchases one precursor and the arresting officer has knowledge of defendant’s previous involvement with methamphetamine.”²⁴ Presumably, any of these four scenarios would suffice under section 11 scrutiny as well.²⁵

Justice Boehm, joined by Chief Justice Shepard, dissented.²⁶ Recounting that the men lingered in the cold remedy aisle, purchased the maximum number of packages a store may sell to an individual, checked out individually, and then emptied the boxes into bags of loose pills, Justice Boehm concluded: “I can think of nothing these actions suggest except preparation to cook these pills into some broth. It seems to me that the police had a moral certainty, not just reasonable suspicion, that they had some unregulated pharmaceutical manufacturers on their hands.”²⁷

Although the de novo standard of review²⁸ entitles each justice to his own view of the facts, the future value of *Bulington* lays not so much in the fact-sensitive consideration of reasonable suspicion but its broader concerns espoused in the majority opinion. In response to *Bulington*, one could hope that law enforcement would design policies that minimize the potential for traffic stops based on arbitrary and discriminatory motives. This would certainly set section 11 apart from prevailing Fourth Amendment jurisprudence and seemingly offer Hoosiers additional protection in areas of life commonly regarded as private.

In *Finger v. State*,²⁹ the Indiana Supreme Court again addressed detention and reasonable suspicion for a vehicle stop.³⁰ There, a police officer pulled behind a vehicle that was partially stopped in the driving lane.³¹ Although the driver reported he was out of fuel, the officer observed that the gas gauge showed one-eighth of a tank and knew a gas station was less than two blocks away.³² Merely stopping behind a vehicle or questioning a driver is not detention under the Fourth Amendment,³³ but the stop was transformed from a consensual encounter into an investigatory stop once the officer retained Finger’s license for

23. *Id.* at 440.

24. *Id.* at 441 (footnotes omitted).

25. *See id.* at 441-42.

26. *Id.* at 442 (Boehm, J., dissenting).

27. *Id.*

28. *See id.* at 438, 442.

29. 799 N.E.2d 528 (Ind. 2003).

30. *Id.* at 533.

31. *Id.* at 530.

32. *Id.* at 530-31.

33. *Id.* at 533.

several minutes.³⁴

Turning to the issue of reasonable suspicion, the court recounted the facts relied on by the officer: (1) the car was reported as a “suspicious” vehicle; (2) Finger’s statement that the vehicle was out of fuel was inconsistent with the gas gauge and the close proximity of a gas station; (3) Finger told other inconsistent stories to the officer; (4) the officer observed a folded pocketknife in the vehicle; and (5) Finger and his passenger were “acting nervous.”³⁵ The court placed little emphasis on the first and fifth factor because a “report that describes a suspicious car, but gives no further information, is insufficient to create reasonable suspicion”³⁶ and “it is common for most people ‘to exhibit signs of nervousness when confronted by a law enforcement officer’ whether or not the person is currently engaged in criminal activity.”³⁷ The detention was upheld based on the other factors, specifically the “implausible explanation” of the vehicle’s occupants and the subsequent report of a robbery in the immediate vicinity.³⁸

Justice Rucker dissented in *Finger*, based largely on his view of the timing of the relevant facts.³⁹ In his view, at the time of detention the officer knew only that Finger had lied about being out of gas and had seen the folded pocketknife, which is not contraband.⁴⁰ A deceptive response, standing alone, does not give rise to reasonable suspicion.⁴¹

Coupled with his vote in *Bulington*, Justice Rucker, the court’s newest member, may be emerging as the staunchest supporter of individual rights against police activity. The opinion in *Finger*, however, seems largely limited to its facts and could be fodder for either side in later cases involving reasonable suspicion.

B. Indiana Court of Appeals Cases

The court of appeals issued several opinions addressing search and seizure issues. The old adage, “when it rains, it pours,” seems especially true in the realm of searches of garbage, as the issue arose in several cases during the survey period. The grant of transfer in one of those cases, however, suggests that resolution will not come until next year.

The garbage search saga began with *State v. Stamper*,⁴² where a panel of the court of appeals held that a warrantless search of trash that was not placed for collection and was obtained by trespassing on the defendant’s property violated article I, section 11 of the Indiana Constitution. Several months later, in

34. *Id.*

35. *Id.* at 534.

36. *Id.* (citing *United States v. Packer*, 15 F.3d 654, 659 (7th Cir. 1994)).

37. *Id.* (quoting *United States v. Salzano*, 158 F.3d 1107 (10th Cir. 1998) (quoting *United States v. Wood*, 106 F.3d 942, 948 (10th Cir. 1997))).

38. *Id.* at 535.

39. *Id.* at 537 (Rucker, J., dissenting).

40. *Id.*

41. *Id.*

42. 788 N.E.2d 862 (Ind. Ct. App.), *trans. denied*, 804 N.E.2d 747 (Ind. 2003).

Litchfield v. State,⁴³ a different panel “decline[d] to follow” that case, reasoning that the earlier opinion had improperly created a bright-line test by forbidding any entry onto private property—regardless of “how many feet the officer had to traverse to reach the garbage bag.”⁴⁴ Instead, the court relied on *Moran v. State*,⁴⁵ which had upheld a curbside warrantless search of trash that (1) was reached without trespassing on the defendant’s property, (2) was performed at a time when neighbors would not be disturbed, and (3) was performed in a manner consistent with typical trash collection.⁴⁶ In upholding the search in *Litchfield*, the majority acknowledged that the police officer had trespassed onto the defendants’ property but did so in a manner consistent with their regular trash collection and at times when his activities would not draw the neighbor’s attention.⁴⁷ Finally, the trash containers were more than fifty yards from the residence in an unfenced area that was not part of the curtilage.⁴⁸

Judge Riley dissented, relying heavily on *Stamper*, a case in which the supreme court had denied transfer.⁴⁹ In her view, the police officer’s trespass onto the defendants’ property resolved the issue because the officer violated the defendants’ reasonable expectation of privacy. Moreover, she faulted the majority for making a distinction based on curtilage, which she characterized as a “sweeping change to, and . . . an unnecessary deterioration of, our supreme court’s liberal interpretation of Article I, [section 11] of the Indiana Constitution.”⁵⁰

In *State v. Neanover*,⁵¹ the State appealed the grant of a motion to suppress the warrantless search and seizure of garbage. The garbage had been placed just outside the door of the defendant’s apartment, which was one of only two apartments on the top floor of a three-story apartment building. The court of appeals found the seizure to violate the Fourth Amendment because Neanover had a reasonable expectation of privacy in the trash.⁵² It was left in a low-traffic area that was used as a patio/storage area, which few would access.⁵³

The court also found the seizure to violate article I, section 11 of the Indiana Constitution and its reasonableness “under the totality of the circumstances” standard.⁵⁴ Reviewing recent decisions on garbage searches, the court emphasized the propriety of seizing trash left in the regular location for collection, the eschewing of a bright-line rule barring entry onto private property,

43. 808 N.E.2d 713 (Ind. Ct. App. 2004), *vacated on transfer by* 824 N.E.2d 356 (Ind. 2005).

44. *Id.* at 716 (quoting *Stamper*, 788 N.E.2d at 866 n.2).

45. 644 N.E.2d 536 (Ind. 1994).

46. *Litchfield*, 808 N.E.2d at 716.

47. *Id.*

48. *Id.*

49. *Id.* at 717 (Riley, J., dissenting).

50. *Id.* at 718.

51. 812 N.E.2d 127 (Ind. Ct. App. 2004).

52. *Id.* at 130-31.

53. *Id.* at 131.

54. *Id.*

and the general preference for a warrant absent exigent circumstances.⁵⁵ The court noted that “by walking up to the landing empty-handed and coming back down with Neanover’s garbage, the officer did something even the trash collection service was not authorized to do.”⁵⁶ Echoing language similar to its Fourth Amendment analysis, the court concluded that the officers had stepped into an area in which the defendant had “manifested an expectation of privacy akin to what a homeowner feels in his house and curtilage, a zone of privacy.”⁵⁷

The *Neanover* panel squared its decision with *Litchfield*, a case in which a divided panel upheld the seizure of garbage taken from private property “in a manner consistent with the [defendants’] regular trash collection service and at times [of the day] that would not bring [the] police activities to the neighbors’ attention.”⁵⁸

Finally, in *Lovell v. State*,⁵⁹ police smelled a strong odor of ether when they went to a home, but no one answered the door when police knocked. After observing the house from a nearby parking lot, police saw four people leave the home, and police then retrieved three garbage bags that had been placed by the mailbox.⁶⁰ The court of appeals upheld the constitutionality of the search under the reasonableness standard of section 11, noting that other homes had garbage bags in a similar location, which suggested the bags had been placed for trash pickup.⁶¹ Moreover, the trash bags were seized by police in the same way that garbage collectors would have taken them and without trespassing on the property.⁶²

Although common themes appear, these cases are difficult to reconcile. Transfer was denied in *Stamper* and *Lovell* and not sought in *Neanover*. Transfer was granted in *Litchfield*, suggesting guidance on the horizon on this old issue of strangely newfound interest. The supreme court will likely rely heavily on its own precedent in *Moran*, which upheld a search of garbage but expressed concern that “Hoosiers are not entirely comfortable with the idea of police officers casually rummaging through trash left at curbside.”⁶³ The concern for the reasonableness of police conduct is not grounded solely in where the trash is located but in the reasonable suspicion for which police seek the trash. The concern for arbitrary and discriminatory police activity noted in *Bulington*⁶⁴ may therefore resurface in crafting a response to police searches of garbage.

The court of appeals held in *Denton v. State*,⁶⁵ that a vehicle’s broken rear

55. *Id.* at 132.

56. *Id.*

57. *Id.* at 133.

58. *Id.* at 132-33 (quoting *Litchfield*, 808 N.E.2d at 716) (alterations in original).

59. 813 N.E.2d 393 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 976 (Ind. 2004).

60. *Id.* at 395.

61. *Id.* at 398.

62. *Id.*

63. *Moran*, 644 N.E.2d at 541.

64. *See supra* notes 10-28 and accompanying text.

65. 805 N.E.2d 852 (Ind. Ct. App. 2004).

window does not, standing alone, create reasonable suspicion to stop the vehicle.⁶⁶ The prevailing view in other states permits such stops,⁶⁷ but the *Denton* panel expressed concern at the prospect of allowing police to stop “any car at all with a broken window.”⁶⁸ Windows can be broken accidentally, and although deference is given to an officer’s training and experience, the officer who stopped Denton said nothing to suggest an assessment that the vehicle had been stolen based on the particular broken window at issue.⁶⁹ Because the stop was based “upon nothing more than unparticularized suspicion,” the motion to suppress should have been granted.⁷⁰

Finally, the court of appeals seemingly broke new ground in chastising and sanctioning police for apparently encouraging illegal behavior to effect their desired ends. One can usually glean quite a bit from the way the court frames an issue in the first sentence of its opinion. When the issue is framed as “whether a police officer may encourage a person on home detention to speed through an inhabited area while under the influence of alcohol and drugs in order to effectuate a pretextual stop to allow them to detain and search the occupants of the vehicle,”⁷¹ the word “reversed” is almost certain to follow. Indeed, in *Osborne v. State*, the court of appeals held as an issue of first impression that the exclusionary rule applies not only to illegal conduct but also to the “outrageously dangerous conduct” that police encouraged in that case.⁷² The court grounded its decision in article I, section 11 and therefore found it unnecessary to address the Fourth Amendment claim.⁷³ Finally, the court found, as the State had conceded at oral argument, that a passenger had standing to challenge a traffic stop, disagreeing with two earlier decisions.⁷⁴

II. INSANITY DEFENSE

The appellate courts tackled two issues related to the insanity defense in the survey period: (1) procedural issues regarding calling a defense expert on insanity if the defendant did not cooperate with the court-appointed experts and (2) the substantive issue of the quantum of proof necessary to uphold a factfinder’s rejection of the insanity defense on appeal.

In *Berryman v. State*,⁷⁵ the State appealed two reserved questions of law after

66. *Id.* at 853.

67. *See id.* at 856 n.3 (collecting cases).

68. *Id.* at 856.

69. *Id.*

70. *Id.*

71. *Osborne v. State*, 805 N.E.2d 435, 437 (Ind. Ct. App. 2004).

72. *Id.* at 440.

73. *Id.* at 441.

74. *Id.* at 439 (citing *Porter v. State*, 570 N.E.2d 1324, 1325 (Ind. Ct. App. 1991); *Groff v. State*, 415 N.E.2d 721, 726 n.8 (Ind. Ct. App. 1981)).

75. 796 N.E.2d 741 (Ind. Ct. App. 2003), *aff’d as modified on trans.*, 801 N.E.2d 170 (Ind. 2004).

a defendant was found not responsible by reason of insanity in his murder trial.⁷⁶ When a defendant files a notice to pursue an insanity defense, the trial court must appoint two or three competent disinterested psychiatrists or psychologists to examine the defendant and to testify at trial.⁷⁷ Berryman's lawyer, however, notified the court that he had retained his own two psychiatrists to examine and testify regarding the insanity defense, objected to the appointment of the court-appointed experts, and would advise his client not talk to the court's experts if they were appointed.⁷⁸ The trial court appointed its own experts, and when they went to visit Berryman were told that he would not talk with the doctors.⁷⁹ In light of Berryman's failure to cooperate with the court-appointed experts, the State filed a motion to exclude the testimony of Berryman's expert witnesses.⁸⁰ Both had spoken to Berryman and concluded that he was insane at the time of the murder. The State never sought an order compelling Berryman's cooperation with the court-appointed experts, even when the trial court inquired about this possibility on the day before trial.⁸¹ The trial court concluded it would be improper to order the defendant to comply without a motion from the State, denied the State's motion to exclude, and allowed Berryman's experts to testify.⁸²

The court of appeals, in a 2-1 opinion authored by Judge Vaidik, held that the trial court was correct in denying the State's motion to exclude. Relying heavily on the Indiana Supreme Court's 1980 opinion in *McCall v. State*,⁸³ the court reasoned that Berryman was "under no duty to cooperate or face the sanction of exclusion of evidence absent an order [to cooperate] from the trial court."⁸⁴ Berryman was never told that the testimony of his experts could be excluded because of his failure to cooperate with the court's experts.⁸⁵ The court suggested the proper course would have been the State securing an order compelling Berryman's cooperation and a hearing advising him of the consequences for non-compliance.⁸⁶ Finally, consistent with *McCall*, the court noted that the State had the right to offer evidence of Berryman's failure to cooperate and an instruction that his uncooperative conduct could be considered as evidence of his sanity.⁸⁷

76. *Id.* at 742. Indiana Code section 35-38-4-2 allows the State to appeal reserved questions of law, although double jeopardy principles bar a retrial. *Id.* at 746.

77. IND. CODE § 35-36-2-2 (2004).

78. *Berryman*, 796 N.E.2d at 742-43.

79. *Id.* at 743.

80. *Id.*

81. *Id.*

82. *Id.* at 743-44.

83. 408 N.E.2d 1218 (Ind. 1980).

84. *Berryman*, 796 N.E.2d at 745.

85. *Id.*

86. *Id.*

87. *Id.* Relying on Rule 3.4 of the Indiana Rules of Professional Conduct, the court held that defense counsel should not have been allowed to attend the psychiatric evaluations with the court's experts because his sole purpose was to advise his client not to cooperate, which is an "obstructive

The Indiana Supreme Court granted transfer and summarily affirmed the court of appeals with the following revision to one sentence of the opinion: “Had there been such an order compelling Berryman’s cooperation, and a hearing advising him that the testimony of his experts could be excluded if he failed to cooperate with the court-appointed experts, the State *would have prevailed* on this issue.”⁸⁸ In apparent response to this case, the General Assembly amended the insanity defense statute by adding subsection (c), which provides:

If a defendant does not adequately communicate, participate, and cooperate with the medical witnesses appointed by the court, after being ordered to do so by the court, the defendant may not present as evidence the testimony of any other medical witness:

- (1) with whom the defendant adequately communicated, participated, and cooperated; and
- (2) whose opinion is based upon examinations of the defendant; unless the defendant shows by a preponderance of the evidence that the defendant’s failure to communicate, participate, or cooperate with the medical witnesses appointed by the court was caused by the defendant’s mental illness.⁸⁹

A couple of months after *Berryman*, the Indiana Supreme Court again addressed the insanity defense statute—but this time disagreed with the court of appeals. Prevailing on a sufficiency of the evidence claim has always been difficult on appeal, but it now appears virtually impossible when challenging the rejection of an insanity defense. In *Thompson v. State*,⁹⁰ the court of appeals reversed a conviction for residential entry because the State submitted no evidence to contradict expert testimony that the defendant was insane at the time of the offense.⁹¹ Previous cases had upheld convictions when, despite expert testimony of insanity, conflicting lay testimony about the defendant’s behavior near the time of the crime suggested an appreciation of the wrongfulness of the conduct.⁹²

On transfer, the Indiana Supreme Court went one step further, holding that conflicting lay testimony is not required for a factfinder to reject expert testimony—or for the appellate court to uphold the conviction.⁹³ “If judges and juries can disbelieve uncontradicted testimony about facts, they are surely entitled to decide whether to accept or reject testimony that represents a witness’s opinion.”⁹⁴ Nevertheless, the court addressed other facts that cut against Thompson’s insanity defense, such as her seemingly normal conduct days before

tactic.” *Id.* at 746.

88. *State v. Berryman*, 801 N.E.2d 170 (Ind. 2004) (per curiam opinion) (emphasis added).

89. IND. CODE § 35-36-2-2(c) (2004).

90. 782 N.E.2d 451 (Ind. Ct. App. 2003).

91. *Id.* at 453-54.

92. *Thompson v. State*, 804 N.E.2d 1146, 1149 (Ind. 2004).

93. *Id.* at 1149-50.

94. *Id.* at 1149.

the incident and the trial court's comments about her history of avoiding criminal responsibility, telling conflicting stories, and using alcohol and illegal drugs while on medication.⁹⁵ In affirming the conviction, the supreme court concluded that the evidence on the insanity issue "clearly was in conflict and did not lead inexorably to a single conclusion."⁹⁶

In a separate concurring opinion, Justice Sullivan expressed the view that it was not the court's intent to expand its previous holdings to give even less weight to psychiatric testimony.⁹⁷ There will be insufficient evidence to uphold a conviction in cases of "unanimous credible, expert testimony that a defendant is insane at the time of the crime" in which there is "no other evidence of probative value from which a conflicting inference can be drawn."⁹⁸

III. STATE LAW JURY ISSUES

The right to a fair trial, of which a jury is usually an integral part in criminal proceedings, is deeply ingrained in the federal⁹⁹ and state¹⁰⁰ constitutions. Criminal defendants are entitled to "a fair trial by a panel of impartial, 'indifferent' jurors,"¹⁰¹ "regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies."¹⁰² In recent years, Indiana's appellate courts have reversed convictions for a variety of juror-related flaws, some seemingly minor in the scheme of an entire trial and the magnitude of evidence of guilt, in cases involving such things as a juror lying during voir dire in a capital case¹⁰³ or a State's witness socializing with a juror over a lunch-hour recess.¹⁰⁴ That trend continued during the survey period as the appellate courts reversed in three cases because of juror-related issues.

A. *Change of Venue*

In *Ward v. State*,¹⁰⁵ the supreme court reversed several convictions and a death sentence because the trial court erred in denying the defendant's motion for change of venue from county. The brutal rape and murder of a fifteen-year-old girl at issue occurred in Spencer County, which had a population of just over 20,000.¹⁰⁶ Juror questionnaires completed before trial and the questioning of jurors during voir dire revealed not only widespread discussion and knowledge

95. *Id.* at 1150.

96. *Id.* (quoting *Rogers v. State*, 514 N.E.2d 1259, 1261 (Ind. 1987)).

97. *Id.* at 1151-52 (Sullivan, J., concurring).

98. *Id.* at 1152.

99. U.S. CONST. amend. VI & XIV.

100. IND. CONST. art. I, § 13.

101. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

102. *Morgan v. Illinois*, 504 U.S. 719, 727 (1992).

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

104. *May v. State*, 716 N.E.2d 419 (Ind. 1999).

105. 810 N.E.2d 1042 (Ind. 2004).

106. *Id.* at 1045.

of the crimes but also a pervasive response—sixty-five percent—that prospective jurors had formed opinions about the guilt of Ward.¹⁰⁷ All but one of the jurors selected to serve on the jury was familiar with the case, and six of the seated jurors had formed a belief about his guilt.¹⁰⁸

A change of venue is provided for generally by Criminal Rule 12, and a criminal statute further allows trial courts the option of drawing a jury from another county in murder and Class A felony cases.¹⁰⁹ Reversal for the denial of a motion for change of venue requires a defendant to show (1) prejudicial pretrial publicity and (2) the inability of jurors to render an impartial verdict.¹¹⁰ Mere exposure to press coverage, even if extensive, is not grounds for a change of venue, but rather the critical inquiry is the extent of prejudice within the community.¹¹¹ Although most jurors claimed to be able to set aside their preconceived belief about the case and were presumed to be giving truthful answers during voir dire, the court found that presumption overcome because of the “deep and bitter hostility shown to be present throughout the community.”¹¹² Moreover, one juror admitted that it would be difficult for her to abandon her belief that Ward was guilty and responded “I don’t know” when asked if she could base her decision solely on the evidence at trial.¹¹³ This juror’s statement alone required a new trial because the empanelling of even one partial juror is grounds for reversal.¹¹⁴

Challenges to the denial of a request for change of venue are quite common in Indiana, but *Ward* represents the unusual case where an abuse of discretion was found. The pervasive prejudice that existed in a small county in *Ward* is uncommon, but *Ward* does signal the importance of an impartial jury and may well give judges pause for concern when confronted with motions for change of venue in the future. To preserve such claims, though, defense counsel should develop the extensive record necessary to allow meaningful consideration of the claim, which includes juror questionnaires, extensive voir dire about the extent and depth of beliefs about the defendant’s guilt and ability to set them aside, and media reports. Finally, although a change of venue is a possibility in any case, trial courts may be especially willing to grant one in a capital case such as *Ward* because of what is at stake. If expense or the inconvenience of moving the trial to a distant county is a concern, Indiana Code section 35-36-6-11 provides the attractive alternative of a local trial with a jury brought in from another county.

107. *Id.* at 1046.

108. *Id.* at 1047.

109. IND. CODE § 35-36-6-11 (2004).

110. *Ward*, 810 N.E.2d at 1049 (citing *Specht v. State*, 734 N.E.2d 239, 241 (Ind. 2000)).

111. *See id.* at 1049.

112. *Id.* at 1049-50.

113. *Id.* at 1050.

114. *Id.*

B. Reversal for Batson Violation

A fair trial requires not only jurors free from the prejudicial taint of publicity but also a jury that has not been purposefully purged of members based on race. *Batson v. Kentucky*¹¹⁵ and its progeny place the burden on a defendant claiming purposeful discrimination in jury selection to show (1) the prosecutor exercised peremptory challenges to remove members of a cognizable racial group, and (2) the circumstances of the case raise an inference that the prosecutor used that practice to exclude prospective jurors based on race.¹¹⁶ Once the prima facie showing has been made, the burden shifts to the State to provide a race-neutral explanation.¹¹⁷ “Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral.”¹¹⁸

In *McCormick v. State*,¹¹⁹ the State used a peremptory challenge to remove the only African American venire person. The prosecutors offered several race-neutral reasons for the strike—the prospective juror was distraught, looked uncomfortable, and her answers made her appear uncomfortable with the process.¹²⁰ However, another reason that was not race-neutral was also offered—that the juror would find it difficult “passing judgment on a member of ones [sic] own in the community.”¹²¹ Therefore, the court was presented with an issue not yet addressed in Supreme Court jurisprudence: “whether the existence of permissible reasons for exercising a peremptory strike is sufficient to overcome an impermissible one.”¹²²

Some federal circuits have examined such cases under a “dual motivation” analysis, which requires the State to demonstrate “that the strike would have been exercised even in the absence of any discriminatory motivation.”¹²³ Several state courts, on the other hand, have rejected this analysis and instead apply a “tainted” approach, which mandates reversal when any discriminatory reason is present, regardless of how many nondiscriminatory ones may have been advanced as well.¹²⁴ Choosing the latter approach, the court recognized that *Batson* “protects against only the most conspicuous and egregious biases,”¹²⁵ and excusing an obvious discriminatory reason “would erode what little protection *Batson* provides against discrimination in jury selection.”¹²⁶

115. 476 U.S. 79 (1986).

116. *McCormick v. State*, 803 N.E.2d 1108, 1110 (Ind. 2004).

117. *Id.*

118. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion)).

119. 803 N.E.2d 1108, 1111 (Ind. 2004).

120. *Id.*

121. *Id.* (alteration in original).

122. *Id.* at 1112.

123. *Id.*

124. *Id.*

125. *Id.* at 1113.

126. *Id.* (quoting *Payton v. Kears*, 495 S.E.2d 205, 210 (S.C. 1998)).

*C. The Jury Rules: Questions by Jurors During Trial and
Instructions Upon Inquiry*

In *Ashba v. State*,¹²⁷ the court of appeals addressed, as a matter of first impression, the proper procedures for jurors to pose questions to witnesses at trial. Jury Rule 20 mandates several things that jurors must be told in preliminary instructions, including “that jurors may seek to ask questions of the witnesses by submission of questions in writing.” Even before the adoption of the Jury Rules, which became effective January 1, 2003, Evidence Rule 614(d) had long provided that jurors are permitted to ask questions of witnesses by submitting them in writing after allowing the parties to lodge their objections.¹²⁸

The court in *Ashba* held that the same procedure approved under Rule 614(d)—written submission of questions by jurors, an opportunity for parties to object, and the propounding of the questions to the witness by the trial court—should apply under Jury Rule 20.¹²⁹ The trial court should explain the specifics of the questioning procedures at the outset of the trial, and trial courts may employ “a variety of methods” to obtain the questions, such as glancing at the jury or instructing the jurors to indicate verbally or physically that they have questions.¹³⁰

In *Massey v. State*,¹³¹ the court of appeals reiterated another way in which the Jury Rules have changed longstanding trial practices. Before the Jury Rules, trial courts responded to juror inquiries about legal issues during deliberations with instructions that the juror reread all of the instructions.¹³² The Jury Rules provide greater flexibility, however, and Jury Rule 28 specifically allows inquiry by the trial court upon juror impasse into “how the court and counsel can assist them in their deliberative process,” followed by the trial court directing “that further proceedings occur as appropriate.”¹³³ The trial court in *Massey* was confronted with multiple questions suggesting confusion by the jurors about lesser-included offenses.¹³⁴ It responded by rereading the instructions in their entirety and adding a new instruction about use of the verdict forms for the lesser-included offenses.¹³⁵ Because the additional instruction was not erroneous and giving it was “consistent with the underlying goal of the new jury rules,” the convictions were affirmed.¹³⁶

127. 808 N.E.2d 670 (Ind. Ct. App.), *as corrected by* 818 N.E.2d 540 (Ind. Ct. App. 2004).

128. *Id.* at 674.

129. *Id.*

130. *Id.*

131. 803 N.E.2d 1133 (Ind. Ct. App. 2004).

132. *Id.* at 1137.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 1137-39.

D. Deliberations: Limitations on Outside Communication

Indiana courts have been strict and literal in enforcing the requirement that jurors remain together during deliberations unless exigent circumstances warrant a separation.¹³⁷ Four decades ago, the Indiana Supreme Court recognized that a juror's phone call home to arrange for caring of the juror's livestock constituted a separation.¹³⁸ Because the subject of the phone call in that case was "entirely collateral and unrelated to the subject matter of the cause on trial," there was no possibility of prejudice and the conviction was upheld.¹³⁹

Fast forwarding to 2004, the court of appeals in *Pagan v. State*¹⁴⁰ was confronted with two jurors' use of their cell phones to make calls home during deliberations. The court placed the burden upon the defendant to show four things: "(1) extra-judicial communication occurred; (2) pertaining to a matter before the jury; (3) the misconduct was gross; and (4) it probably caused him prejudice."¹⁴¹ Although the bailiff's post-trial testimony established that the calls had occurred, the nature of the calls was, similar to those in *Bryant*, purely personal and outside the protection of the prohibition.¹⁴² Similarly, the misconduct was not found to be "gross," and the defendant did not establish "actual prejudice."¹⁴³

Although ruling against the defendant, the court concluded by acknowledging the legitimacy of the concern for cell phone use during deliberations. "In this day and age, thanks to cell phones, most people now take it for granted that they can call or be called by anyone, anywhere, at any time. This expectation should not be carried into the jury room once deliberations have commenced."¹⁴⁴ Cell phones open the potential for all sorts of abuses including subtle or not-so-subtle pressure from family or business associates based on the length of deliberations, seeking extraneous information relevant to the case through the phone or its Internet access, or the disruptive receipt of calls during deliberations.¹⁴⁵ The court offered two possible solutions when jurors wish to make calls during deliberations: (1) securing the consent of all parties and admonishing the jurors consistent with Jury Rule 29 or (2) requiring a bailiff or

137. See generally *Pagan v. State*, 809 N.E.2d 915, 920 (Ind. Ct. App. 2004) (citing *Follrad v. State*, 428 N.E.2d 1201, 1203 (Ind. 1981)); *id.* at 922 n.5 (citing IND. CODE § 35-37-2-6).

138. *Bryant v. State*, 202 N.E.2d 161 (Ind. 1964).

139. *Id.* at 164.

140. 809 N.E.2d 915, 921 (Ind. Ct. App. 2004).

141. *Id.* at 922. The confusing and seemingly irreconcilable standards applied by Indiana's appellate courts in challenges to communications occurring with jurors is well summarized in Judge Mathias' thoughtful opinion in *Hall v. State*, 796 N.E.2d 388, 395-96 (Ind. Ct. App. 2003).

142. *Pagan*, 809 N.E.2d at 921.

143. *Id.* at 922. Again, as noted in *Hall* and highlighted by Evidence Rule 606(b), requiring a defendant to demonstrate prejudice is usually very difficult, if not impossible. See *supra* note 142 and accompanying text.

144. *Pagan*, 809 N.E.2d at 922.

145. *Id.*

other court official to make the call for the juror.¹⁴⁶ Nevertheless, the court stopped short of encouraging or even requiring court officials to retain cell phones during deliberations, which is arguably crucial to minimizing the many potential abuses noted by the court.

E. Replacing a Juror During Deliberations

Finally, in *Riggs v. State*,¹⁴⁷ the supreme court addressed the standard for allowing replacement of a juror with an alternate after deliberations begin. There, the foreman sent a note to the trial court explaining that one juror was “belligerent, not willing to discuss the issues” after four hours of deliberation.¹⁴⁸ A colloquy with the foreman ensued, and the State later moved that the complained-of juror be replaced with the alternate; Riggs objected.¹⁴⁹ Within the next hour or so, the foreman sent a note explaining that juror Wallace needed to see the judge “ASAP.”¹⁵⁰ With the agreement and presence of the parties, the trial court interviewed Mr. Wallace, who complained he had been accused of “trying to defend the defendant” but asserted that he was going to “give a fair and impartial determination to this evidence and to this Court.”¹⁵¹ Citing concern of what might occur if the juror was returned to deliberations, the trial court dismissed juror Wallace.¹⁵² A verdict of guilty as to the murder and criminal deviate conduct charge was reached three hours later.¹⁵³

The supreme court drew a line between removal of jurors before deliberations—for an abuse of discretion under Trial Rule 47(B)—and removal during deliberations, which requires a “carefully developed record as to the ground for removal and also requires precautions to avoid inappropriate consequences from the removal.”¹⁵⁴ Although physical threats or intimidation justify removal, rudeness and intransigence do not.¹⁵⁵ “A failure to agree, however unreasonable, is a ground for mistrial, not removal of the obstacle to unanimity.”¹⁵⁶ Finally, the court held that the error, which involved the basic right to a fair trial by an impartial adjudicator, was a structural one not amenable

146. *Id.*

147. 809 N.E.2d 322 (Ind. 2004). The court of appeals relied on *Riggs* in upholding a trial court’s decision not to replace a juror who was approached by a witness during a recess and told that witnesses were “lying.” *Spears v. State*, 811 N.E.2d 485, 489 (Ind. Ct. App. 2004). The court further observed that the juror “immediately notified the court and fully explained the nature and content of the contact to the satisfaction of both parties.” *Id.* at 490.

148. *Riggs*, 809 N.E.2d at 324.

149. *Id.* at 325.

150. *Id.* at 326.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 327.

155. *Id.* at 328.

156. *Id.*

to harmless error analysis.¹⁵⁷

IV. SIXTH AMENDMENT IN THE SPOTLIGHT: *CRAWFORD* AND *BLAKELY* AND THEIR IMPACT IN INDIANA

During the survey period, the criminal defense bar's new best friend, Justice Antonin Scalia, authored two landmark Sixth Amendment opinions grounded in centuries-old history but with far-reaching future consequences. The first, *Crawford v. Washington*,¹⁵⁸ overruled decades-old precedent and cast widespread doubt about the admission of hearsay evidence that had been regularly relied upon in many contexts. The second, *Blakely v. Washington*,¹⁵⁹ promised to change the landscape of sentencing in courts around the country, giving new importance to the role of juries as discussed in Part B.

A. *Crawford v. Washington: Let the Confusion Begin*

Since *Ohio v. Roberts*¹⁶⁰ in 1980, the Confrontation Clause had been understood to allow the admissibility of hearsay statements made by an unavailable witness against a criminal defendant if the statements fell "within a firmly rooted hearsay exception" or otherwise bore "particularized guarantees of trustworthiness."¹⁶¹ In *Crawford*, the Court overruled *Roberts* and held that, consistent with the Confrontation Clause, the prosecution may introduce a "testimonial" out-of-court statement against a criminal defendant only upon two showings: (1) the witness who made the statement is unavailable; and (2) the defendant had a prior opportunity to cross-examine the witness.¹⁶² *Crawford* was grounded in the state of the common law in 1791, when the Sixth Amendment was ratified.¹⁶³ Rather than the focus on recognized hearsay exceptions from *Roberts*, under the Court's *Crawford* analysis a statement that was made in a situation that did not allow the defendant an opportunity for examination must be excluded if it is "testimonial."¹⁶⁴ Non-testimonial statements may be admitted at a criminal trial under the prevailing hearsay rules.¹⁶⁵ Testimonial is not specifically defined, although the Court noted that such statements could be unsworn.¹⁶⁶ The court provided the following examples:

ex parte in-court testimony or its functional equivalent . . . such as affidavits, custodial examinations, prior testimony that the defendant was

157. *Id.* at 328-29.

158. 541 U.S. 36 (2004).

159. 124 S. Ct. 2531 (2004).

160. 448 U.S. 56 (1980).

161. *Id.* at 66.

162. 541 U.S. at 68.

163. *Id.* at 53-54.

164. *Id.* at 61.

165. *Id.*

166. *Id.* at 52.

unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions . . . statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.¹⁶⁷

Although *Crawford* suggests a broad approach to “testimonial” statements and a greater reach for the Confrontation Clause, Indiana appellate decisions in the months after *Crawford* suggest some reticence to change longstanding practice. The first mention of *Crawford* was a footnote in *Clark v. State*,¹⁶⁸ where the supreme court correctly noted that “when the declarant appears for cross-examination at trial, the Confrontational Clause places no constraints at all on the use of his prior testimonial statements.”¹⁶⁹ However, the court acknowledged the significance of *Crawford*, which “may have called into question settled evidentiary rulings on a number of related issues. Certainly it made clear that rules of evidence do not trump the Confrontation Clause.”¹⁷⁰

Like *Clark*, none of the post-*Crawford* cases from the Indiana Court of Appeals brought relief to defendants. Transfer was granted in two of the cases and not sought in the third,¹⁷¹ suggesting that the ultimate resolution of the issue will not come for several months, when the Indiana Supreme Court issues its transfer opinions or addresses *Crawford* in a direct appeal. The two cases, *Hammon v. State*¹⁷² and *Fowler v. State*,¹⁷³ were both domestic battery cases. In *Fowler*, the complaining witness testified at trial, albeit it uncooperatively, and therefore one judge would have found *Crawford* inapplicable under the supreme court’s reasoning in *Clark*.¹⁷⁴ The majority, however, following the reasoning in *Hammon* held that complaining witness’s statement was not “testimonial” because it did not occur in a formal setting nor was it contained in a formalized document.¹⁷⁵ As explained in *Hammon*, “when police arrive at the scene of an incident in response to a request for assistance and begin informally questioning

167. *Id.* at 51-52 (citations omitted).

168. 808 N.E.2d 1183, 1189 n.2 (Ind. 2004).

169. *Id.* (quoting *Crawford*, 541 U.S. at 59 n.9).

170. *Id.*

171. See *Rogers v. State*, 814 N.E.2d 695 (Ind. Ct. App. 2004), *trans. not sought*; *Fowler v. State*, 809 N.E.2d 960 (Ind. Ct. App. 2004), *trans. granted* (Ind. Dec. 9, 2004); *Hammon v. State*, 809 N.E.2d 945 (Ind. Ct. App. 2004), *trans. granted* (Ind. Dec. 9, 2004). In *Hendricks v. State*, 809 N.E.2d 865, 871 (Ind. Ct. App. 2004), *trans. denied* (Ind. Sept. 28, 2004), the court correctly held in a post-conviction appeal that *Crawford* had no bearing on its review of whether counsel was ineffective in 1994.

172. 809 N.E.2d 945.

173. 809 N.E.2d 960.

174. *Id.* at 965-66 (Crone, J., concurring in result).

175. *Id.* at 964.

those nearby immediately thereafter in order to determine what has happened, statements given in response thereto are not ‘testimonial.’”¹⁷⁶ It specifically excepted from the protective reach of the Confrontation Clause those “preliminary questions asked at the scene of a crime shortly after it has occurred.”¹⁷⁷ Those statements, however, are often the most damaging against a defendant, and the focus of *Crawford* was to not protect domestic violence victims or preserve the excited utterance exception to the hearsay rule¹⁷⁸ but rather a revitalization of the Confrontation Clause to its meaning at the time the Sixth Amendment was ratified.¹⁷⁹

In addition to the domestic violence context, where victims frequently seek not to participate at a trial or recount the events differently (and damagingly to the State’s case) at trial, challenges to the child hearsay statute would seem likely under *Crawford*.¹⁸⁰ Indiana Code section 35-37-4-6 has long allowed the admission of hearsay statements by a child witness found incompetent to testify at trial. Such statements cannot be admitted under the reasoning of *Clark*, because the child witness does not testify at trial. Moreover, the State may face some difficulty in categorizing the interview of the child witness as non-testimonial. Next year’s survey may provide some answers to the *Crawford* fallout in both of these contexts.

B. The Tremors of Blakely v. Washington Begin to Reach Indiana

On June 24, 2004, the United States Supreme Court issued *Blakely v. Washington*,¹⁸¹ which Justice O’Connor soon aptly called a No. 10 earthquake.¹⁸² To fully understand and appreciate the significance of *Blakely*, however, a little history and context is helpful. In *Apprendi v. New Jersey*,¹⁸³ the United States Supreme Court reversed a New Jersey trial court’s “hate crime” enhancement of a sentence because the judge, not a jury, determined that the crime was racially motivated. The Court held that “[o]ther 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.”¹⁸⁴ To determine when a fact “increases the penalty . . . beyond the prescribed statutory maximum,” the Court stated, “the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater

176. 809 N.E.2d at 952.

177. *Id.*

178. *See Fowler*, 809 N.E.2d at 965.

179. *Crawford*, 541 U.S. at 53-54.

180. *See generally Hendricks*, 809 N.E.2d at 871.

181. 124 S. Ct. 2531 (2004).

182. Lyle Denniston, *Justices Agree to Consider Sentencing*, N.Y. TIMES, Aug. 3, 2004, at A14.

183. 530 U.S. 466 (2000).

184. *Id.* at 490 (emphasis added).

punishment than that authorized by the jury's guilty verdict?"¹⁸⁵ The Court did not explicitly define "statutory maximum."

In *Blakely*, however, the Court stated precisely what it meant by "statutory maximum." The Supreme Court invalidated Washington's sentencing scheme to the extent it permits a judge to impose what that state refers to as "exceptional" sentences based on facts not found by the jury.¹⁸⁶ Blakely pleaded guilty to kidnapping his estranged wife, and "[t]he facts admitted in his plea, standing alone, supported a maximum sentence of 53 months."¹⁸⁷ The judge, however, imposed a sentence of ninety months after determining that Blakely had acted with "deliberate cruelty."¹⁸⁸ The Court held that Blakely's ninety-month sentence violated the Sixth Amendment, as explained in *Apprendi*, because it was based on facts neither found by a jury nor admitted by Blakely.¹⁸⁹

In *Blakely*, the State argued that the ninety-month sentence was within the range permitted by the plea, because the "statutory maximum" was not fifty-three months, but the maximum permitted generally for Class B felonies, i.e., ten years.¹⁹⁰ The Court flatly rejected that contention, stating: "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."¹⁹¹ The Court elaborated,

[T]he relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.¹⁹²

Based on this holding, the federal sentencing guidelines quickly came under scrutiny, with the Supreme Court holding arguments on October 4, 2004, in the cases of *United States v. Booker* and *United States v. Fanfan*. Courts in at least three states (other than Washington) soon held that felony sentences in their state are constrained, at least in part, by *Blakely*;¹⁹³ and the Vera Institute concluded that thirteen states (including Indiana) are "fundamentally affected by *Blakely*,"

185. *Id.* at 494.

186. *Blakely*, 124 S. Ct. at 2537-38.

187. *Id.* at 2534.

188. *Id.*

189. *Id.* at 2537-38.

190. *Id.* at 2537.

191. *Id.* (alterations in original).

192. *Id.* (alterations in original).

193. See *Aragon v. Wilkinson ex rel. County of Maricopa*, 97 P.3d 886, 891 (Ariz. Ct. App. 2004) ("In Arizona the 'maximum sentence' the court may impose absent additional findings is the 'presumptive term.'"); *Sigler v. State*, 881 So.2d 14 (Fla. Dist. Ct. App. 2004); *State v. Sawatzky*, 96 P.3d 1288 (Or. Ct. App. 2004).

while another eight states are “possibly affected by *Blakely*.”¹⁹⁴

Although appellate and trial lawyers in Indiana took fairly quick notice of the decision in *Blakely*, the first mention of the *Blakely* case in a published Indiana opinion was an unremarkable one of mere acknowledgment in a footnote in *Wilkie v. State*,¹⁹⁵ which is discussed for its significant holding in Part V.B. of this Article.

The court of appeals then issued two opinions that rejected *Blakely* claims in August and September. First, in *Carson v. State*,¹⁹⁶ Judge Vaidik, writing for Judges Sullivan and May, denied a petition for rehearing that raised a *Blakely* claim after no sentencing challenge was initially raised on appeal.¹⁹⁷ The court found the claim waived because Carson “did not challenge his sentence on direct appeal,”¹⁹⁸ before proceeding to the merits of the claim nonetheless. Without squarely addressing whether *Blakely* applies to Indiana’s presumptive sentencing scheme, the court found no Sixth Amendment violation based on *Blakely*. The courts reasoned that it held the criminal history aggravator is exempt from the *Apprendi/Blakely* rule, and the other two aggravating circumstances—a need for corrective or rehabilitative treatment that can best be provided by incarceration in a penal institution and the strong likelihood that Carson would reoffend based on his criminal history—were “simply derivative” of the criminal history aggravator and “thus would seem also not to implicate the *Blakely* analysis.”¹⁹⁹ A month later, in *Bledsoe v. State*,²⁰⁰ Judge Sullivan, writing for Judges Friedlander and Bailey, followed *Carson* in holding the *Blakely* challenge waived because “Bledsoe did not raise this alleged sentencing error on direct appeal.”²⁰¹ The court proceeded to find no basis for relief on *Blakely* grounds based on the criminal history exception and the view that the other aggravators—“that his rehabilitation could only occur in a penal institution, that he was on probation at the time of the offense, and that the trial court believed that Bledsoe would continue to engage in criminal activities”—were derivative of that history.²⁰² In both cases, the court offered a cursory quasi-harmless-error comment that “a single aggravating circumstance will justify a sentence enhancement.”²⁰³

Although the Indiana Supreme Court said nothing of *Blakely* in its published

194. See Jon Wool & Don Stemen, *Aggravated Sentencing: Blakely v. Washington, Practical Implications For State Sentencing Systems*, VERA INSTITUTE OF JUSTICE, STATE SENTENCING & CORRECTIONS POL’Y & PRACTICE REV., Aug. 2004, at 3, available at http://www.vera.org/publication_pdf/242_456.pdf.

195. 813 N.E.2d 794, 799 n.2 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 981 (Ind. 2004).

196. 813 N.E.2d 1187 (Ind. Ct. App.), *trans. denied* (Ind. Aug. 20, 2004).

197. *Id.* at 1188.

198. *Id.* at 1188-89.

199. *Id.* at 1189.

200. 815 N.E.2d 507 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 983 (Ind. 2004).

201. *Id.* at 507.

202. *Id.* at 508.

203. *Id.*; *Carson*, 813 N.E.2d at 1189 (both citing *Powell v. State*, 769 N.E.2d 1128, 1135 (Ind. 2002)).

opinions during the survey period, in September it granted transfer and set oral argument in two cases in which *Blakely* claims had been raised for the first time on transfer.²⁰⁴ Those cases, and the many that were percolating through the appellate courts as the survey period ended, posed several significant questions for Indiana's appellate courts.²⁰⁵

C. Does Blakely Apply to Indiana's Presumptive Sentencing Scheme?

The threshold question is whether Indiana's presumptive sentencing scheme is affected at all by *Blakely*. Although Washington's sentencing scheme is not identical to Indiana's, the differences between Indiana and Washington are unlikely to be found to outweigh their unconstitutional commonality: sentences are increased beyond that permitted solely by the jury's verdict based on facts found by a judge. In Indiana, a trial judge may deviate from the presumptive sentence only after finding the presence of an aggravating factor.²⁰⁶ Thus, a felony sentence may not be increased from the presumptive sentence, or "fixed term," unless and until the trial judge—not a jury—makes additional findings of fact, i.e., the aggravating factors enumerated in Indiana Code section 35-38-1-7.1(b).

Although in several early briefs the Attorney General described Indiana's felony sentencing statutes as providing a "range of possible sentences," the Code and the supreme court's holdings state otherwise. Indiana Code section 35-35-3-1 explicitly defines "presumptive sentence" as "the penalty prescribed by IC 35-50-2 without consideration of mitigating or aggravating circumstances."²⁰⁷ This language practically mirrors the Supreme Court's statement in *Blakely* that the "statutory maximum" is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."²⁰⁸ Therefore, it seems highly likely that Indiana's sentencing scheme is impacted by *Blakely*.

Because a large percentage of sentences are aggravated in Indiana based on criminal history, though, *Blakely* may not impact sentences if the exception

204. The cases are *Heath v. State*, Case No. 57S04-0409-CR-409, and *Smylie v. State*, Case No. 41S01-0409-CR-408. Specific information about each case and all Indiana appellate cases may be accessed from the online docket of the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court at the following website: <http://hostpub.courts.state.in.us/HostPublisher/ISC3RUS/ISC2menu.jsp>.

205. The author served as co-counsel of an amicus brief filed on behalf of the Marion County Public Defender Agency in the *Heath* and *Smylie* cases. Many of the ideas and some of the text in this section of the article have their genesis in the drafting process and subsequent discussion of that brief with co-authors Ann Sutton, Kathleen Sweeney, and Mike Limrick, as well as lawyers from around the state.

206. IND. CODE § 35-35-3-1 (2004); *Trowbridge v. State*, 717 N.E.2d 138, 149 (Ind. 1999); *Carter v. State*, 711 N.E.2d 835, 838 (Ind. 1999).

207. IND. CODE § 35-35-3-1 (emphasis added).

208. *Blakely*, 124 S. Ct. at 2537.

recognized in *Carson* and *Bledsoe* applies. This issue is not as simple as it might seem, though. Indiana's aggravating circumstance is that a defendant "has a history of criminal or delinquent activity."²⁰⁹ Exempt from the rule of *Apprendi* and *Blakely* is "the fact of a prior conviction,"²¹⁰ although the continued viability of that exception is somewhat in doubt.²¹¹ Nevertheless, as the supreme court has acknowledged, a "history of criminal activity" is not necessarily the same as a "fact of a prior conviction." In *Wooley v. State*, the court noted, "a criminal history comprised of a single, nonviolent misdemeanor is not a significant aggravator in the context of a sentence for murder."²¹² Implicit in this statement is that the determination whether a defendant has a "history" of criminal activity—as distinguished from "a prior conviction"—is not simply a binary question unmistakably proved by reference to certified court documents but rather is a subjective determination that, under *Apprendi* and *Blakely*, should be left to a jury.

At some point the Indiana Supreme Court will need to define the outer limits to the "history of criminal activity" aggravator, which was given an expansive reading in *Carson* and *Bledsoe*. The Supreme Court has itself described the "prior conviction" exception as exceedingly narrow and "at best an exceptional departure" from the rule in *Apprendi* and *Blakely*.²¹³ The court of appeals' broad reading in *Carson* and *Bledsoe* may well not survive scrutiny when the Indiana Supreme Court addresses the issue or when the Supreme Court reconsiders the exception itself.²¹⁴

D. May the Trial or Appellate Courts Cure the Unconstitutionality of Indiana's Statutes—and, if so, What is a Constitutional Remedy?

Pursuant to *Blakely*, for the State to increase constitutionally a defendant's sentence beyond the presumptive, two basic requirements must be satisfied: (1) there must be a charging instrument that provides notice of the sentence-increasing factor; and (2) the sentence-increasing factor must be submitted to a jury for a determination, beyond a reasonable doubt, of its existence.²¹⁵ The criminal code, however, provides no such procedures, and to create them judicially would seem to violate both the prohibition on common-law crimes and the separation of powers doctrine of article III, section 1 of the Indiana

209. IND. CODE § 35-38-1-7.1(b)(2).

210. *Blakely*, 124 S. Ct. at 2536 (quoting *Apprendi*, 530 U.S. at 490).

211. The exception stems from the United States Supreme Court's holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). But in *Apprendi*, Justice Thomas—who joined the 5-4 *Almendarez-Torres* majority—retreated from his position in *Almendarez-Torres*, criticizing his own vote in that case. *Apprendi*, 530 U.S. at 521 (Thomas, J., concurring) ("[I]t is evident why the fact of a prior conviction is an element under a recidivism statute [thus requiring a jury finding].").

212. 716 N.E.2d 919, 929 (Ind. 1999).

213. *Apprendi*, 530 U.S. at 487.

214. See *supra* note 211 and accompanying text.

215. 124 S. Ct. at 2536-37.

Constitution.

According to statute, “[c]rimes shall be defined and punishment therefore fixed by statutes of this state and not otherwise.”²¹⁶ If the State seeks an increase from the statutory “fixed term”²¹⁷ based on an aggravating factor, the State must charge that aggravating factor because, under *Apprendi*, it is an essential element of the crime.²¹⁸ Indiana law, however, provides no such procedure, and to impose one judicially would result in the creation of common law crimes prohibited by Indiana Code section 1-1-2-2. For example, the statute describing “robbery” states:

A person who knowingly or intentionally takes property from another person or from the presence of another person:

- (1) By using or threatening the use of force on any person; or
- (2) By putting any person in fear; commits robbery, a Class C felony. However, the offense is a Class B felony if it is committed while armed with a deadly weapon or results in bodily injury to any person other than a defendant, and a Class A felony if it results in serious bodily injury to any person other than a defendant.²¹⁹

This statute sets forth three types of robberies, the elements of each, and (by reference to the applicable felony class) the resulting penalty. For trial courts to permit the State to charge an additional (aggravating) element, as required by *Blakely*, would result in the creation of a new crime, i.e., the charge would include an element “essential to the punishment” that is not referred to in the robbery statute. This result is impermissible under Indiana law.²²⁰

Moreover, such a result would be impracticable as the criminal code is currently designed. The statute outlining aggravating factors includes such factors as: “The person is in need of correctional or rehabilitative treatment that can best be provided by commitment of the person to a penal facility.”²²¹ There is no manner of indictment or information that could include that factor as an element of the offense and still meet the Indiana Supreme Court’s requirement that “[t]he violation of a statute defining an offense consist[] in the commission

216. IND. CODE § 1-1-2-2 (2004).

217. *See id.* §§ 35-50-2-3 to -7.

218. *See Blakely*, 124 S. Ct. at 2536 (“[A]n accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason.”) (quoting 1 J. BISHOP, CRIMINAL PROCEDURE § 87, at 55 (2d ed. 1872)); *McCormick v. State*, 119 N.E.2d 5, 7 (Ind. 1954) (“[T]he accused has a right to have all the essential elements that enter into the offense, charged in the affidavit, so that he may know what he has to meet”) (internal quotation marks omitted).

219. IND. CODE § 35-42-5-1.

220. *See Knotts v. State*, 187 N.E.2d 571, 573 (Ind. 1963) (“In Indiana no common-law crimes exist, and the legislature fixes the elements necessary for any statutory crime.”).

221. IND. CODE § 35-38-1-7.1(b)(3).

of certain acts under *specified circumstances* and in some cases with a specified knowledge or particular intent.”²²² An offense “must be charged in direct and unmistakable terms, and the charge must be such that the defendant may know definitely what he has to meet.”²²³ Stating in a charging instrument that “the defendant is in need of correctional or rehabilitative treatment” specifies no conduct, no knowledge, and no intent.

In addition, there is no statutory provision by which a jury may hear evidence of aggravating circumstances. Instead, Indiana Code section 35-38-1-3 requires trial courts alone to “conduct a hearing to consider the facts and circumstances relevant to sentencing.”²²⁴ Without such statutory authority, a trial court may not permit a jury to hear that evidence without seemingly violating the Separation of Powers doctrine of article III, section 1 of the Indiana Constitution.²²⁵

In the wake of *Blakely*, the State began arguing that *Lawrence v. State*,²²⁶ authorized the convening of a sentencing jury to hear evidence of aggravating factors. In *Lawrence*, the Indiana Supreme Court held that a defendant’s right to a fair trial was infringed when evidence of his habitual offender status was presented at the same time as evidence of the underlying offense.²²⁷ The court then created a bifurcated trial procedure, leaving the presentation of habitual offender evidence until after a guilty verdict is rendered.²²⁸ However, *Lawrence* appears inapposite, as the statute at issue there explicitly provided for habitual offender evidence to be presented to a jury. Here, the statute permitting consideration of aggravating factors explicitly states that the evidence is to be presented to the court alone. While the holding in *Lawrence* simply affected the timing of the evidentiary presentation permitted by the statute, the State’s position with regard to *Blakely* would require the Court to read into the statute something that was never envisioned and is originally prohibited.²²⁹

In short, the problems created by *Blakely* are not the sort of fender-benders that can be fixed in the judicial body shop; they are a massive pile-up that requires legislative intervention.²³⁰ The supreme court has noted that “even in an

222. *McCormick*, 119 N.E.2d at 7 (emphasis added).

223. *Id.* at 7 (internal quotation marks omitted); *see also* IND. CODE § 35-34-1-2.

224. IND. CODE § 35-38-1-3.

225. *Cf. Deasy-Leas v. Leas*, 693 N.E.2d 90, 99 (Ind. Ct. App. 1998) (“In any event, this Court may not assume a legislative function and pronounce a guardian ad litem privilege where no statutory provision exists.”).

226. 286 N.E.2d 830 (Ind. 1972).

227. *Id.* at 833-34.

228. *Id.* at 835-36.

229. *See* IND. CODE § 35-50-1-1.

230. Although article VII, section 4 vests the Indiana Supreme Court with the power of “supervision of the exercise of jurisdiction by the other courts of the State,” this supervisory power has not tread into the legislative arena in a manner that would raise separation of powers concerns. *See, e.g., Williams v. State*, 690 N.E.2d 162, 169-70 (Ind. 1997) (courtroom security procedures); *Williams v. State*, 669 N.E.2d 1372, 1381-82 (Ind. 1996) (exclusion of jurors based on race); *Winegeart v. State*, 665 N.E.2d 893, 902 (Ind. 1996) (reasonable doubt instruction). None of these

effort to save a statute from constitutional infirmity, a court cannot effectively rewrite it.”²³¹ Allowing trial courts to convene a jury to consider the State’s proposed aggravating circumstances would force courts to transform “aggravating circumstances” into statutory offenses, and alter the statutory requirement that judges determine aggravating circumstances to say just the opposite.²³² Similarly, the sections prescribing felony penalties would have to be rewritten to make clear that aggravating “circumstances” are actually offenses and can be found only by a jury.²³³

Title 35 of the Indiana Code states that its provisions shall be construed with the general purpose of “secur[ing] simplicity in procedure.”²³⁴ Any sort of fix—legislative or judicial—would create a different and complicated felony trial procedure from the filing of an information through discovery, trial, and sentencing. This is not a judicial function, and the proper course would be for the appellate courts to simply declare the current statutory scheme unconstitutional, leaving the necessary overhaul where it belongs: the legislature.

E. Who May Reap the Benefits of Blakely on Appeal?

Not surprisingly the State began arguing waiver—or forfeiture—for failure to object on *Apprendi* grounds in the trial court or, as a fallback, failure to raise such a claim initially on appeal. Within months of *Blakely*, the Seventh Circuit Court of Appeals and other courts held that the rule announced in *Blakely* was a new constitutional rule because it was “based on the Constitution and was not dictated or compelled by *Apprendi* or its progeny.”²³⁵ This is consistent with the approach Indiana courts had taken with respect to *Apprendi* since 2000. Until *Blakely*, no Indiana court had ever suggested that *Apprendi* would be applied in such a way as to invalidate this state’s felony sentencing scheme.²³⁶ As a matter of principle, defendants should not be held to have waived these claims when the courts clearly would not have recognized them in the first instance. As a matter

cases involved statutory rules or procedures, let alone involved the wholesale rewriting of statutes necessitated by *Blakely*.

231. *Baldwin v. Reagan*, 715 N.E.2d 332, 339 n.10 (Ind. 1999); *cf. State ex rel. Young Metal Prods., Inc. v. Lake Superior Court Room No. 5*, 258 N.E.2d 853, 858 (1970) (“Where the legislature has by statute afforded a remedy and the prescribed procedure to be followed in connection with the remedy, then the procedure must be strictly followed.”).

232. *See* IND. CODE §§ 35-38-1-3, 35-38-1-7.1, 35-50-1-2, 35-50-2-11, 35-50-2-13, 35-50-2-14.

233. *Id.* §§ 35-50-2-3 to -7.

234. *Id.* § 35-32-1-1.

235. *Simpson v. United States*, 376 F.3d 679, 681 (7th Cir. 2004).

236. *See, e.g., Parker v. State*, 754 N.E.2d 614 (Ind. Ct. App. 2001) (statutory maximum for Class A felony in Indiana is fifty years, not thirty-year presumptive); *see also Leone v. State*, 797 N.E.2d 743, 750 (Ind. 2003) (implying that a guilty plea to the underlying offense necessarily results in waiver of the right to jury trial of aggravating factors).

of federal constitutional law, the benefits of *Blakely* would appear to be fully available in appeals that are not yet final.²³⁷

The Indiana Supreme Court has repeatedly noted that it is fundamental error to “permit a conviction upon a charge not made.”²³⁸ As discussed above, any attempt to judicially rewrite Indiana’s statutes to jive with *Blakely* would permit convictions based upon elements of the crime (aggravating factors) that were never charged. These errors would thus not be subject to waiver.²³⁹

In addition to the fundamental error doctrine, the supreme court has observed that “the constitutionality of a criminal statute may be raised at any stage of the proceeding including raising the issue *sua sponte* by this Court,”²⁴⁰ a principle that has been echoed by the court of appeals in a number of cases.²⁴¹ Whether grounded in federal constitutional law or state fundamental error doctrine, the courts appear obligated to address *Blakely* claims raised at any juncture on direct appeal.

V. DEATH PENALTY

The dubious constitutionality of Indiana’s death penalty in the wake of *Apprendi v. New Jersey*²⁴² and *Ring v. Arizona*²⁴³ was discussed at length in a previous survey.²⁴⁴ In March of 2002, the Indiana Supreme Court upheld the constitutionality of Indiana’s death penalty statute in *Saylor v. State*,²⁴⁵ a post-conviction appeal in which the jury had unanimously recommended against imposition of a death sentence but the trial judge overrode that recommendation, relying heavily on the Supreme Court’s 1990 opinion in *Walton v. Arizona* and a creative interpretation of “statutory maximum” from a couple of different

237. See, e.g., *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987) (observing that “failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication”). Nevertheless, the court of appeals held that *Blakely* claims cannot be raised in a petition for rehearing. *Carson v. State*, 813 N.E.2d 1187, 1188-89 (Ind. Ct. App. 2004).

238. *Martin v. State*, 480 N.E.2d 548, 551 (Ind. 1985) (quoting *Griffin v. State*, 439 N.E.2d 160, 162 (Ind. 1982)) (internal quotation marks omitted).

239. See *Stevens v. State*, 422 N.E.2d 1297, 1303 (Ind. Ct. App. 1981) (“It is axiomatic that a conviction upon a charge not made or upon a charge not tried would be sheer denial of due process.”).

240. *Morse v. State*, 593 N.E.2d 194, 197 (Ind. 1992).

241. See, e.g., *Vaughn v. State*, 782 N.E.2d 417, 419-20 (Ind. Ct. App. 2003); *Haggard v. State*, 771 N.E.2d 668, 673 n.7 (Ind. Ct. App. 2002); *Cooper v. State*, 760 N.E.2d 660, 664 (Ind. Ct. App. 2001).

242. 530 U.S. 466 (2000).

243. 536 U.S. 584 (2002).

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

245. 765 N.E.2d 535 (Ind. 2002).

Indiana statutes.²⁴⁶ *Ring* overruled *Walton* and offered a view of statutory maximum that seems nearly impossible to square with the one explained in *Saylor*.²⁴⁷ Nearly two years after rehearing was sought in *Saylor*, the Indiana Supreme Court opted to avoid the *Ring* issue and instead vacated Saylor's death sentence based on independent state law grounds of the "appropriateness" of the sentence under Appellate Rule 7(B) and the court's constitutional authority to review and revise sentences.²⁴⁸ Justice Boehm, writing for the majority, relied on the 2002 statutory amendment that removed the possibility of a judicial override as the basis of the decision to reduce the sentence to 100 years.²⁴⁹

Saylor is one of only three individuals currently under a death sentence despite a jury's recommendation to the contrary. By virtue of the 2002 amendments to the death penalty statute, no future executions will take place without a jury recommendation. Under these circumstances, it is inappropriate to carry out a death sentence that could not be imposed today.²⁵⁰

Chief Justice Shepard dissented, noting that the appropriateness of Saylor's sentence had been reviewed on direct appeal and the statutory amendment "had little to do with defendants situated like Benny Saylor, whose jury, after all, found beyond a reasonable doubt both the aggravating circumstances that render him eligible for the death penalty."²⁵¹

Within days of the rehearing opinion in *Saylor*, the court issued several other death penalty opinions that clarified important, lingering questions about Indiana's death penalty statute. In *Ritchie v. State*,²⁵² the court addressed whether the State must prove beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors. The current version of the death penalty statute requires that before the jury may recommend the death penalty, it must find that "(1) the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances listed in subsection (b) exists; and (2) any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances."²⁵³ Nevertheless, the court rejected Ritchie's argument that the weighing determination was a fact that must be determined beyond a reasonable doubt.²⁵⁴ This conclusion is difficult to square not only with the language of the statute and but also the decisions in *Apprendi* and *Ring*; two findings are required—a defendant may be not sentenced to death solely because of the

246. See Schumm, *supra* note 244, at 1005-06.

247. *Id.* at 1007-09.

248. See IND. CONST. art. VII, § 4; *Saylor v. State*, 808 N.E.2d 646 (Ind. 2004).

249. *Saylor*, 765 N.E.2d at 651.

250. *Id.*

251. *Id.* at 652 (Shepard, C.J., dissenting).

252. 809 N.E.2d 258 (Ind. 2004).

253. IND. CODE § 35-50-2-9(*l*) (2004).

254. *Ritchie*, 809 N.E.2d at 268.

existence of an aggravating circumstance.²⁵⁵

The question is a far-reaching one, because subsection f of the death penalty statute allows a trial court to dismiss a hung jury and impose a death sentence.²⁵⁶ In *State v. Barker*,²⁵⁷ the court upheld the statute, concluding that as long as the jury has found an aggravating circumstance, the trial court may impose a death sentence—acting alone without a jury—consistent with subsection f and the holdings in *Ring* and *Apprendi*.²⁵⁸ Because the death penalty statute now requires trial courts to “provide a special verdict form for each aggravating circumstance alleged,”²⁵⁹ a jury may unanimously find certain aggravating circumstances but not reach unanimous agreement as to the weighing of aggravating and mitigating circumstances.²⁶⁰ In such cases, the court reasoned that subsection f would allow the trial court to discharge the jury and impose the sentence acting alone.²⁶¹ If the jury could not reach agreement as to the existence of the aggravating circumstance(s), however, the trial court could not impose sentence and would rather be required to declare a mistrial and submit the case to a new jury for a new penalty phase.²⁶²

In *Barker* and two other cases,²⁶³ the court held that the amended version of subsection e, which had previously allowed a trial court to impose a sentence different from the one recommended by the jury²⁶⁴ but was amended to provide that the court “shall sentence the defendant” according to the recommendation,²⁶⁵ eliminates the trial court’s ability to override or modify a jury’s recommendation. As the court put it, “there is only one sentence determination, which is made by the jury, and the judge must apply the jury determination.”²⁶⁶ The term “determination” is not used in the statute, however, and the word “recommendation” is not only a misnomer but one of potential consequence. In *Stroud v. State*, the court reversed three death sentences because the trial court

255. See generally Michael R. Limrick, *Indiana Supreme Court Addresses Impact of Apprendi on Capital Sentencing Statute*, RES GESTAE, June 2004, at 22. That the weighing is not a “fact” that must be proved beyond a reasonable doubt enjoys some support in opinions of other states and even Supreme Court precedent. See *Ritchie*, 809 N.E.2d at 266-67; see also Limrick, *supra*, at 23 & n.26 (citing *Harris v. Alabama*, 513 U.S. 504, 512 (1995)).

256. IND. CODE § 35-50-2-9(f).

257. 809 N.E.2d 312 (Ind. 2004).

258. This is somewhat remarkable because it required the court to refuse to accept the State’s concession to the contrary. *Id.* at 315-16.

259. IND. CODE § 35-50-2-9(d).

260. *Barker*, 809 N.E.2d at 316.

261. *Id.*

262. *Id.*

263. *Stroud v. State*, 809 N.E.2d 274 (Ind. 2004); *Helsley v. State*, 809 N.E.2d 292 (Ind. 2004).

264. See *Barker*, 809 N.E.2d at 318.

265. IND. CODE § 35-50-2-9(e).

266. *Stroud*, 809 N.E.2d at 287.

had improperly instructed the jury as to the effect of its “recommendation.”²⁶⁷ There, the trial court instructed the jury, in part, that a recommendation for death “is a recommendation only and the Judge will sentence the defendant to death or life imprisonment without parole. The law does not require that the Judge must follow your sentencing recommendation.”²⁶⁸ This violated *Caldwell v. Mississippi*,²⁶⁹ because the true sentencer (the jury) had been “led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”²⁷⁰ A proper instruction would instead tell that jury that it would make a sentencing recommendation “and the judge would ‘sentence the defendant accordingly.’”²⁷¹

In a concurring opinion in *Helsley v. State*,²⁷² Justice Boehm raised the issue of whether a trial court could override a jury’s recommendation for death if the aggravating circumstance was not supported by sufficient evidence.²⁷³ Trial Rule 57(J)(7) allows a trial judge to act as a “thirteenth juror” when a jury’s verdict is against the weight of evidence. In Justice Boehm’s view, this rule allows a trial judge to set aside a jury’s recommendation if it is not supported by the evidence.²⁷⁴

After these cases were decided, the United States Supreme Court held in *Schriro v. Summerlin*²⁷⁵ that *Ring v. Arizona* is not available to death row defendants on collateral review as a matter of federal constitutional law. Although the Indiana Supreme Court could adopt a different approach as a matter of state law,²⁷⁶ this would seem unlikely to garner majority support from the court’s current membership.

Finally, the most significant development in Indiana capital punishment law did not occur in the judiciary or legislature. Rather, Governor Joe Kernan, for the first time in nearly half a century, exercised his constitutional power of clemency²⁷⁷ to an inmate on death row.²⁷⁸ As summarized in last year’s survey,

267. *Id.* at 290.

268. *Id.* at 289.

269. 472 U.S. 320 (1985).

270. *Stroud*, 809 N.E.2d at 289 (quoting *Caldwell*, 472 U.S. at 328-29)).

271. *Id.* at 290 (quoting IND. CODE § 35-50-2-9(e) (Supp. 2002)).

272. 809 N.E.2d 292 (Ind. 2004).

273. *Id.* at 306 (Boehm, J., concurring).

274. *Id.* at 306-08.

275. 124 U.S. 2519, 2526 (2004).

276. See *Saylor v. State*, 808 N.E.2d 646, 649 (Ind. 2004) (observing pre-*Schriro* “we do not need to await resolution of this federal constitutional issue, and also do not address whether, even if there is no federal requirement that *Ring* be applied retroactively, Indiana may nevertheless choose to apply it to pre-*Ring* convictions as a matter of state law”).

277. IND. CONST. art. V, § 17.

278. See Mary Beth Schneider & Theodore Kim, *Governor Spares Life of Inmate; Convicted Killer of Gary Couple Was to be Executed Next Week*, INDIANAPOLIS STAR, July 3, 2004, at 1A. Governor Kernan’s decision also received support from the editorial board of the Indianapolis Star. See *Inmate Didn’t Deserve Death*, INDIANAPOLIS STAR, July 3, 2004, at 12A.

Governor O'Bannon issued a stay of execution just days before the scheduled execution of Darnell Williams.²⁷⁹ The Governor's statement commented on the "unique circumstances" of the case and its stated purpose was to allow DNA testing that would "permit all potentially relevant evidence to be discovered."²⁸⁰ Those test results were reviewed nearly a year later by the Indiana Supreme Court, which concluded "what the DNA test results seem to show is not much different from what was presented at trial."²⁸¹

Governor Kernan followed the unanimous recommendation of the five-member parole board in commuting Williams' sentence to life imprisonment.²⁸² He offered a fairly detailed explanation of his decision, specifically referring to Williams' mental status (IQ of 78-81 and special education classes), Williams' lesser degree of culpability than his co-defendant who had been spared the death sentence, and finally the "doubt as to Williams' direct participation" in the murders.²⁸³

VI. APPELLATE SENTENCE REVIEW

This Article ends, as has become a tradition over the past several years, with some reflection on the year in appellate sentence review. Once again, the issue appears to have been the most frequently raised and successful of the many issues litigated in criminal appeals. The distinction between the procedural finding of aggravating and mitigating circumstances and the substantive review of the resulting sentence for its reasonableness or appropriateness received little discussion during the survey period,²⁸⁴ although claims from both genres were raised.

A. Procedural Sentencing Claim: Race as an Aggravating Circumstance

When a trial court relies on aggravating circumstances to enhance a sentence, it must state the "specific reason why each circumstance is determined to be . . . aggravating."²⁸⁵ In a pair of cases during the survey period, the appellate courts addressed the propriety of race as an aggravating circumstance.

In *Witmer v. State*,²⁸⁶ the Indiana Supreme Court began its opinion with some appropriate indignation: "It is hard to imagine that in this age two young white men could troll around town looking for an African-American to kill just so they

279. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 37 IND. L. REV. 1003, 1008 (2004).

280. *Id.*

281. *Williams v. State*, 808 N.E.2d 652, 660 (Ind. 2004).

282. *Schneider & Kim*, *supra* note 278.

283. *Id.*

284. *See generally* Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 34 IND. L. REV. 645, 665-66 (2001).

285. *McCann v. State*, 749 N.E.2d 1116, 1119 (Ind. 2001).

286. 800 N.E.2d 571 (Ind. 2003).

could say they had done so.”²⁸⁷ Although the court had never been confronted with the propriety of aggravating a sentence based on the race of the victim, it had held that “characteristics of the victims can support an enhanced sentence.”²⁸⁸ After considering cases from other states that had upheld the propriety of considering the race of the victim at sentencing as well as the non-exclusive list of aggravating circumstances in Indiana’s sentencing statute,²⁸⁹ the court concluded “without hesitation that racially motivated crimes are intolerable and may constitute an aggravating circumstance.”²⁹⁰

Months later, in *Williams v. State*,²⁹¹ the court of appeals was confronted with the trial court’s reliance on the defendant’s race as an aggravating circumstance. Jerome Williams and another man decided to rob an eighty-two-year-old woman and strangled her to death in the process. Williams and his cohort were African-American; the woman was white.²⁹² In sentencing Williams after he pleaded guilty to felony murder, the trial court found as an aggravating circumstance that the “crime impacted the community especially elderly people and increased their fear of African-Americans.”²⁹³ The trial court also observed that Williams’s crime would “set back racial relations” and that “it’s going to make people [even] more concerned about people of color being in their neighborhoods.”²⁹⁴

The court of appeals observed that it was “very uncomfortable with the trial judge’s reference to the fact that Williams is African-American and the victim is white.”²⁹⁵ Although the court found the trial court’s concern about race relations “laudable,” the “use of race to address that concern” was impermissible.²⁹⁶ The case was remanded for resentencing.²⁹⁷

B. Substantive Sentence Review

Article VII, sections 4 and 6 of the Indiana Constitution provide for the review and revisions of statutorily authorized sentences. Appellate Rule 7(B) is the current mechanism through which these provisions are applied, and provides for appellate revision of sentences that are “inappropriate in light of the nature of the offense and character of the offender.”²⁹⁸ Appellate Rule 7(A), however,

287. *Id.* at 571.

288. *Id.* at 573.

289. *See* IND. CODE § 35-38-1-7.1(b) (2004).

290. *Witmer*, 800 N.E.2d at 573.

291. 811 N.E.2d 462 (Ind. Ct. App. 2004).

292. *Id.* at 464-65.

293. *Id.* at 464.

294. *Id.* at 465.

295. *Id.*

296. *Id.*

297. *Id.* at 466.

298. IND. APP. R. 7(B). The adoption of the “inappropriate” standard, as a replacement to the previously less-deferential “manifestly unreasonable” standard, was discussed in the 2003 survey. *See* Schumm, *supra* note 279, at 1032-33.

excludes appeals of sentences by the State, even though such appeals would likely increase the “consistency” in sentencing that underlies the rule.²⁹⁹

1. *Substantive Review of Sentences Imposed Under a Plea Agreement.*—An important threshold question in cases involving substantive sentence review is whether the case is eligible for appellate review. Three court of appeals cases during the survey period took three different approaches to the effect of a plea agreement on a defendant’s ability to challenge his or her sentence on appeal.³⁰⁰

Sentences imposed pursuant to plea agreements that afford the trial court discretion have often been reviewed by Indiana’s appellate courts.³⁰¹ As the Indiana Supreme Court has observed, defendants are “entitled to contest the merits of a trial court’s sentencing discretion where the court has exercised sentencing discretion.”³⁰² Without citation to these cases or reference to the frequency of the practice, the court of appeals held in *Gist v. State*,³⁰³ in March of 2004 that a defendant pleading guilty to a Class B felony pursuant to an agreement with a cap of ten years “necessarily agreed that a ten-year sentence was appropriate” and therefore was unassailable under Appellate Rule 7(B) on appeal.³⁰⁴

The court reasoned that, if *Gist* thought ten years was an inappropriate sentence, he should “have taken his chances at trial without the benefit of a plea agreement,” but this seems to miss the mark.³⁰⁵ In many cases guilt is uncontestable, and a defendant who desires to plead guilty is at the mercy of the State when negotiating the most favorable agreement. If the agreement affords the trial court some discretion, and the trial court exercises that discretion at the higher end of the range, a challenge to the appropriateness of the sentence through the independent review function of the appellate courts seems quite reasonable.

Five months later in *Wilkie v. State*,³⁰⁶ another panel took issue with the

299. See *Rodriguez v. State*, 785 N.E.2d 1169, 1177 (Ind. Ct. App. 2002), *trans. denied*, 792 N.E.2d 50 (Ind. 2003).

300. Related but unresolved during the survey period is the proper timing of a sentencing challenge brought after a plea agreement. In *Taylor v. State*, 780 N.E.2d 430 (Ind. Ct. App. 2003), the court of appeals held that defendants who pleaded guilty must raise sentencing challenges on direct appeal if at all. However, in *Collins v. State*, 800 N.E.2d 609 (Ind. Ct. App. 2003) and *Gutermuth v. State*, 800 N.E.2d 592 (Ind. Ct. App. 2003), the court of appeals held that sentencing challenges in which defendants were not advised of their right to appeal the sentence could be raised in a postconviction proceeding. The State’s petitions to transfer in *Collins* and *Gutermuth* were granted, so resolution of this conflict will likely be addressed in the next survey period.

301. See, e.g., *Sensback v. State*, 720 N.E.2d 1160, 1166 (Ind. 1999); *Westmoreland v. State*, 787 N.E.2d 1005, 1012 (Ind. Ct. App. 2003); *Rodriguez v. State*, 785 N.E.2d 1169 (Ind. Ct. App. 2003).

302. *Tumulty v. State*, 666 N.E.2d 394, 396 (Ind. 1996).

303. 804 N.E.2d 1204 (Ind. Ct. App. 2004).

304. *Id.* at 1206-07.

305. *Id.* at 1207.

306. 813 N.E.2d 794 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 981 (Ind. 2004).

breadth of the seemingly sweeping holding in *Gist*. There, the defendant pleaded guilty to two Class C felonies pursuant to an agreement that provided for concurrent terms but allowed the trial court to select the term of years.³⁰⁷ The trial court imposed the maximum of eight years, and an appeal ensued.³⁰⁸ Relying on *Gist*, the State argued that Wilkie could not challenge the appropriateness of his sentence because he pleaded guilty pursuant to a plea agreement.³⁰⁹ The *Wilkie* panel first distinguished the plea agreement from the one in *Gist*, where the State had limited its sentencing recommendation to the presumptive term and which acknowledged that the defendant was induced to plead guilty based on that sentencing recommendation.³¹⁰ “By signing an agreement in which he attested only that he understood the range of sentences which the trial court could impose by law, Wilkie did not in any way agree that a maximum sentence was appropriate.”³¹¹ The court disagreed with *Gist* to the “extent that it suggests that anytime a defendant voluntarily enters into a plea agreement, that defendant is thereafter barred from challenging his sentence as inappropriate.”³¹² Instead, the court concluded that only defendants who sign agreements agreeing “to a specific term of years, or to a sentencing range other than the range authorized by statute” have forfeited 7(B) claims.³¹³

Finally, in *Bennett v. State*,³¹⁴ the defendant pleaded guilty pursuant to a plea agreement that left sentencing to the discretion of the trial court and then challenged his maximum three-year sentence for operating a vehicle while intoxicated (with a prior) on appeal. The panel in *Bennett* went a step beyond *Gist* in holding that “when a defendant is sentenced in accordance with a plea agreement, he has implicitly agreed that his sentence is appropriate.”³¹⁵ Reasoning that sentencing fell “within the ambit of the trial court’s discretion upon acceptance of the agreement,” the court reasoned that the defendant “may not now complain” about his maximum sentence.³¹⁶ Remarkably, *Bennett* was originally issued as a not-for-publication opinion; it was later ordered published upon the State’s motion. The State realized its significance, but it is likely not the last word on the subject, as suggested by the irreconcilable inconsistencies. Moreover, all three opinions seemingly conflict with Indiana Supreme Court precedent in *Tumulty*³¹⁷ as well as the practice of sentence review in both the supreme court and court of appeals in recent years.

The opinions raise some serious practical concerns for trial courts and

307. *Id.* at 798.

308. *Id.*

309. *Id.* at 802.

310. *Id.* at 803.

311. *Id.*

312. *Id.*

313. *Id.* at 804.

314. 813 N.E.2d 335 (Ind. Ct. App. 2004).

315. *Id.* at 338.

316. *Id.*

317. *See supra* note 302 and accompanying text.

litigants. If every defendant who pleads guilty pursuant to a plea agreement that gives the trial court discretion has forfeited the right to challenge the sentence under Appellate Rule 7(B), far fewer defendants will likely plead guilty. Little—if anything—would be gained by pleading guilty, especially in counties where prosecutors insist on a plea agreement to the highest charge. Even in the face of overwhelming guilt, defendants with cases pending before judges known to be tough at sentencing would seemingly be better off to go to trial simply to preserve their right to appeal the sentence. The burdens imposed on an already overwhelmed trial system seem considerable.

Moreover, what advisements should trial courts provide to defendants who plead guilty? It is not uncommon to advise these defendants of their right to appeal a sentence, which may no longer be a right or may be a severely restricted one.³¹⁸ Finally, in light the overarching goal of appellate sentence review—to ensure that similar defendants who commit similar crimes are treated similarly³¹⁹—it should make no difference if the plea agreement sets a cap, a range, or is entirely open. If all Rule 7(B) appeals are precluded after a guilty plea, there will be little incentive for a defendant to plead guilty and forego the important—and often successful—right to challenge the sentence imposed.

2. *Some Specific Cases.*—In *Serino v. State*,³²⁰ Chief Justice Shepard, writing for a unanimous court, provided a thorough and thoughtful history of appellate sentence review. In considering the approaches of the federal sentencing guidelines and some states, the court aptly observed that, although difficult, “a respectable legal system attempts to impose similar sentences on perpetrators committing the same acts who have the same backgrounds.”³²¹ After tracing the history and purpose of the 1970 Indiana constitutional amendment that provides for appellate sentence review as well as the iterations of the appellate rule that have implemented it, the Court concluded that it had over the years “taken modest steps to provide more realistic appeal of sentencing issues. . . . [The current] formulation places central focus on the role of the trial judge, while reserving for the appellate court the chance to review the matter in a climate more distant from local clamor.”³²²

Serino was convicted of child molesting and sexual misconduct involving a teenage boy over a period of three years. He was sentenced to 385 years in prison, a sentence well “outside the typical range of sentences imposed for child molesting in any reported Indiana decision.”³²³ Citing a number of “factually similar cases,” and distinguishing “dramatically different” cases in which

318. For example, a defendant could seemingly raise a procedural challenge to the finding of aggravating circumstances or the failure to find mitigating circumstances, although such challenges are generally less likely to result in a reduced sentence than is a substantive challenge under Rule 7(B).

319. See generally Schumm, *supra* note 284, at 669.

320. 798 N.E.2d 852 (Ind. 2003).

321. *Id.* at 854.

322. *Id.* at 856-57.

323. *Id.* at 853, 857.

sentences had been affirmed, the court reasoned that the sentence should be reduced to ninety years in light of Serino's positive character traits and the victim's mother's recommendation at sentencing.³²⁴ Specifically, the court noted that sentences had been reduced in cases with lengthy sentences involving one victim, multiple counts of molestation, and a lack of criminal history, while sentences had been affirmed when the sentences were shorter in duration and involved multiple victims or multiple different sexual acts.³²⁵

Serino is significant not only because of its useful historical perspective but because it also explains a number of pragmatic principles that can be applied in a fairly consistent manner to future cases.³²⁶ Indeed, just weeks later the court of appeals distinguished *Serino* and upheld a 326-year sentence based on the egregious nature of the offenses, which included repeated molestation of two young victims over a period of several years by acts including bondage, violence, and threats to kill or hurt the victims, as well as the defendant's character—a father figure to the children whom he sexually abused on a weekly or even daily basis.³²⁷ There, the court applied the oft-cited principle that the maximum sentences should be reserved for the “worst offenses and offenders,” finding him to be the “proverbial ‘worst offender’ for whom maximum sentences are to be reserved.”³²⁸

In *Rose v. State*,³²⁹ the court affirmed an aggregate 135-year sentence based on the defendant's role in holding a gun while his cohort repeatedly raped and committed criminal deviate conduct against two women, one of whom was seven months pregnant, and his prior juvenile adjudications.³³⁰ The worst offense/worst offender principle did not apply because none of the sentences on the individual counts were maximum sentences.³³¹

The principle did apply and resulted in a reduced sentence in *Pagan v. State*,³³² where the eighteen-year-old defendant was sentenced to the maximum sentence of twenty years for B felony robbery.³³³ The court relied on the defendant's youthful age and non-violent nature of his delinquency/criminal history in concluding that, although an enhanced sentence would be appropriate, that sentence should be fifteen years instead of the maximum term of twenty years.³³⁴ Although it would be impossible to summarize all of the sentence

324. *Id.* at 857-58.

325. *Id.*

326. *Id.*

327. *Haddock v. State*, 800 N.E.2d 242, 289-49 (Ind. Ct. App. 2003).

328. *Id.* at 248, 249 n.8.

329. 810 N.E.2d 361 (Ind. Ct. App. 2004).

330. *Id.* at 368-69.

331. *Id.*

332. 809 N.E.2d 915 (Ind. Ct. App. 2004).

333. Four years of the sentence were suspended, but the court reiterated that it would consider suspended portions of sentences as well as executed portions when reviewing appropriateness under Rule 7(B). *See id.* at 926 n.9.

334. *Id.* at 928.

review cases from the survey period, this small sample suggests that some greater degree of consistency of principles in felony cases has solidified.

However, the court of appeals confronted and confused sentence review for misdemeanors. First, in *Ruggieri v. State*,³³⁵ the court addressed a challenge to an eighteen-month sentence imposed for two misdemeanor convictions. Although even the State had couched its argument in terms of appropriateness under Appellate Rule 7(B), the court found that argument “misplaced” and instead applied a seemingly lower standard of abuse of discretion in affirming the sentence.³³⁶

In *Gaerte v. State*,³³⁷ the court of appeals upheld a maximum sentence of 180 days for an inmate convicted of criminal mischief for breaking a window in a jail isolation cell. In reviewing his challenge to the appropriateness of his sentence pursuant to Appellate Rule 7(B), the majority suggested that it is appropriate—although not necessary—to consider aggravating and mitigating circumstances in misdemeanor sentencing, before concluding that the sentence could not be deemed inappropriate in light of Gaerte’s “lengthy criminal history.”³³⁸ Judge Sullivan dissented, however, pointing to the significance of Gaerte’s “clear expression of remorse and willingness to pay for the broken window,” and would have remanded with instructions to reduce the sentence to ninety days.³³⁹

Gaerte does not discuss the seemingly lower standard from *Ruggieri*, and both the majority and dissenting opinions acknowledge the importance of aggravating and mitigating circumstances in misdemeanor sentencing and the applicability of appellate review for appropriateness under Appellate Rule 7(B). Indeed, it is unclear why a different standard should apply in reviewing misdemeanor sentences. Article VII of the Indiana Constitution and Appellate Rule 7(B) make no mention of felonies or misdemeanors,³⁴⁰ and each presumably applies to the review of both. Although the statutory scheme for misdemeanor sentences has no presumptive (the starting point for review of felony sentences) and instead only a maximum sentence, this presents no obstacle to reviewing the “nature of the offense” and the “character of the offender” to ensure they are not “inappropriate.” Finally, considering that misdemeanor sentences may be ordered consecutively and therefore be even longer than some D felony sentences, the meaningful review provided for by Rule 7(B) is appropriate in all appeals.

335. 804 N.E.2d 859 (Ind. Ct. App. 2004).

336. *Id.* at 867.

337. 808 N.E.2d 164 (Ind. Ct. App. 2004).

338. *Id.* at 167.

339. *Id.* at 168 (Sullivan, J., concurring and dissenting).

340. Indeed, section 4 of article VII provides for sentence revision “in all appeals of criminal cases.”