

## RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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The General Assembly and Indiana's appellate courts confronted several significant issues during the survey period October 1, 2007, to September 30, 2008. The General Assembly created new crimes, altered penalties for existing crimes, and saw a couple of new laws struck down by federal judges. Sentencing issues assumed less prominence than in recent years on the dockets of the supreme court and court of appeals. A wide range of other issues received some play, including bail, interpreters, online crimes against children, plea agreements, and probation. This Survey seeks not only to summarize the significant legislation and court opinions but also to offer some perspective on their likely future impact.

### I. LEGISLATIVE DEVELOPMENTS

Although property tax relief dominated the 2008 short session of the General Assembly,<sup>1</sup> several bills affecting criminal law and procedure were also enacted. A few appeared to be in response to recent judicial decisions, while others appeared grounded in broader societal concerns, usually creating new offenses or increasing the penalty for existing offenses. Two of these new bills were found unconstitutional by federal judges before taking effect.

#### A. *New Offenses*

The General Assembly created the new offense of sexual communication with a child under fourteen, which is defined as the knowing or intentional communication concerning sexual activity with a child less than fourteen "with the intent to gratify the sexual desires of the person."<sup>2</sup> The base offense is a Class B misdemeanor, but is enhanced to a Class A misdemeanor if committed via a computer.<sup>3</sup> In addition, individuals with prior convictions for a variety of sex offenses, or who have been found to be a sexually violent predator, can no longer use social networking websites, instant messaging, or chat room programs that the offender knows allows access to children under age eighteen.<sup>4</sup> The

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1. *See Another Job Still Undone*, INDIANAPOLIS STAR, Mar. 12, 2008, at 8.

2. IND. CODE § 35-42-4-13 (2008).

3. *Id.* The court of appeals has previously remarked that more severe treatment of offenses committed online versus face-to-face was "somewhat troubling" on its face, but found no proportionality violation because of the great deference given to the legislature, which "may have deemed that use of the internet may expose Indiana children to dangers that require a greater vigilance by society, or that use of the internet lessens inhibitions." *Laughner v. State*, 769 N.E.2d 1147, 1156 (Ind. Ct. App. 2002).

4. *See* IND. CODE § 35-42-4-12 (2008).

offense is a Class A misdemeanor for the first offense or a Class D felony if the defendant has a prior conviction for the same offense.<sup>5</sup>

Outside the realm of sex and the Internet, the General Assembly also enacted new offenses for: failing to report a dead body (within three hours of finding a body under various “suspicious or unusual circumstances”);<sup>6</sup> inmate fraud, when a prisoner obtains or attempts to obtain money through misrepresentations;<sup>7</sup> disarming a law enforcement officer;<sup>8</sup> and possession of looted property.<sup>9</sup> The legislature also expanded the duties of drivers (and now passengers) involved in accidents) to seek help in the event of an accident.<sup>10</sup> Finally, the invasion of privacy statute<sup>11</sup> was amended to include violations of no-contact orders on defendants in lawful detention<sup>12</sup> and no-contact orders imposed as a condition of an executed sentence.<sup>13</sup>

### *B. Enhanced Penalties*

The General Assembly also enhanced penalties for several existing offenses. The penalty for operating a vehicle while intoxicated may now be enhanced to a Class C felony if the defendant has a prior conviction for operating while intoxicated resulting in death or serious bodily injury.<sup>14</sup> Birth certificate fraud may now be charged as a D felony if the person makes a false or fraudulent statement regarding the birth certificate; alters, counterfeits, or mutilates a birth certificate; or uses the same.<sup>15</sup> Persons under twenty-one now face a Class C misdemeanor—rather than an infraction—if they make a false statement or present false identification in the quest to procure an alcoholic beverage.<sup>16</sup> Adults similarly face greater penalties for recklessly or knowingly furnishing alcohol to a minor, which is a Class B misdemeanor for a first offense, a Class

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5. *Id.*

6. *Id.* § 35-45-19-3.

7. *Id.* § 35-43-5-20.

8. *Id.* § 35-44-3-3.5. The base offense is a Class C felony. It is elevated to a Class B felony if the officer is seriously injured or a Class A felony if the officer dies or if the officer is seriously injured and the officer's firearm is taken. *Id.*

9. *See* IND. CODE § 14-21-1-36 (Supp. 2008). The offense is a Class D felony but can be enhanced to a Class C felony if the cost to carry out an archeological investigation on the site damaged to obtain the looted property is at least \$100,000. *Id.*

10. *Id.* §§ 9-26-1-1, 9-26-1-1.5.

11. IND. CODE § 35-46-1-15.1 (2008).

12. *Id.* § 35-46-1-15.1(12) (referencing IND. CODE § 35-33-8-3.2 (2008)).

13. *Id.* § 35-46-1-15.1(13) (referencing IND. CODE § 35-38-1-30) (2008)). This amendment appears to be in response to recent supreme court cases holding that felony statutes do not authorize the imposition of a no-contact order as part of an executed sentence. *See, e.g., Jarrett v. State*, 829 N.E.2d 930, 932 (Ind. 2005); *Laux v. State*, 821 N.E.2d 816, 819 (Ind. 2005).

14. *See* IND. CODE § 9-30-5-3 (Supp. 2008).

15. *See* IND. CODE § 16-37-1-12 (2008).

16. IND. CODE § 7.1-5-7-1 (Supp. 2008).

A misdemeanor for any subsequent offense, and a Class D felony if the alcohol is the proximate cause of serious bodily injury or death to any person.<sup>17</sup> Finally, in stark contrast to the usual trend of escalating criminal penalties, an environmental permit statute was amended to reduce the penalty for tampering with records, monitoring devices, or monitoring data from a Class D felony to a Class B misdemeanor.<sup>18</sup>

In addition to these changes, two amendments could also lead to longer sentences. The list of statutory aggravating circumstances was expanded to encompass crimes committed when the defendant knew or should have known the victim was suffering from a disability.<sup>19</sup> The statute limiting the imposition of consecutive sentences committed as part of the same criminal episode to the next higher level felony<sup>20</sup> was amended to add two new offenses to the list of exemptions: A person who operates a vehicle while intoxicated causing serious bodily injury to another person or who commits resisting law enforcement as a felony can face unlimited consecutive sentences.<sup>21</sup>

### *C. Flexibility for Probation*

Continuing the trend of allowing trial courts latitude in dealing with probation, the General Assembly amended Indiana Code section 35-38-2-3 to make clear that trial courts can impose one or more sanctions on probationers who violate conditions of probation.<sup>22</sup> This was likely in response to the court of appeals's opinion in *Prewitt v. State (Prewitt I)*,<sup>23</sup> which held that trial courts did not have the authority in revocation hearings both to execute a portion of a previously executed sentence and to modify conditions of probation.<sup>24</sup> Even before the legislative change, however, the Indiana Supreme Court had held otherwise, emphasizing the importance of "creative and case-specific sentences," which serve "the public interest by giving judges the ability to order sentences they deem to be most effective and appropriate for individual defendants who violate probation."<sup>25</sup>

### *D. Reduced Credit Time for "Credit Restricted Felons"*

Before June 30, 2008, most defendants served one-half of their term of imprisonment based on long-standing statutory provisions that allow for good time credit. Defendants imprisoned for a crime or in jail awaiting trial are

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17. *Id.* § 7.1-5-7-8.

18. *Id.* § 13-30-10-1.

19. IND. CODE § 35-38-1-7.1(7) (2008).

20. *Id.* 35-50-1-2(c).

21. *Id.* § 35-50-1-2(a)(15) & (16).

22. *Id.* § 35-38-2-3.

23. 865 N.E.2d 669 (Ind. Ct. App.), *vacated by* 878 N.E.2d 184 (Ind. 2007).

24. *Id.* at 672.

25. *Prewitt v. State (Prewitt II)*, 878 N.E.2d 184, 187 (Ind. 2007).

generally assigned to Class I.<sup>26</sup> Such a person could be reassigned to Class II or III if he or she violates certain rules of the department of correction or the penal facility.<sup>27</sup> Such reassignments could have a significant effect on the length of a person's incarceration; defendants in Class I earn one day of credit for each day of credit confined, those in Class II earn one day for every two days confined, and those in Class III receive no credit time.<sup>28</sup>

House Enrolled Act 1271 dramatically changed credit time statutes for "persons convicted after June 30, 2008."<sup>29</sup> That legislation created a new category of defendants known as "[c]redit restricted felon[s]."<sup>30</sup> This category includes defendants (1) at least twenty-one years old who are convicted of child molesting involving sexual intercourse or deviate sexual conduct involving a child under the age of twelve; (2) convicted of child molesting resulting in serious bodily injury or death; or (3) convicted of murder (a) while committing or attempting to commit child molesting, (b) of a victim of a sex crime for which the person was convicted, or (c) of a victim known to be a witness against the defendant in a prosecution for a sex crime if the murder was committed to prevent that person from testifying.<sup>31</sup>

Credit restricted felons may not be assigned to Class I or II but instead are initially assigned to a newly created Class IV.<sup>32</sup> By virtue of this assignment, the person "earns (1) day of credit time for every six (6) days the person is imprisoned for a crime or confined awaiting trial or sentencing."<sup>33</sup> If a class IV defendant violates correctional rules, he or she may be assigned to Class III and earn no credit time.<sup>34</sup> A credit restricted felon may never be assigned to Class I or II.<sup>35</sup>

Although legislatures generally have very broad authority in assigning penalties for an offense,<sup>36</sup> this new statute likely runs afoul of the prohibition on ex post facto laws as applied to those who committed offenses before June 30,

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26. IND. CODE § 35-50-6-4(a) (2008).

27. *Id.* § 35-50-6-4(c).

28. *Id.* § 35-50-6-3.

29. See H.E.A. 1271, 115th Leg. 2d Reg. Sess. (Ind. 2008).

30. IND. CODE § 35-41-1-5.5 (2008).

31. *Id.*

32. *Id.* § 35-50-6-4(b).

33. *Id.* § 35-50-6-3(d).

34. *Id.* §§ 35-50-6-4(d), -6-3(c).

35. *Id.* § 35-50-6-4(b).

36. Federal precedent imposes a nearly impossible burden in challenging a non-capital sentence as excessive under the Eighth Amendment. See *generally* *Ewing v. California*, 538 U.S. 11 (2003). In rare circumstances, Indiana courts have found penalties disproportionate under article 1, section 16 of the Indiana Constitution. See, e.g., *Connor v. State*, 626 N.E.2d 803 (Ind. 1993) (holding that sentence for dealing fake marijuana cannot exceed sentence for dealing actual marijuana); *Poling v. State*, 853 N.E.2d 1270, 1276 (Ind. Ct. App. 2006) (finding a section 18 violation when "one defendant can receive a harsher sentence than another for the very same crime").

2008.<sup>37</sup> The focus of the Ex Post Facto Clause is the time a crime “was committed.”<sup>38</sup> States may not enact laws that impose “additional punishment to that then prescribed.”<sup>39</sup> The purpose of this provision is to give “fair warning” of the effect of criminal laws “and permit individuals to rely on their meaning until explicitly changed.”<sup>40</sup>

“[E]ven if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.”<sup>41</sup> In *Weaver v. Graham*,<sup>42</sup> the Court found a change in Florida statutes providing for “gain time” credit for good conduct in prison violated the Ex Post Facto Clause.<sup>43</sup> The pre-1979 version of the statute awarded five, ten, or fifteen days per month as “gain time for good conduct.”<sup>44</sup> Legislation passed in 1978, effective January 1, 1979, changed the formula, reducing those credits to only three, six, or nine days per month as gain-time credit.<sup>45</sup> The petitioner, who pleaded guilty to a crime that occurred on January 31, 1976,<sup>46</sup> successfully argued this reduction in gain-time credit violated the Ex Post Facto Clause.<sup>47</sup> The Court reasoned the new law “substantially alter[ed] the consequences attached to a crime already completed, and therefore change[d] the quantum of punishment.”<sup>48</sup> Put another way, the amended statute constricted the opportunity “to earn early release, and thereby ma[de] more onerous the punishment for crimes committed before its enactment.”<sup>49</sup>

H.E.A. 1271, like the statutory amendment at issue in *Weaver*, is both retrospective and more onerous than the previous statutes. Under the pre-2008 statutory scheme, all defendants began in Class I and remained there unless they committed a violation of correctional facility rules.<sup>50</sup> They earned one day of credit for each day served, which meant they served fifty percent of their sentence.<sup>51</sup> For example, if an advisory sentence of thirty years for a Class A felony was imposed, the defendant would serve an actual sentence of fifteen years. Under the amended statutory scheme, however, defendants convicted of

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37. U.S. CONST. art. 1, § 10.

38. *Weaver v. Graham*, 450 U.S. 24, 28 (1981).

39. *Id.* (string citation omitted); *accord* Cal. Dep’t of Corr. v. Morales, 514 U.S. 499, 504, 506 n.3 (1995) (reiterating that laws may not “increase[] the penalty by which a crime is punishable”).

40. *Weaver*, 450 U.S. at 28-29.

41. *Id.* at 30-31.

42. 450 U.S. 24 (1981).

43. *Id.*

44. *Id.* at 26.

45. *Id.* at 26-27.

46. *Id.* at 26.

47. *See generally id.*

48. *Id.* at 33 (quotation omitted).

49. *Id.* at 36.

50. IND. CODE § 35-50-6-4(a) (2007).

51. *See id.* § 35-50-6-3.

an offense that renders them a “credit restricted felon” begin in a newly created Class IV through which they earn one day of credit for every six days served.<sup>52</sup> Thus, a defendant who receives a thirty year sentence would be required to serve more than twenty-five and a half years. Just as in *Weaver*, the new statute constricts the opportunity “to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment.”<sup>53</sup>

#### *E. Unconstitutional Before Taking Effect*

Finally, two pieces of legislation were declared unconstitutional by different federal judges before the bills even took effect. Chief Judge Hamilton entered a declaratory judgment against amendments to Indiana Code section 11-8-8-8(b), which would have required registered sex offenders and violent offenders no longer on probation or parole to “consent to the search of their personal computers or devices with internet capability at any time” and “consent to installation on the same devices, at their expense, of hardware or software to monitor their internet use.”<sup>54</sup> Although felons are often “prohibited from possessing guns, voting, and holding certain professional positions,”<sup>55</sup> this legislation went considerably further by violating the Fourth Amendment protection of one’s home.<sup>56</sup> “Unlike registering public information or working in particular professions, the right to privacy in one’s home and personal effects is fundamental.”<sup>57</sup>

Days later, Judge Barker granted summary judgment in favor of a group of booksellers and artists who challenged amendments to Indiana Code section 23-1-55-2, which would have required any entity intending to sell “sexually explicit materials” to register with the secretary of state and “provide a statement detailing the types of materials that the person intends to offer for sale or sell.”<sup>58</sup> The registration would have been a matter of public record; the secretary of state would have been required to notify local officials of registrants; and registrants would have been required to pay a fee.<sup>59</sup> Finally, the bill defined sexually explicit materials broadly, including those “harmful to minors (as described in

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52. IND. CODE §§ 35-50-6-3, -4(a) (2008).

53. 450 U.S. at 35-36. The proper remedy would be to declare the new statute unconstitutional as applied to defendants who commit offenses on or before June 30, 2008. *Id.* at 36 (noting that “severable provisions which are not *ex post facto* may still be applied”).

54. *Doe v. Prosecutor*, 566 F. Supp. 2d 862, 865 (S.D. Ind. 2008).

55. *Id.* at 882.

56. *See id.* at 883.

57. *Id.* This case did not include a challenge to those same restrictions for defendants on probation or parole, and this would be a much steeper hill to climb in light of the diminished liberty interests of probationers and parolees. *See Harris v. State*, 836 N.E.2d 267, 276 (Ind. Ct. App. 2005) (“Restricting a child molester’s access to [the Internet] serves to protect the public and prevent future criminal activity.”).

58. *See Big Hat Books v. Prosecutors*, 565 F. Supp. 2d 981 (S.D. Ind. 2008).

59. *Id.* at 985.

IC 35-49-2-2), even if the product or service is not intended to be used by or offered to a minor.”<sup>60</sup> The court concluded the bill unduly burdened First Amendment rights and was unconstitutionally vague and overbroad.<sup>61</sup> As to the final point, the court aptly described the overbreadth of the statute’s reach: a “romance novel sold at a drugstore, a magazine offering sex advice in a grocery store checkout line, an R-rated DVD sold by a video rental shop, a collection of old Playboy magazines sold by a widow at a garage sale.”<sup>62</sup> This reach was found “constitutionally disproportionate to the stated aim of the statute to provide a community ‘heads-up’ upon the opening of ‘adult bookstore-type businesses.’”<sup>63</sup>

## II. SENTENCING APPEALS ON THE DECLINE

Last year’s survey included the caption, “Sentencing: Still the Main Event”<sup>64</sup>—and with good reason. The year was marked by the landmark *Anglemyer* opinion,<sup>65</sup> which made clear that sentencing statements are still required, and included a variety of other sentencing claims and reductions under Indiana Appellate Rule 7(B).<sup>66</sup> Although the appellate courts issued scores of sentencing opinions again this year, those numbers appear to be declining and will likely not rebound as plea agreements around the state increasingly include sentencing waivers.<sup>67</sup>

### A. Waiving the Right to Appeal a Sentence

In *Childress v. State*,<sup>68</sup> the supreme court made clear that defendants who plead guilty have a right to appeal their sentence if the trial court exercised any discretion.<sup>69</sup> This included plea agreements with a cap or range of years and even plea agreements that included a set term of years but allowed discretion in where the sentence would be served.<sup>70</sup> Largely in response to that decision, prosecutors

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60. *Id.*

61. *Id.* at 999.

62. *Id.* at 998.

63. *Id.* at 999.

64. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 41 IND. L. REV. 955, 960 (2008) [hereinafter Schumm I].

65. *Id.* at 962-63 (discussing *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007)).

66. *Id.* at 964-73.

67. The numbers may well decline for another reason, which was not resolved during the survey period. In *McCullough v. State*, 888 N.E.2d 1272 (Ind. Ct. App. 2008), *vacated*, 900 N.E.2d 745 (Ind. 2009), a divided court of appeals concluded the State can cross-appeal a sentence as inappropriate when the defendant makes a sentencing challenge on appeal.

68. 848 N.E.2d 1073 (Ind. 2006).

69. *Id.* at 1079.

70. See generally Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 40 IND. L. REV. 789, 799-801 (2007) [hereinafter Schumm II].

began including sentencing waiver provisions in plea agreements.<sup>71</sup> As discussed in last year's survey, the first appellate challenge to a waiver provision proved fruitless, as the court of appeals concluded such agreements are contractual in nature and permissible in federal court.<sup>72</sup> This survey period, the issue reached the Indiana Supreme Court. In *Creech v. State*,<sup>73</sup> the court addressed the propriety and effect of the following provision of a plea agreement:

I understand that I have a right to appeal my sentence if there is an open plea. An open plea is an agreement which leaves my sentence to the Judge's discretion. I hereby waive my right to appeal my sentence so long as the Judge sentences me within the terms of my plea agreement.<sup>74</sup>

The court concluded such provisions are enforceable; defendants may prospectively waive the right to appeal a sentence.<sup>75</sup> Defendants may later challenge a plea as coerced or unintelligent in a post-conviction proceeding, and a plea agreement may not waive the right to pursue post-conviction relief.<sup>76</sup> However, trial courts are not required to engage in a colloquy with the defendant to ensure he or she understands a waiver provision but should avoid "confusing remarks" as part of any colloquy.<sup>77</sup>

In *Brattain v. State*,<sup>78</sup> the court of appeals adhered to *Creech* and reiterated that a colloquy discussing such provisions is not required by the trial court, and the appointment of appellate counsel does not invalidate a waiver provision.<sup>79</sup> However, in *Clay v. State*,<sup>80</sup> the court invalidated a waiver provision. There, the defendant pleaded guilty to burglary with a cap of thirty-five years pursuant to a plea agreement that included a provision agreeing to waive "any right to challenge [the] sentence under Indiana Appellate Rule 7."<sup>81</sup> The court of appeals held the provision was not enforceable because the trial court did not confirm the defendant's understanding of that plea provision in a colloquy before accepting the plea agreement.<sup>82</sup> The court was especially concerned because of the

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71. *Id.* at 799.

72. Schumm I, *supra* note 64, at 972 (discussing *Perez v. State*, 866 N.E.2d 817 (Ind. Ct. App. 2007)).

73. 887 N.E.2d 73 (Ind. 2008).

74. *Id.* at 74.

75. *Id.* at 75.

76. *Id.* at 75-76.

77. *Id.* at 76.

78. 891 N.E.2d 1055 (Ind. Ct. App. 2008).

79. *Id.* at 1057. Regardless of the waiver provision, the court concluded the sentence of eight years with four-and-one-half of those years executed for operating a vehicle when the defendant's license was forfeited for life was appropriate in light of the defendant's lengthy history of alcohol- and driving-related offenses. *Id.*

80. 882 N.E.2d 773 (Ind. Ct. App. 2008).

81. *Id.* at 775.

82. *Id.* at 774.



“extensive plea agreement negotiations between the parties.”<sup>83</sup>

*Clay* is anomalous among waiver cases, and the vast majority of sentencing waivers will likely not be challenged on appeal or any such challenges will be rejected. As the number of counties using these provisions expands, as it did within weeks after *Creech* was issued, to include large counties that generate most criminal appeals—such as Marion County—the number of sentencing appeals will diminish further. Only defendants who go to trial or plead “open,” i.e., without a plea agreement, will be able to avail themselves of sentencing appeals under Indiana Appellate Rule 7(B). As made clear by the significant number and degree of sentencing reductions discussed below,<sup>84</sup> however, defense counsel should be very cautious in signing a plea agreement that waives the right to challenge a sentence.

### *B. Limitations on Consecutive Sentences*

An “episode of criminal conduct” means offenses or a connected series of offenses that are closely related in time, place, and circumstance.”<sup>85</sup> Significant limitations are imposed on consecutive sentences involving non-violent crimes committed as part of the same episode of criminal conduct; the aggregate sentence cannot exceed the advisory term for the next higher class felony.<sup>86</sup>

In *Henson v. State*,<sup>87</sup> the court of appeals found that two burglaries of neighboring garages committed in the early morning hours of the same day were “closely related in time, place, and circumstance” as required by the statute.<sup>88</sup> Therefore, the sentence for the two Class C felonies could not exceed ten years (the advisory term for a Class B felony).<sup>89</sup> However, in *Williams v. State*,<sup>90</sup> the court found that attacks occurring on separate ends of the Purdue campus, separated by ninety minutes during which the defendant changed his clothes, were not part of the same episode of criminal conduct.<sup>91</sup>

Although the statutory provisions on consecutive sentences are usually invoked for the benefit of defendants, *Hardley v. State*<sup>92</sup> is a notable exception. In *Hardley*, the defendant was charged with theft, released on his own recognizance, and then committed and was charged with additional offenses. The trial court found him guilty of multiple offenses but ordered all counts served concurrently. The court of appeals concluded this was improper, in light of Indiana Code section 35-50-1-2(d): “[i]f, after being arrested for one (1)

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83. *Id.* at 776.

84. *See infra* Part II.C.

85. IND. CODE § 35-50-1-2(b) (2008).

86. *Id.* § 35-50-1-2(c).

87. 881 N.E.2d 36 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 46 (Ind. 2008).

88. *Id.* at 39.

89. *Id.*

90. 889 N.E.2d 1274 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1225 (Ind. 2008).

91. *Id.* at 1282.

92. 893 N.E.2d 1140 (Ind. Ct. App. 2008).

crime, a person commits another crime . . . upon the person's own recognizance[,] the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed.”<sup>93</sup>

Beyond the statutory limitations on consecutive sentences, the supreme court placed further restrictions on the imposition of consecutive sentences. In *Pedraza v. State*,<sup>94</sup> the court held consecutive sentences may not be imposed when the same conviction is used to elevate one charge and enhance another charge based on the defendant's status as a habitual substance offender.<sup>95</sup> The court held in *Sweatt v. State*<sup>96</sup> that the same prior felony may constitute an element of the crime of unlawful possession of a firearm by a serious violent felon (SVF) and also support a finding that the defendant is a habitual offender.<sup>97</sup> However, if the two convictions occur in the same trial, consecutive sentences cannot be imposed.<sup>98</sup>

### C. Substantive Review of Sentences for Appropriateness

Article 7, sections 4 and 6 of the Indiana Constitution, implemented through Indiana Appellate Rule 7(B), provide a defendant the right to challenge the sentence imposed on the grounds that it is “inappropriate in light of the nature of the offense and the character of the offender.”<sup>99</sup> The supreme court has made clear that this provision provides for extensive sentence review “when certain broad conditions are satisfied.”<sup>100</sup> As the court of appeals aptly recognized a quarter of a century ago:

We are in as good a position as the trial court to make these determinations based upon the record before us in a proper case. All the material available to the trial court at time of sentencing is equally available to us on appeal. It is contained in the record. Further, the appellate process is uniquely suited to dispassionate consideration of the

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93. *Id.* at 1146.

94. 887 N.E.2d 77 (Ind. 2008).

95. *Id.* at 81.

96. 887 N.E.2d 81 (Ind. 2008).

97. *Id.* at 84.

98. *Id.* The court makes no mention in many of these cases of any requirement of an objection by defense counsel at sentencing, and many types of sentencing error do not require an objection to be raised on appeal. The Indiana Supreme Court has explained that both it and the court of appeals review “many claims of sentencing error . . . without insisting that the claim first be presented to the trial judge.” *Kincaid v. State*, 837 N.E.2d 1008, 1010 (Ind. 2005). That said, an objection may lead the trial court to fix the problem, and knowing the law on this point will, at a minimum, allow counsel to better advise their client of the exposure in any case.

99. IND. R. APP. P. 7(B).

100. *Neale v. State*, 826 N.E.2d 635, 639 (Ind. 2005); *see also Stewart v. State*, 866 N.E.2d 858, 865-66 (Ind. Ct. App. 2007) (observing that, as of May 2007, the Indiana Supreme Court has reduced eleven of twenty-two sentences reviewed under Appellate Rule 7(B) since January 2003).

subject free of the everyday pressures of a trial courtroom.<sup>101</sup>

More recently, our supreme court has emphasized that the Indiana Constitution authorizes “*independent appellate review*” of a sentence, even when that sentence is imposed pursuant to a plea agreement that provides a cap and “the trial court has been meticulous in following the proper procedure in imposing a sentence.”<sup>102</sup>

Article 7, sections 4 and 6 of the Indiana Constitution were proposed in the 1960s and took effect as constitutional amendments approved by the voters in 1970.<sup>103</sup> The framers of “these provisions had in mind the sort of sentencing revision conducted by the Court of Criminal Appeals in England.”<sup>104</sup> In England, the appellate court

shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal.<sup>105</sup>

“The Commission’s comments demonstrate that the intent of the Amendment was to expand the role of appellate review, not restrict it.”<sup>106</sup> At the time of the Amendment, the English system included “a complex and coherent body of sentencing principles and policy,” which had been developed to realize the goal of eradicating disparities in the sentences imposed by trial courts.<sup>107</sup>

Sentencing principles geared toward eradicating disparities between sentences have been applied in many cases. For example, in reviewing sentences of defendants who plead guilty in England, “the Court of Appeal has formulated the principle that . . . an offender’s remorse, expressed in his plea of guilty, may properly be recognized as a mitigating factor.”<sup>108</sup> The Indiana Supreme Court has taken a similar view, recognizing that an early guilty plea saves the victims from going through a full-blown trial and conserves limited prosecutorial and judicial

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101. *Cunningham v. State*, 469 N.E.2d 1, 8 (Ind. Ct. App. 1984).

102. *Childress v. State*, 848 N.E.2d 1073, 1079-80 (Ind. 2006).

103. *See Walker v. State*, 747 N.E.2d 536, 537 (Ind. 2001); *see generally* Article 7, Indiana Constitution, <http://www.in.gov/legislative/ic/code/const/art7.html> (detailing ratification date) (last visited Feb. 4, 2009).

104. *Id.*; *see also Report of the Judicial Study Commission* cmt. at 140 (1966) (“[T]he proposal that the appellate power in criminal cases include the power to review sentences is based on the efficacious use to which the power has been put by the Court of Criminal Appeals in England.”)

105. *Walker*, 747 N.E.2d at 538 (quoting Criminal Appeal Act, 1907, 7 Edward 7, ch. 23 § 4(3)).

106. *King v. State*, 769 N.E.2d 239, 241 (Ind. Ct. App. 2002) (Najam, J., concurring).

107. D.A. Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193, 194, 197 (1968).

108. *Id.* at 201.

resources; therefore, it is a mitigating circumstance entitled to significant weight.<sup>109</sup>

Moreover, the supreme court, consistent with English practice, has taken an especially hard look at consecutive sentences, especially those involving the same victim.<sup>110</sup> In England, trial courts also enjoy considerable discretion in imposing concurrent or consecutive sentences, but

the aggregate of the sentences imposed must bear some relationship to the gravity of the individual offences. Even for completely separate offences, it is not permissible to aggregate consecutive sentences so that a total is reached which is far in excess of what would be considered appropriate for the most serious of the individual offences.<sup>111</sup>

In *Serino v. State*, the Indiana Supreme Court built on existing precedent in holding that a 385-year sentence imposed after a jury found the defendant guilty of twenty-six counts inappropriate “where there was one victim, multiple counts . . . , and a lack of criminal history.”<sup>112</sup> Although the sentencing statutes allowed for consecutive sentences, the court concluded “there is no escaping that the outcome is at the high end of the sentencing spectrum” and revised the sentence to three presumptive, consecutive terms.<sup>113</sup>

With this backdrop in mind, the Survey turns to several cases from the survey period, most of which reduced sentences while relying on principles that can be applied to future cases.<sup>114</sup> Principles are not always easy to divine, but the reductions in this year’s cases continue a few noticeable trends.

1. *Indiana Supreme Court.*—In *Reid v. State*,<sup>115</sup> the court reviewed a maximum sentence of fifty years for conspiracy to commit murder.<sup>116</sup> While incarcerated in a county jail, Reid began discussing with a fellow inmate his desire to have his wife and mother-in-law killed.<sup>117</sup> That inmate had snitched on others in the past and did the same with Reid, securing the involvement of an

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109. See *Francis v. State*, 817 N.E.2d 235, 238 (Ind. 2004); *Hope v. State*, 834 N.E.2d 713, 719 (Ind. Ct. App. 2005).

110. See, e.g., *Serino v. State*, 798 N.E.2d 852, 857-58 (Ind. 2003).

111. Thomas, *supra* note 107, at 203.

112. *Serino*, 798 N.E.2d at 857.

113. *Id.* at 858.

114. Beyond these cases, *King v. State*, 894 N.E.2d 265 (Ind. Ct. App. 2008), offers an important reminder for appellate lawyers. Sentencing challenges may allege trial court error in its sentencing statement, which is reviewed for an abuse of discretion, or may challenge the number of years or placement as inappropriate. *Id.* at 267. As to the latter, appellants must convince the appellate court a sentence is inappropriate in light of the nature of the offense or the character of the offender under Indiana Appellate Rule 7(B). This is an independent review by the appellate court and not reviewed under an abuse of discretion standard. *Id.* at 267-68.

115. 876 N.E.2d 1114 (Ind. 2007).

116. *Id.* at 1115.

117. *Id.*

undercover officer.<sup>118</sup> Although the court of appeals affirmed the sentence, the Indiana Supreme Court granted transfer and reduced it to the advisory term of thirty years.<sup>119</sup> The court seemed most impressed by Reid's young age (twenty-two) and "that no one was injured, both potential victims pleaded for leniency, and Reid had a history of mental health problems."<sup>120</sup>

In *Smith v. State*,<sup>121</sup> the Indiana Supreme Court reduced a 120-year sentence (four consecutive terms of thirty years) to sixty years (two counts consecutive, two concurrent).<sup>122</sup> The crimes involved the same victim—the defendant's stepdaughter with whom he had abused a position of trust—and he had previously been convicted of Class D felony child molesting and charged with sexual battery about ten years earlier.<sup>123</sup> These aggravating facts were offset by the defendant's poor mental health, which included depression and suicide attempts.<sup>124</sup>

In *Monroe v. State*,<sup>125</sup> the supreme court reduced a 100-year sentence for five counts of Class A felony child molesting (twenty on each count, served consecutively) to fifty years (the maximum sentence on each count, served concurrently).<sup>126</sup> The court found the nature of the crimes (repeated molestation over two years) and the defendant's position of trust warranted enhanced sentences, but not consecutive sentences, in light of the defendant's minor criminal history.<sup>127</sup>

The lesson of *Smith*, *Monroe*, and other recent child molest cases involving a single victim is that crimes against a single victim should generally not put a defendant in the century club. Indeed, *Smith* includes a string cite of cases where the court has reduced lengthy consecutive sentences to one or two consecutive terms.<sup>128</sup>

2. *Indiana Court of Appeals.*—In *Williams v. State*,<sup>129</sup> the court reiterated that "the State may not 'pile on' sentences by postponing prosecution in order to gather more evidence."<sup>130</sup> Relying on Indiana Appellate Rule 7(B), the court extended those cases requiring concurrent sentences when the State sponsors multiple drug buys to convictions obtained from evidence seized from the

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118. *Id.* at 1117.

119. *Id.* at 1116-17.

120. *Id.* The court mentioned that Reid had "amassed a lengthy criminal history" but observed that "many of these offenses were either misdemeanors, occurred while he was a juvenile, or did not result in any physical injuries." *Id.* at 1116.

121. 889 N.E.2d 261 (Ind. 2008).

122. *Id.* at 262.

123. *Id.* at 263-64.

124. *Id.* at 264.

125. 886 N.E.2d 578 (Ind. 2008).

126. *Id.* at 581.

127. *Id.* at 580.

128. *Smith*, 889 N.E.2d at 264-65.

129. 891 N.E.2d 621 (Ind. Ct. App. 2008).

130. *Id.* at 635.

defendant's home within twenty-four hours of the last buy pursuant to a search warrant.<sup>131</sup>

In *Feeney v. State*,<sup>132</sup> the Court of Appeals reduced a forty-year sentence (thirty years at the Department of Correction, four years at community corrections, and six years on supervised probation) for ten counts of burglary to fourteen years (ten years at the Department of Correction, two years on community corrections, and two years on supervised probation).<sup>133</sup> Regarding the nature of the offense, the court expressed concern at the sheer number of burglaries but noted that none involved violence or a threat of violence.<sup>134</sup> More importantly, regarding the character of the offender, the court gave significant weight to the young age of the defendant (eighteen) and his lack of a prior delinquent or criminal history.<sup>135</sup>

In *Kemp v. State*,<sup>136</sup> the court reduced a thirty-two-year sentence for a church administrator who stole more than \$350,000 from a church over a four-year period.<sup>137</sup> In reducing the sentence, the court was impressed by the absence of any prior criminal history and the defendant's willingness to plead guilty as charged.<sup>138</sup> The court directed the trial court "to decide how Kemp should serve those sixteen years, keeping the goal of monetary restitution to the Church in mind."<sup>139</sup>

In *Filice v. State*,<sup>140</sup> the court of appeals reduced a ten-year sentence for Class B felony rape to eight years.<sup>141</sup> The court seemed particularly impressed with the lack of any criminal history for the thirty-four-year-old defendant who had been a successful college professor.<sup>142</sup>

In *Westlake v. State*,<sup>143</sup> the court of appeals cut in half a fourteen-year sentence for Class B felony dealing and Class C felony neglect of a dependent.<sup>144</sup> Although the defendant had been dealing drugs for several months from a home where she lived with her six-year-old son, the court found her offenses

were not a continuation of a related criminal history and her character is unusually and extraordinarily mitigating. The combination of Westlake's previously undiagnosed bipolar disorder, her comprehensive

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131. *Id.* at 633-35.

132. 874 N.E.2d 382 (Ind. Ct. App. 2007).

133. *Id.* at 383.

134. *Id.* at 385.

135. *Id.* at 385-86.

136. 887 N.E.2d 102 (Ind. Ct. App. 2008).

137. *Id.* at 105.

138. *Id.* at 106.

139. *Id.*

140. 886 N.E.2d 24 (Ind. Ct. App. 2008).

141. *Id.* at 39-40.

142. *Id.* at 40.

143. 893 N.E.2d 769 (Ind. Ct. App. 2008).

144. *Id.* at 772-73.

response to treatment, and resulting stellar success in Tippecanoe County's excellent pre-conviction program lead us to the conclusion that her sentence is inappropriate.<sup>145</sup>

Two years of the seven-year revised sentence were suspended, and the five-year executed term was ordered served on community corrections.<sup>146</sup>

Not every defendant who sought a reduced sentence received one. In *Fonner v. State*,<sup>147</sup> a defendant who received the four-year advisory sentence for the Class C felony of operating a vehicle while privileges are forfeited for life did not challenge the length of the sentence but merely challenged the appropriateness of placement in the Department of Correction.<sup>148</sup> Although the location where a sentence is to be served may be challenged under Indiana Appellate Rule 7(B), the court observed "it will be quite difficult for a defendant to prevail on a claim that the placement of his or her sentence is inappropriate."<sup>149</sup> The court correctly observed that "trial courts know the feasibility of alternative placements in particular counties or communities."<sup>150</sup>

As *Fonner* suggests, defendants face an uphill battle in arguing that a Department of Correction sentence should be revised to a community corrections placement. A defendant who receives a split sentence between the Department of Correction and community corrections and seeks to reduce the Department of Correction portion of the sentence is less likely to face the same burden because there is no question the defendant qualifies for the alternative placement, as implicit in *Feeney*.<sup>151</sup>

3. *Conclusion.*—The court takes an especially hard look at consecutive sentences, especially when imposed in a case involving the same victim, such as a child molestation case. Here, the prosecutor has considerable discretion in charging and negotiating a plea, and the supreme court has gone a long way in leveling the field by often limiting sentences to a maximum term for a single count or advisory term for two consecutive counts.<sup>152</sup> As regards the character of the offender, Indiana courts have continued to be impressed by defendants with little or no criminal history, those who plead guilty for their offenses, and

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145. *Id.* at 772.

146. *Id.* at 772-73.

147. 876 N.E.2d 340 (Ind. Ct. App. 2007).

148. *Id.* at 343.

149. *Id.*

150. *Id.*

151. *See Feeney v. State*, 874 N.E.2d 382 (Ind. Ct. App. 2007); *see also Davis v. State*, 851 N.E.2d 1264, 1269 (Ind. Ct. App. 2006) (reducing sentence of four years at DOC followed by two years at community corrections to "four years with the time remaining on her sentence to be served through Community Corrections so that she may continue to work to provide for her children and to pay restitution to the victims").

152. *Serino v. State*, 798 N.E.2d 852, 857 (Ind. 2003) (referencing "muscular" charging decisions that may "create the theoretical possibility of very long sentences").

those suffering from a mental illness.<sup>153</sup> If a defendant falls into two or three of these categories, a maximum or near-maximum sentence is almost certain to be reduced.<sup>154</sup>

*D. Clarifying Credit Time Confusion: A Marion County Exception*

In *Robinson v. State*,<sup>155</sup> the Indiana Supreme Court adopted a presumption that “[s]entencing judgments that report only days spent in pre-sentence confinement and fail to expressly designate credit time earned shall be understood by courts and by the Department of Correction (DOC) automatically to award the number of credit time days equal to the number of pre-sentence confinement days.”<sup>156</sup> The court emphasized that a motion to correct an erroneous sentence may only arise out of information contained on the formal judgment of conviction—and not from an abstract of judgment.<sup>157</sup>

In *Neff v. State*,<sup>158</sup> the court carved out an exception for defendants challenging erroneous sentences in Marion County, where trial courts generally issue a DOC abstract and not a written judgment of conviction.<sup>159</sup> “[W]hen a defendant files a motion to correct an erroneous sentence in a county that does not issue judgments of conviction (we are currently aware only of Marion County), the trial court’s abstract of judgment will serve as an appropriate substitute for purposes of making the claim.”<sup>160</sup> Although *Neff* is certainly a necessary and welcome development for litigants in Marion County in the event they seek to challenge their sentence, it seems to give judges in Marion County a free pass to disregard statutes<sup>161</sup> or statewide court rules<sup>162</sup> simply because they have a “very high volume of criminal cases.”<sup>163</sup> One can hope the trend is not extended further—and never in areas where litigants would be disadvantaged as the result of special rules.

Finally, the court also included a helpful explanation of the proper method to calculate the earliest release date from DOC: “When an offender is sentenced and receives credit for time served, earned credit time, or both, that time is applied to the new sentence *immediately*, before application of prospective earned credit time, in order to determine the defendant’s earliest release date.”<sup>164</sup>

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153. See *supra* notes 115-46 and accompanying text.

154. See *supra* notes 115-46 and accompanying text; accord Schumm I, *supra* note 64, at 968-70.

155. 805 N.E.2d 783 (Ind. 2004).

156. *Id.* at 792.

157. *Id.* at 794.

158. 888 N.E.2d 1249 (Ind. 2008).

159. *Id.* at 1251.

160. *Id.*

161. See, e.g., IND. CODE §§ 35-38-2-3(a), -4(b) (2008).

162. See, e.g., IND. R. CRIM. P. 15.1.

163. *Neff*, 888 N.E.2d at 1251.

164. *Id.*



### III. DEVELOPMENTS OUTSIDE THE SENTENCING REALM

Beyond sentencing, published opinions also tackled issues including bail, jury selection, availability of interpreters, Internet crimes against children or police officers posing as children, and probation. This brief survey seeks to explore those issues that have had or are likely to have a significant impact on criminal cases—from beginning to end.

#### A. A Rare Bail Challenge

Both the Eighth Amendment to the U.S. Constitution and article 1, section 17 of the Indiana Constitution impose significant limitations on the setting of bail.<sup>165</sup> “Bail set at a figure higher than an amount reasonably calculated” to assure the presence of the accused “is ‘excessive’ under the Eighth Amendment.”<sup>166</sup> Fixing the amount of bail in each case “must be based upon standards relevant to the purpose of assuring the presence of that defendant.”<sup>167</sup> The Indiana Constitution expressly provides a right to bail “by sufficient sureties.”<sup>168</sup> This right is more expansive than that provided by the United States Constitution.<sup>169</sup> “The law confines the use of pre-trial detention to only one end—namely, that the criminal defendant be present for trial. This limitation is implicit in the concept of bail.”<sup>170</sup> Pretrial incarceration cannot be punitive, and accused persons are presumed innocent.<sup>171</sup>

Indiana Code section 35-33-8-4(b) lists several factors to be considered in setting bail.<sup>172</sup> A bail matrix or bail schedule, which are widely used in counties across the state, will seldom track these. In *Samm v. State*,<sup>173</sup> the court of appeals reiterated “[p]aramount considerations convince us that bail should be tailored to the individual in each circumstance. Bond schedules should serve only as a starting point for such considerations.”<sup>174</sup> Although the defendant submitted evidence on several of the statutory factors, the trial court relied primarily on the number of charges pending.<sup>175</sup> By “failing to acknowledge uncontroverted evidence on several” statutory factors, the trial court was held to have abused its

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165. See U.S. CONST. amend. VIII; IND. CONST. art. 1, § 17.

166. *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

167. *Id.*; accord *Hobbs v. Lindsey*, 162 N.E.2d 85, 88 (Ind. 1959) (“[T]he principal purpose of bail is the assurance of the accused party’s presence in court . . . . [B]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ . . . .”) (quoting *Boyle*, 342 U.S. at 3).

168. IND. CONST. art. 1 § 17.

169. *Ray v. State*, 679 N.E.2d 1364, 1366 (Ind. Ct. App. 1997); cf. U.S. CONST. amend. VIII.

170. *Brown v. State*, 322 N.E.2d 708, 712 (Ind. 1975) (citing IND. CONST. art. 1, § 17).

171. *Sherelis v. State*, 452 N.E.2d 411, 413 (Ind. Ct. App. 1983).

172. See IND. CODE § 35-33-8-4(b) (2008).

173. 893 N.E.2d 761 (Ind. Ct. App. 2008).

174. *Id.* at 766.

175. *Id.* at 768.

discretion.<sup>176</sup>

Counsel should be sure to make a record in a bail hearing that is grounded in the factors listed in Indiana Code section 35-33-8-4(b). Bail determinations are final, appealable judgments.<sup>177</sup> Rarely, however, do bail challenges make it to the court of appeals or supreme court. The standard timeline for record preparation and briefing generally takes more than six months,<sup>178</sup> and most cases go to trial in less time, making any challenge to bail moot. Moreover, seeking an expedited appeal is important to avoid a finding of mootness, although the court of appeals held in *Samm* that an exception to the mootness doctrine applied.<sup>179</sup>

Bail schedules are especially problematic for indigent defendants. The ultimate and salient determination is a binary one: Will the defendant be free on bail pending trial or remain incarcerated? Many indigent defendants can post no or very little bail money; therefore, it is especially important to give weight to the statutory factors of “ability to give bail” and “the source of funds or property to be used to post bail” to avoid jails filled with poor people charged with minor crimes.<sup>180</sup> Incarcerating such defendants, absent a showing they are not likely to appear in court, runs afoul not only of the presumption of innocence but also the constitutional guarantee of equal protection.<sup>181</sup> “In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant’s guilt or innocence . . . .”<sup>182</sup>

Finally, questions will likely surface in future cases as to the specific contours of the right to bail. The constitutional right to bail and statutory considerations do not specify a time limit for their enforcement, and it is often several hours or possibly one or more days before a judicial officer can review

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176. *Id.* Although bail schedules are used in many counties, the Vanderburgh County local rule, for example, appropriately provides that “[t]he Court shall consider factors found in IC 35-33-8-4 in setting appropriate bond in all cases.” VANDERBURGH CIRCUIT AND SUPERIOR COURT R. LR82-CR00-2.03(A), available at <http://www.in.gov/judiciary/localrules/current/vanderburgh-all-111208.pdf> (last visited Feb. 4, 2009).

177. *Bradley v. State*, 649 N.E.2d 100, 106 (Ind. 1995) (“The denial of bail is deemed a final judgment appealable immediately, without waiting for the final judgment following trial.”).

178. The Indiana Rules of Appellate Procedure provide the court reporter ninety days after the filing of the Notice of Appeal to prepare the transcript, which generally must be completed before the Appellant can begin working on his brief, which is due thirty days later. IND. R. APP. P. 11(B), 45(B). The Appellee then has thirty days to file its brief, before the Appellant has another fifteen days to file a reply brief under Rule 45(B). IND. R. APP. P. 45(B). The court of appeals then needs at least a few weeks, if not months, to issue a written opinion.

179. *Samm*, 893 N.E.2d at 765. Moreover, the court of appeals has previously decided, long after conviction, challenges involving bail issues without any mention of mootness. *See, e.g., Traylor v. State*, 817 N.E.2d 611, 625 (Ind. Ct. App. 2004); *Wertz v. State*, 771 N.E.2d 677, 680-82 (Ind. Ct. App. 2002).

180. IND. CODE § 35-33-8-4(b) (2008).

181. U.S. CONST. amend. XIV.

182. *Griffin v. Illinois*, 351 U.S. 12, 17-18 (1956).

bail. New statutes put restrictions on setting bail for persons charged with domestic violence<sup>183</sup> and certain sex offenders.<sup>184</sup>

*B. Jury Selection: The Batson Door Swings Both Ways*

Many lawyers think of *Batson v. Kentucky*<sup>185</sup> as prohibiting prosecutors from striking all African-American jurors, but Indiana cases make clear the *Batson* Rule is much broader. “[T]he Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges.”<sup>186</sup> The following analysis then applies:

First, the party contesting the peremptory challenge must make a prima facie showing of discrimination on the basis of race. Second, after the contesting party makes a prima facie showing of discrimination, the burden shifts to the party exercising its peremptory challenge to present a race-neutral explanation for using the challenge. Third, if a race-neutral explanation is proffered, the trial court must then decide whether the challenger has carried its burden of proving purposeful discrimination.<sup>187</sup>

In *Jeter v. State* defense counsel offered three race-neutral reasons for striking a white juror: “(1) the juror’s father was a police officer; (2) his grandfather had been a local attorney and judge of a municipal court; and (3) the juror responded ‘I guess not’ when asked if he could think of any murders that were not suitable for the death penalty.”<sup>188</sup> However, the trial court did not believe the stated explanation for challenging the juror and refused to allow the use of a peremptory challenge.<sup>189</sup> At the time defense counsel “moved to strike the juror, he had previously used his first nine peremptory challenges to exclude whites from the jury, especially white males. As a consequence, of the ten seated

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183. A new statute requiring a “cooling off” period of eight hours before a court may release a person arrested for a crime of domestic violence seems immune from attack. See IND. CODE §§ 35-33-1-1.7 (discussing the duty of facilities), 35-33-8-6.5 (2008) (discussing court’s duties).

184. During the 2008 session the General Assembly added Indiana Code section 35-33-8-3.5 to place restrictions on bail for persons charged with a sex or violent offense who are sexually violent predators under Indiana Code section 35-38-1-7.5. No bail is permitted under a bail hearing held within forty-eight hours of arrest. Although there seems to be little basis on which to challenge such a restriction for a recidivist sexual offender, language in the statute suggests it could also be applied simply to someone arrested for child molesting or child solicitation, regardless of prior status. This would appear to conflict with the constitutional right to bail and general bail statute, although the question remains whether being held without bail for forty-eight hours is an unconstitutional denial of bail (as opposed to a permissible delay in setting bail).

185. 476 U.S. 79 (1986).

186. *Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

187. *Jeter v. State*, 888 N.E.2d 1257, 1263 (Ind. 2008) (citing *Batson*, 476 U.S. at 96-97).

188. *Id.* at 1264.

189. *Id.*

jurors, none were white males.”<sup>190</sup> Based on this, the supreme court concluded the trial court’s ruling was not clearly erroneous.<sup>191</sup>

This case underscores that trial judges have considerable discretion in deciding whether to accept or reject the reasons for a challenge. Trial courts can reject the reasons given by the State when defendants raise a *Batson* challenge, although such rulings are unlikely to be appealed.<sup>192</sup>

### C. “Reasonable” Parental and Teacher Discipline

In *Willis v. State*,<sup>193</sup> the Indiana Supreme Court set aside a mother’s conviction for battery of her child based on the theory of reasonable parental discipline.<sup>194</sup> “To sustain a conviction for battery where a claim of parental privilege has been asserted, the State must prove that either: (1) the force the parent used was unreasonable or (2) the parent’s belief that such force was necessary to control her child and prevent misconduct was unreasonable.”<sup>195</sup> The court adopted the Restatement (Second) of Torts view: “A parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his [or her] child as he [or she] reasonably believes to be necessary for its proper control, training, or education.”<sup>196</sup> The following non-exhaustive factors should be weighed:

- (a) whether the actor is a parent;
- (b) the age, sex, and physical and mental condition of the child;
- (c) the nature of his offense and his apparent motive;
- (d) the influence of his example upon other children of the same family or group;
- (e) whether the force or confinement is reasonably necessary and appropriate to compel obedience to a proper command;
- (f) whether it is disproportionate to the offense, unnecessarily degrading, or likely to cause serious or permanent harm.<sup>197</sup>

In *Willis*, the child was eleven, and the court reasoned more severe discipline is appropriate for older children than younger ones.<sup>198</sup> The child had taken his mother’s clothes to school, sold them, and then lied about it, which the court found to be serious, especially because it was part of a pattern of similar

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190. *Id.* at 1265.

191. *Id.*

192. *See generally* IND. CODE § 35-38-2(4) (2008) (providing the State the right to appeal a reserved question of law, which is seldom exercised).

193. 888 N.E.2d 177 (Ind. 2008).

194. *Id.* at 184.

195. *Id.* at 182.

196. *Id.* (quoting and adopting RESTATEMENT (SECOND) OF TORTS § 147(1) (1965)).

197. *Id.*

198. *Id.* at 183.

behavior.<sup>199</sup> The mother had unsuccessfully tried progressive forms of discipline, such as grounding the child or withholding privileges, and considered the appropriate punishment for two days before the spanking.<sup>200</sup> The court concluded the five to seven swats on the buttocks, arm, and thigh with a belt or extension cord was not unreasonable, as it left only mild, temporary bruising the next day and did not require medical attention.<sup>201</sup>

The Indiana Court of Appeals had its first opportunity to apply *Willis* in *Matthew v. State*.<sup>202</sup> There, a mother struck a rebellious twelve year old with a closed fist and belt downstairs and then followed the child upstairs after he escaped.<sup>203</sup> Although the child had been verbally warned about his behavior and no permanent injuries resulted, the court upheld the conviction.<sup>204</sup> Chief Judge Baker dissented, finding the facts remarkably similar to *Willis*: the child was twelve years old, just one year older than the child in *Willis*, and progressive discipline had been employed. Chief Judge Baker thus believed ten blows with a hand and belt were not excessive.<sup>205</sup>

These cases are exceedingly fact sensitive, and the great amount of deference given factfinders seems somewhat diminished in *Willis*.<sup>206</sup> In light of that case, defendant may seek to have the case dismissed as a matter of law through a pretrial motion to dismiss to avoid a trial.<sup>207</sup> If the cases go to trial, the Restatement factors would seem helpful to a jury through an instruction, although the trend of the Indiana Supreme Court has been moving away from including language from appellate opinions in jury instructions.<sup>208</sup> Legislative action may occur as well. As an Associated Press editorial put it, “In a state that has a serious problem with violence against children, let us hope that a 4-1 decision by the Indiana Supreme Court did nothing to dissuade concerned observers from getting involved.”<sup>209</sup>

The court of appeals also sanctioned physical contact as part of reasonable teacher discipline. In *State v. Fettig*,<sup>210</sup> the court upheld the dismissal of a battery

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199. *Id.*

200. *Id.*

201. *Id.* at 183-84.

202. 892 N.E.2d 695 (Ind. Ct. App. 2008).

203. *Id.* at 696-97.

204. *Id.* at 699.

205. *Id.* at 701 (Baker, C.J., dissenting).

206. *Id.* at 701-02 (Baker, C.J., dissenting) (“Here—and in *Willis*—the factfinder concluded that the respective mothers’ actions went beyond the boundary of reasonableness, and I am uncomfortable with an appellate court second-guessing that conclusion as a matter of law. That said, it is evident that our Supreme Court has instructed us to do precisely that . . .”).

207. *Cf.* *State v. Fettig*, 884 N.E.2d 341 (Ind. Ct. App. 2008).

208. *See generally* Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 37 IND. L. REV. 1003, 1010-11 (2004) [hereinafter Schumm III].

209. *Children at Risk*, EVANSVILLE COURIER & PRESS, June 30, 2008, available at <http://www.courierpress.com/news/2008/jun/30/indiana-editorial-by-the-associated-press/>.

210. 884 N.E.2d 341 (Ind. Ct. App. 2008).

charge against a teacher who disciplined a student by grabbing her chin, which involved “no weapons, no closed fist, no repeated blows, no verbal abuse, and the only alleged injury being a stinging sensation.”<sup>211</sup> It relied on cases from the 1800s, which provoked a dissent that noted the “world has changed greatly since that time” and the whipping allowed in those cases would probably not be allowed today.<sup>212</sup>

#### *D. Confrontation Clause*

In *State v. Martin*,<sup>213</sup> the court of appeals held the trial court erred in finding pretrial statements made by a domestic violence victim testimonial and therefore inadmissible.<sup>214</sup> The statements were made minutes after police responded to a 911 call of a woman with blood coming from her mouth running from a vehicle.<sup>215</sup> The woman told police her boyfriend had struck her in the face in the car and then had driven off with her children.<sup>216</sup> She did not testify at trial, and the State sought to admit her statements to police.<sup>217</sup> Under *Davis v. Washington*,<sup>218</sup> the key inquiry is whether the statements were testimonial:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.<sup>219</sup>

The court in *Martin* found the statements made by the victim were not testimonial because (1) the declarant was describing events as they were actually happening, instead of past events; (2) the declarant was facing an ongoing emergency; (3) the nature of the police inquiry elicited statements necessary to be able to resolve the present emergency rather than simply to learn about past events; and (4) the lack of formality of the interview.<sup>220</sup>

The farther reaching issue brewing around the Confrontation Clause is whether a forensic analyst’s lab report prepared for use in criminal prosecution is testimonial and therefore subject to cross-examination under the Sixth

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211. *Id.* at 346.

212. *Id.* at 347 (Kirsch, J., dissenting).

213. 885 N.E.2d 18 (Ind. Ct. App. 2008).

214. *Id.* at 21.

215. *Id.* at 19.

216. *Id.*

217. *Id.*

218. 547 U.S. 813 (2006).

219. *Id.* at 822.

220. *Martin*, 885 N.E.2d at 20-21.

Amendment.<sup>221</sup> The Indiana Court of Appeals has issued seemingly contradictory opinions,<sup>222</sup> and the matter is pending before the Indiana Supreme Court.

*E. No New Oath Required for Officers*

The biggest non-issue of the survey period is one that generated significant media attention. The Indianapolis Metropolitan Police Department (IMPD) was created by statute and local ordinance to assume law enforcement responsibilities for Marion County beginning January 1, 2007.<sup>223</sup> It replaced the Indianapolis Police Department (IPD) and Marion County Sheriff Department (MCSD).<sup>224</sup> A defendant arrested by IMPD officers challenged her arrest in 2007 on the grounds that the arresting officer, although sworn as an IPD or MCSD officer, had not been re-sworn as an IMPD officer.<sup>225</sup> The challenge was grounded in large part in the statutory requirement that all law enforcement officers take an oath before assuming their official duties.<sup>226</sup> Most judges quickly rejected such challenges, but one judge granted the defendant's motion to suppress all evidence from her traffic stop and sua sponte dismissed the case, concluding the arresting officer was not authorized by statute or the constitution to enforce the laws of Indiana.<sup>227</sup> The Indiana Supreme Court reversed, noting that the statute did not "impose any additional requirements on officers, such as passing a new examination or re-swearing," and the ordinance "declared that all members of the IPD and MCSD

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221. Petition for Writ of Certiorari at 9, *Melendez-Diaz v. Massachusetts*, No. 07-591, 2007 WL 3252033 (U.S. Oct. 26, 2007) (petition granted, 128 S. Ct. 1647 (2008)).

222. In *Pendergrass v. State*, 889 N.E.2d 861 (Ind. Ct. App.), *vacated by* 898 N.E.2d 1219 (Ind. 2008), the court of appeals addressed the admissibility of "test results" from DNA analysis offered through the supervisor of the technician who performed the analysis and prepared the report. The court rejected a *Crawford v. Washington*, 541 U.S. 36 (2004), challenge because "the Confrontation Clause does not apply to statements admitted for reasons other than proving the truth of the matter asserted" and the court found the exhibits were not offered to prove molestation but rather "merely provided context" for the expert's opinion. *Id.* at 869. Weeks later, in *Jackson v. State*, 891 N.E.2d 657 (Ind. Ct. App. 2008), another panel of the court of appeals found a Sixth Amendment Confrontation Clause violation when the trial court admitted a lab report prepared by a technician who did not testify at trial. The court sided with those courts which have found such reports testimonial on the grounds that they are (1) created by a law enforcement agency (2) for the prosecution (3) for the sole purpose of proving an element of a charged crime. *Id.* at 661. The ability to cross-examine the technician's supervisor is not a sufficient substitute for the right to confront and cross-examine the technician—nor does the business record exception salvage the testimony. *Id.* at 662.

223. *State v. Oddi-Smith*, 878 N.E.2d 1245, 1247 (Ind. 2008).

224. *Id.*

225. *Id.*

226. *Id.* at 1247-48 (citing IND. CODE § 5-4-1-1(a) (2006)).

227. *Id.* at 1247.

automatically became members of the IMPD.”<sup>228</sup> The court concluded “the arresting officer was recruited, trained, and sworn as an IPD officer and that he took all that with him to the IMPD.”<sup>229</sup> The suppression and dismissal were reversed, and the case was remanded for a trial on the merits.<sup>230</sup>

*F. Non-Indigent Defendants: BYOT (Bring Your Own Translator)*

In *Arrieta v. State*,<sup>231</sup> the Indiana Supreme Court provided a thorough review of the history and procedures for use of interpreters in Indiana courts.<sup>232</sup> It reiterated that indigent defendants are entitled to interpreters at public expense both for the proceedings and for the defendant.<sup>233</sup> When a defendant is not indigent, however, the court crafted a different rule. The court first held that “proceedings interpreters,” or those who translate non-English testimony from the witness stand, must be provided at public expense.<sup>234</sup> “Just as a trial cannot proceed without a judge or bailiff, an English-speaking court cannot consider non-English testimony without an interpreter.”<sup>235</sup> However, the court differentiated solvent defendants by stating they are not entitled to “defense interpreters”—those who interpret the trial for the defendant and help him communicate with his lawyer—at public expense, just as a solvent defendant is not entitled to court-appointed counsel.<sup>236</sup>

Although *Arrieta* sets a clear rule for these two types of interpreters, it does not provide much guidance to trial courts in deciding whether a defendant is financially able to hire an interpreter. Rather, it simply concludes that *Arrieta*, who posted a \$50,000 bond and hired his own lawyer, was required to “present evidence contradicting his ability to pay for a defense interpreter.”<sup>237</sup> In future cases, the trial court must make an indigency determination, just as it does for counsel, “based on a thorough examination of the defendant’s total financial picture as is practical, and not on a superficial examination of income and ownership of property.”<sup>238</sup>

In *Gado v. State*,<sup>239</sup> the court of appeals confronted a different set of circumstances but nevertheless upheld the denial of an interpreter.<sup>240</sup> Although

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228. *Id.* at 1248-49.

229. *Id.* at 1249.

230. *Id.*

231. 878 N.E.2d 1238 (Ind. 2008).

232. *Id.* at 1240-44.

233. *Id.* at 1232-44.

234. *Id.* at 1245.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 1245 n.10 (internal quotation marks omitted) (quoting *Lamonte v. State*, 839 N.E.2d 172, 176-77 (Ind. Ct. App. 2005)).

239. 882 N.E.2d 827 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 49 (Ind. 2008).

240. *Id.* at 831.



the defendant sought an interpreter of Djerma, a rare language for which it is difficult to find interpreters, the court had interacted with the defendant in English several times and relied on evidence that the defendant had previously conversed with a witness many times in English.<sup>241</sup>

*G. Online Child Solicitation and Attempted Sexual Misconduct*

Millions of television viewers have become accustomed to seeing online chats with would-be children end with the suspect appearing at a house to meet *To Catch a Predator* host Chris Hansen.<sup>242</sup> However, what if an adult engages in a sexually charged online chat with an officer pretending to be a child online but never sets up a meeting? In *Kuypers v. State*,<sup>243</sup> the court of appeals made clear “[n]either a meeting nor an immediate request [to meet] is necessary to complete the crime of child solicitation because it is the mere exposure of children to such solicitations that the statute seeks to avoid.”<sup>244</sup> *Kuypers* addressed only a challenge to the sufficiency of the evidence and focused on the statutory definition of the term “solicit,” which means “to command, authorize, urge, incite, request, or advise an individual” to engage in a sex act.<sup>245</sup> *Kuypers* seemingly gives the green light to law enforcement officers and prosecutors to obtain records from Internet service providers to track down those who engage in such sexually charged chats. Based on these records, law enforcement may then secure a warrant to search suspects’ computers, if not arrest them.<sup>246</sup>

In *Aplin v. State*,<sup>247</sup> the court reversed a conviction for attempted sexual misconduct with a minor that resulted from a man chatting with a detective pretending to be a fifteen-year-old girl (“glitterkatie2010”) online and then driving to an arranged meeting for a sexual encounter.<sup>248</sup> Although the court affirmed the child solicitation conviction, “whereby the State need not prove the actual age of the victim but may prove the solicitor’s belief that the solicitee is a minor,”<sup>249</sup> sexual misconduct with a minor requires an actual minor aged fourteen or fifteen—not an adult pretending to be a child.<sup>250</sup> The problem with

241. *Id.*

242. See generally Brian Stelter, “*To Catch a Predator*” Is Falling Prey to Advertisers’ Sensibilities, N.Y. TIMES, Aug. 27, 2007, at C1.

243. 878 N.E.2d 896 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 42 (Ind. 2008).

244. *Id.* at 899 (internal quotations omitted).

245. *Id.* at 898 (quoting IND. CODE § 35-42-4-6(a) (2006)).

246. No claim was raised about the possible vagueness of this statute, i.e., whether the statute defines the offense with “sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Healthscript v. State*, 770 N.E.2d 810, 815-16 (Ind. 2002) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

247. 889 N.E.2d 882 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1231 (Ind. 2008).

248. *Id.* at 883.

249. *Id.* at 884-85.

250. *Id.* at 884. Any future attempted sexual misconduct or attempted child molest

using mere speech as a substantial step for a crime was aptly summarized in a recent opinion from Judge Posner of the Seventh Circuit:

Treating speech . . . as the “substantial step” would abolish any requirement of a substantial step. It would imply that if *X* says to *Y*, “I’m planning to rob a bank,” *X* has committed the crime of attempted bank robbery, even though *X* says such things often and never acts. The requirement of proving a substantial step serves to distinguish people who pose real threats from those who are all hot air; in the case of Gladish, hot air is all the record shows.<sup>251</sup>

#### *H. Crime or Not a Crime?*

Challenges to the sufficiency of the evidence are generally regarded as a losing cause. If a jury or judge finds a defendant guilty, the standard of review for reversing the conviction is a high hurdle to clear.<sup>252</sup> As the following cases demonstrate, though, Indiana’s appellate courts do reverse convictions based on insufficient evidence. This often occurs in opinions that are written in ways that suggest the issue is a legal one with broader applicability than the facts of the particular case.

In *Henley v. State*,<sup>253</sup> the supreme court found insufficient evidence to uphold

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prosecutions could presumably be dismissed based on *Aplin* and prior case law if: (1) no victim under sixteen is involved or (2) the defendant merely drives to a meeting point, because driving to meet is not a substantial step. In *State v. Kemp*, 753 N.E.2d 47 (Ind. Ct. App. 2001), the court of appeals concluded:

[T]he State alleged in its charging information that Kemp had committed a substantial step toward the offense of child molesting when he agreed to meet “Brittney4u2” at a restaurant parking lot, drove there, and brought some condoms with him. Under these circumstances, we observe that the facts alleged in the information do not reach the level of an overt act leading to the commission of child molesting. At most, such allegations only reach the level of preparing or planning to commit an offense. Were we to conclude otherwise, there would be no limit on the reach of “attempt” crimes. As a result, we conclude that the trial court properly granted Kemp’s motion to dismiss the two child molesting counts.

*Id.* at 51 (citation omitted).

251. *United States v. Gladish*, 536 F.3d 646, 650 (7th Cir. 2008).

252. *See generally* *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005) (“Upon a challenge to the sufficiency of evidence to support a conviction, a reviewing court does not reweigh the evidence or judge the credibility of the witnesses, and respects ‘the jury’s exclusive province to weigh conflicting evidence.’ We have often emphasized that appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. Expressed another way, we have stated that appellate courts must affirm ‘if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.’”) (footnotes omitted).

253. 881 N.E.2d 639 (Ind. 2008).

an attempted murder conviction.<sup>254</sup> In *Henley*, the defendant fired his gun in the dark toward a large dog he believed was attacking him. There was no evidence that he was pointing his firearm at a police officer when he fired it.<sup>255</sup> The court included a helpful string cite of distinguishable cases where evidence of attempted murder has been found sufficient:

*Shelton v. State*, 602 N.E.2d 1017, 1021 (Ind. 1992) (Defendant pointed handgun at victim and shot him twice from a distance of twelve and thirty feet.); *Davis v. State*, 558 N.E.2d 811, 811 (Ind. 1990) (Defendant ran from police, turned, and fired a shot which struck an automobile directly behind the police officer.); *Parks v. State*, 513 N.E.2d 170, 171 (Ind. 1987) (Defendant pointed a loaded shotgun at the officer's midsection and said, "You're dead."); *Brumbaugh v. State*, 491 N.E.2d 983, 984 (Ind. 1986) (Defendant fired a shotgun at a police helicopter and an officer testified that a shot "whizzed" by his head.); *Conley v. State*, 445 N.E.2d 103, 105 (Ind. 1983) (Defendant fired at police officer striking the radiator of the patrol car that acted as shield.).<sup>256</sup>

In *A.B. v. State*,<sup>257</sup> the supreme court vacated several harassment adjudications against a juvenile who posted derogatory statements about a middle school principal.<sup>258</sup> Three adjudications were vacated because the messages were part of a "private profile" site, viewable only by those users accepted as "friends."<sup>259</sup> The principal gained access to the site only through a student during his investigation. Therefore, there was no evidence the respondent expected the principal to see the messages on the private site.<sup>260</sup> Although other comments were posted on a "group" page, the court found insufficient proof of "no intent of legitimate communication" because the messages merely criticized the principal's earlier disciplinary action.<sup>261</sup>

In *Scruggs v. State*,<sup>262</sup> the court of appeals reversed a conviction for neglect of a dependent based on evidence that a mother left her seven-year-old son at home alone for as long as three hours while running an errand.<sup>263</sup> The court reiterated that a neglect conviction requires exposing a child to an actual and appreciable danger to life or health.<sup>264</sup> Although the defendant may have demonstrated "bad judgment," the State did not prove a "subjective awareness

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254. *Id.* at 652-53.

255. *Id.* at 652.

256. *Id.* at 653.

257. 885 N.E.2d 1223 (Ind. 2008).

258. *Id.* at 1228.

259. *Id.* at 1227.

260. *Id.*

261. *Id.*

262. 883 N.E.2d 189 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1221 (Ind. 2008).

263. *Id.* at 191.

264. *Id.*

of a high probability that she had placed [the child] in a dangerous situation.”<sup>265</sup>

Under Indiana law, stalking requires that a defendant (1) knowingly or intentionally (2) engaged in a course of conduct involving repeated or continuing harassment of the victim, (3) that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened, and (4) that actually caused the victim to feel terrorized, frightened, intimidated, or threatened.<sup>266</sup> Stalking does not include statutorily or constitutionally protected activity.<sup>267</sup> In *VanHorn v. State*,<sup>268</sup> the charged conduct was merely parking near the victim’s house on four separate occasions and looking at the victim’s house through binoculars on two of those occasions.<sup>269</sup> In finding insufficient evidence, the court emphasized the due process right to be on a public street and focused on the absence of a protective order, which would have given the defendant notice that his conduct was impermissible.<sup>270</sup>

In *Bell v. State*,<sup>271</sup> the court of appeals reduced three counts of Class A felony dealing to Class B felonies based on Indiana Code section 35-48-4-16(c).<sup>272</sup> That statute creates a defense when a defendant charged with a drug offense is within 1,000 feet of a park or other location “at the request or suggestion of . . . an agent of a law enforcement officer.”<sup>273</sup> In *Bell*, detectives directed a confidential informant (CI) to call the defendant to arrange to purchase drugs.<sup>274</sup> The CI asked the defendant to come to his apartment, which was across the street from a park. The court rejected the State’s argument that the defendant “was free to drive to another location to conduct the drug deal” and that there was no evidence he was “tricked” into selling drugs within 1,000 feet of a park.<sup>275</sup>

Public intoxication convictions have long been upheld against drunk passengers in vehicles on public roads. Not surprisingly, in *Jones v. State*,<sup>276</sup> the court of appeals reversed a public intoxication conviction against a woman who was sitting in a vehicle parked on private property; no one saw her in an intoxicated state in a public place.<sup>277</sup> In a footnote, however, the court questioned

whether it serves the purpose of the statute to convict persons of public intoxication who are passengers in a private vehicle traveling on a public road . . . . It also is difficult to perceive the public policy behind

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265. *Id.*

266. IND. CODE § 35-45-10-1 (2008).

267. *Id.*

268. 889 N.E.2d 908 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1225 (Ind. 2008).

269. *Id.* at 911.

270. *Id.* at 912-14.

271. 881 N.E.2d 1080 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 48 (Ind. 2008).

272. *Id.* at 1086-88.

273. *Id.* at 1086 (quoting IND. CODE § 35-48-4-16(c) (2006)).

274. *Id.*

275. *Id.* at 1086-87.

276. 881 N.E.2d 1095 (Ind. Ct. App. 2008).

277. *Id.* at 1098.

criminalizing riding in (as opposed to driving) a private vehicle in a state of intoxication. In fact, perhaps the better public policy would be to encourage persons who find themselves intoxicated to ride in a vehicle to a private place without fear of being prosecuted for a crime.<sup>278</sup>

Although dicta, the footnote in *Jones* provides a strong argument for an intoxicated passenger to challenge a public intoxication conviction in the future.

In other cases, however, the court found sufficient evidence in opinions that could apply fairly broadly beyond the narrow facts of the cases. In *Nash v. State*,<sup>279</sup> an HIV-positive inmate threw a cup of his urine and excrement at a nurse who was passing by his cell; it landed on her shoes.<sup>280</sup> He was charged with battery by body waste, which requires placing body fluid or waste on a “corrections officer.”<sup>281</sup> Indiana Code section 35-42-2-6(a) defines a “corrections officer” to include “persons employed by (1) the department of correction; (2) a law enforcement agency; (3) a probation department; (4) a county jail; or (5) a circuit, superior, county, probate, city, or town court.”<sup>282</sup> Although the nurse was employed by a staffing agency and not the DOC, the court nevertheless upheld the conviction based on who it believed the legislature “intended” to protect.<sup>283</sup>

In *Zitlaw v. State*,<sup>284</sup> the court of appeals addressed several challenges to a charge of performance harmful to minors. Indiana Code section 35-49-3-3(5) criminalizes “engag[ing] in or conduct[ing] a performance that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by the minor’s parent or guardian.”<sup>285</sup> The offense is a Class D felony, but there is very little case law about it.

The court of appeals’s majority in the 2-1 decision affirmed the denial of the motion to dismiss.<sup>286</sup> The court reasoned the statute merely requires that children have “access” to the area; there need not be actual children anywhere nearby.<sup>287</sup> Judge Riley dissented, believing that the statute requires “the actual presence of

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278. *Id.* at 1098 n.2.

279. 881 N.E.2d 1060 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 49 (Ind. 2008).

280. *Id.* at 1062.

281. *Id.* (citing IND. CODE § 35-42-2-6(a), (c) (2008)).

282. IND. CODE § 35-42-2-6(a) (2008).

283. *Nash*, 881 N.E.2d at 1063-64. *Nash* seems to conflict with Indiana Supreme Court precedent, which has emphasized that penal statutes must be strictly construed against the State. For example, the court recently held that a bus driver working as an independent contractor for a school was not a “child care worker” under the child seduction statute. *Smith v. State*, 867 N.E.2d 1286, 1287-89 (Ind. 2007) (“A long-cherished principle of the American justice system is that a citizen may not be prosecuted for a crime without clearly falling within the statutory language defining the crime.”).

284. 880 N.E.2d 724 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 45 (Ind. 2008). This author was co-counsel for Mr. Zitlaw on appeal.

285. IND. CODE § 35-49-3-3(5) (2006).

286. *Zitlaw*, 880 N.E.2d at 732.

287. *Id.*

minors” and therefore any information would need to allege the name of at least one minor who saw or heard the performance and was unaccompanied by a parent or guardian.<sup>288</sup> She also expressed concern that, for example, a married couple having sex in a tent in the wilderness could be prosecuted under the majority’s interpretation.<sup>289</sup>

The court of appeals’s interpretation wholly writes the term “minor”—in its many uses—out of the statute. Although one part of the statute mentions areas where minors have “access,” several other parts mention performances “before minors” or performances harmful “to minors.”<sup>290</sup> Although the supreme court denied transfer (3-2), the opinion is difficult to reconcile with recent authority interpreting criminal statutes strictly against the State.<sup>291</sup> Finally, as discussed in the American Civil Liberties Union of Indiana amicus brief in support of Zitlaw’s petition, the court of appeals’s interpretation would criminalize a vast array of protected activity, including (1) “a married couple that engages in sex behind closed doors in the marital bedroom, to which children have access, although they are downstairs watching a movie,” (2) “two adults view[ing] a pornographic, but not obscene, picture in a park, where no children are actually present,” and (3) adults “sitting in a private home, after putting the children, including visiting children not related to the adults, to sleep, engaging in a discussion of the merits of American as opposed to English erotic, but not obscene, literature while reading aloud lascivious portions” of classic novels.<sup>292</sup>

In *M.S. v. State*,<sup>293</sup> a juvenile was found delinquent for driving a vehicle that was playing a “DVD depicting nudity and sexual conduct” on a fifteen-inch screen mounted in the rearview window.<sup>294</sup> Adhering to *Zitlaw*, which held “[u]nder the clear and unambiguous definition of ‘access,’ the minor need not be present,”<sup>295</sup> the court affirmed the adjudication because the public street was an area in which minors had “both auditory and visual access.”<sup>296</sup>

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288. *Id.* at 733 (Riley, J., dissenting).

289. *Id.*

290. IND. CODE § 35-49-3-3 (2006).

291. *See, e.g., Brown v. State*, 868 N.E.2d 464, 470 (Ind. 2007) (concluding that identity deception requires a person to use the identifying information of an existing human being); *Smith v. State*, 867 N.E.2d 1286, 1289 (Ind. 2007) (holding a bus driver working as an independent contractor is not a “child care worker”).

292. Brief for ACLU of Indiana as Amicus Curiae Supporting Petitioner, *Zitlaw v. State*, 880 N.E.2d 724 (Ind. Ct. App. 2008), (No. 29A05-0701-CR-35, at 5-6), 2008 WL 1994264; *see also supra* notes 58-63 and accompanying text (discussing *Big Hat Books* case).

293. 889 N.E.2d 900 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1225 (Ind. 2008).

294. *Id.* at 901.

295. *Id.* at 903.

296. *Id.*

*I. Plea Agreement Views*

*Owens v. State*<sup>297</sup> is an unusual case in which the prosecutor included the following language regarding sentence modifications in the plea agreement:

The parties agree that this Plea Agreement will not operate as a waiver of Defendant's right to seek sentence modification within 365 days of sentencing pursuant to I.C. 35-38-1-17(a), and the Prosecuting Attorney consents and approves further filings of petitions for sentence modification thereafter under I.C. 35-38-1-17(b), provided, however, nothing in this agreement shall foreclose the State of Indiana from objecting to any modification of sentence.<sup>298</sup>

The court of appeals, in a split decision, concluded the "only sensible interpretation of the 'consents and approves' language is an interpretation meaning that the State waived its right to approve Owens' petition for sentence modification and has not forfeited its right to object to such a modification."<sup>299</sup> Therefore, because the trial court concluded it had no discretion to rule on the motion without the State's consent, the court reversed and remanded for the trial court to exercise its discretion in ruling on the motion.<sup>300</sup>

*Tubbs v. State*<sup>301</sup> reiterates that, unless a plea agreement affords the court discretion in fixing the terms of probation, trial courts may not impose conditions that "materially add to the punitive obligation."<sup>302</sup> There, the plea agreement included the following two provisions: (1) "That the court may impose whatever sentences it deems appropriate except said sentences shall be served concurrently with each other and the executed portion, if any, shall not exceed nine years. Both sides may argue sentencing" and (2) "[t]hat, as a condition for any suspended sentence or probation, the defendant shall testify truthfully if called upon to do so."<sup>303</sup> The defendant was sentenced to nine years at DOC followed by three years at Community Corrections.<sup>304</sup> The court of appeals vacated the three-year community correction sentence because it was "an additional substantial obligation of a punitive nature not authorized by the plea agreement."<sup>305</sup>

Finally, Indiana Code section 35-35-1-4(b) is seldom used but is an important vehicle to relief if new facts or legal developments ("any fair and just reason") come to light after a guilty plea but before sentencing.<sup>306</sup> A motion for relief

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297. 886 N.E.2d 64 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1216 (Ind. 2008).

298. *Id.* at 66.

299. *Id.* at 67.

300. *Id.* at 68.

301. 888 N.E.2d 814 (Ind. Ct. App. 2008).

302. *Id.* at 816 (quoting *Freije v. State*, 709 N.E.2d 323, 325 (Ind. 1999)).

303. *Id.* at 817.

304. *Id.* at 815.

305. *Id.* at 817.

306. IND. CODE § 35-35-1-4(b) (2008).

from a guilty plea under that statute must be in writing, include specific facts in support of the relief desired, and be verified.<sup>307</sup> In *Craig v. State*,<sup>308</sup> the court of appeals held the defendant should have been allowed to withdraw his guilty plea to an habitual offender enhancement entered into after a jury found him to be a serious violent felon (SVF) but before sentencing.<sup>309</sup> The request in *Craig* was made shortly after the Indiana Supreme Court held in *Mills v. State*<sup>310</sup> that the same felony cannot be used both to establish a defendant as a SVF and as one of the predicate felonies for the habitual offender enhancement.<sup>311</sup> Based on this favorable change in the law, the court held the defendant should have been allowed to withdraw his guilty plea.<sup>312</sup>

### *J. Jury Instructions*

Both the supreme court and court of appeals issued important decisions regarding jury instructions for a number of different situations and offenses.

In *McDowell v. State*,<sup>313</sup> the Indiana Supreme Court found the following instruction improper in a voluntary manslaughter case: “The intent to kill may be inferred from evidence that a mortal wound was inflicted upon an unarmed person with a deadly weapon in the hands of the accused.”<sup>314</sup> Voluntary manslaughter requires the (a) knowing or intentional (b) killing (c) of another person (d) by means of a deadly weapon.<sup>315</sup> The court reversed because the trial court’s instruction alleviated the State of its obligation to prove the required intent element.<sup>316</sup>

In *Watts v. State*,<sup>317</sup> the supreme court made clear that a voluntary manslaughter instruction cannot be given over the defendant’s objection when there is no evidence of sudden heat.<sup>318</sup> Defendants may pursue an “all-or-nothing” (murder or acquittal) strategy and adding an intermediate option “deprives the defendant of the opportunity to pursue a legitimate trial strategy.”<sup>319</sup>

In *Harris v. State*,<sup>320</sup> the court of appeals held that trial courts must instruct juries that a specific intent to kill is required in an attempted voluntary

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307. *Id.*

308. 883 N.E.2d 218 (Ind. Ct. App. 2008).

309. *Id.* at 224.

310. 868 N.E.2d 446 (Ind. 2007).

311. *Id.* at 450.

312. *Craig*, 883 N.E.2d at 222.

313. 885 N.E.2d 1260 (Ind. 2008).

314. *Id.* at 1261-62.

315. IND. CODE § 35-42-1-3(a) (2008).

316. *McDowell*, 885 N.E.2d at 1264.

317. 885 N.E.2d 1228 (Ind. 2008).

318. *Id.* at 1233.

319. *Id.*

320. 884 N.E.2d 399 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 53 (Ind. 2008).



manslaughter trial.<sup>321</sup> Although intent to kill has long been required in attempted murder cases, the Indiana Supreme Court appeared to limit the requirement of specific intent to attempted murder cases in *Richeson v. State*,<sup>322</sup> which held no specific intent was required in a battery case.<sup>323</sup> The holding of *Harris* is a narrow one because attempted voluntary manslaughter is the same class felony as attempted murder and involves the same “intent ambiguity” as attempted murder.<sup>324</sup>

In *Surber v. State*,<sup>325</sup> the court of appeals suggested the following jury instruction may have been inappropriate in a child molesting case: “Any sexual penetration, however slight, may be sufficient to complete the crime of child molestation.”<sup>326</sup> The mere existence of language in an appellate opinion does not make it appropriate for a jury instruction.<sup>327</sup> Adding language reminding the jury that “the other elements are proved” may be more appropriate in such an instruction.<sup>328</sup> Nevertheless, the court found the instructions as a whole did not mislead the jury.<sup>329</sup>

The court of appeals confronted the propriety of jury instruction in rape cases in which the victim was under the influence of alcohol or drugs. In *Newbill v. State*,<sup>330</sup> the court of appeals disapproved an instruction that told the jury to focus on the “victim’s perspective, not the assailant’s” in determining forceful compulsion.<sup>331</sup> The court concluded instead “the ‘perspective’ for a jury’s consideration of the evidence of forceful compulsion in a rape trial might better be described as either the ‘objective perspective of the victim’ or the ‘reasonable perspective of the victim.’”<sup>332</sup> In *Gale v. State*,<sup>333</sup> the court reiterated that defendants in such cases must be aware of a high probability that the victim was unaware that sexual intercourse was occurring.<sup>334</sup>

#### K. Probation

Finally, the appellate courts issued several opinions regarding various aspects of probation, including the requisite notice, the contours of “strict compliance” probation, and restitution.

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321. *Id.* at 404.

322. 704 N.E.2d 1008 (Ind. 1998).

323. *Harris*, 883 N.E.2d at 403-04.

324. *Id.*

325. 884 N.E.2d 856 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 49 (Ind. 2008).

326. *Id.* at 886-87.

327. *Id.* at 867; *accord* Schumm III, *supra* note 208, at 1010-11.

328. *Surber*, 884 N.E.2d at 867.

329. *Id.* at 868.

330. 884 N.E.2d 383 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 51 (Ind. 2008).

331. *Id.* at 393.

332. *Id.*

333. 882 N.E.2d 808 (Ind. Ct. App. 2008).

334. *Id.* at 816.

In *Hunter v. State*,<sup>335</sup> the supreme court held that “contact” as used in standard sex offender probation conditions “lacked sufficient clarity to provide the defendant with fair notice that the conduct at issue would constitute a violation of probation.”<sup>336</sup> There, the defendant was working inside his sister’s mobile home on several occasions when her children returned home from school. He immediately packed up his tools and left, not interacting in any way with the children. The court rejected the State’s argument that merely being in the presence of children qualified as “contact.”<sup>337</sup>

The opinion seems to suggest that trial courts could cure the vagueness problem by rewording the conditions of probation to include a broader definition similar to the one urged by the State; the defendant would then seemingly have clear notice. However, this may create the problem noted in *Piercefield v. State*,<sup>338</sup> which held that restrictions on incidental contact are overly broad.<sup>339</sup> *Piercefield* was remanded to revise the condition to prohibit the defendant from “being alone with or initiating contact” with children.<sup>340</sup>

In *Woods v. State*,<sup>341</sup> the trial court denied a defendant on “strict compliance” probation an opportunity to explain the violations.<sup>342</sup> The Indiana Supreme Court concluded “the very notion that violation of a probationary term will result in revocation no matter the reason is constitutionally suspect.”<sup>343</sup> A defendant may have failed to pay probation fees because he was unable to pay or failed a drug test because of drugs prescribed by his physician. Even with “strict compliance” probation, due process requires that a defendant be given the opportunity to explain why even a “final chance” is deserving of further consideration.<sup>344</sup>

Both the supreme court and court of appeals reiterated some important

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335. 883 N.E.2d 1161 (Ind. 2008).

336. *Id.* at 1164.

337. *Id.* Following *Hunter*, in *Richardson v. State*, 890 N.E.2d 766 (Ind. Ct. App. 2008), the court of appeals reiterated that probation conditions must provide “sufficient clarity to provide the defendant with fair notice that the conduct at issue would constitute a violation of probation.” *Id.* at 769 (quoting *Hunter*, 883 N.E.2d at 1161). Specifically, the court concluded the defendant had reported within three working days as required when he called his probation officer on a Wednesday after his release on a Friday. The court further found that he could not be found in violation for living with his parents in Kentucky when he had not been advised of any travel restrictions. *Id.* at 768-69.

338. 877 N.E.2d 1213 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 34 (Ind. 2008).

339. *Id.* at 1219.

340. *Id.*

341. 892 N.E.2d 637 (Ind. 2008).

342. *Id.* at 641.

343. *Id.*

344. *Id.* Although *Woods* announces an important rule for future cases, the revocation of probation was nevertheless affirmed because the defendant made no offer of proof that would have enabled “both the trial court and the appellate court to determine the admissibility of the testimony and the prejudice which might result if the evidence is excluded.” *Id.* at 641-42 (quoting *Wiseheart v. State*, 491 N.E.2d 985, 991 (Ind. 1986)).

principles regarding restitution. In *Pearson v. State*,<sup>345</sup> the Indiana Supreme Court held that when a trial court orders restitution as a condition of probation or a suspended sentence, it must inquire into the defendant's ability to pay.<sup>346</sup> This is necessary to prevent indigent defendants from being incarcerated because of their inability to pay.<sup>347</sup> When restitution is ordered as part of an executed sentence, however, the trial court does not need to inquire into the defendant's ability to pay.<sup>348</sup> Restitution then is merely a money judgment, and a defendant cannot be imprisoned for non-payment.<sup>349</sup>

The probation statutes impose limitations on restitution. For crimes involving harm to property, a trial court "shall base its restitution order upon a consideration of . . . property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate)."<sup>350</sup> In *Rich v. State*,<sup>351</sup> the court of appeals reasoned in a burglary case that the "break-in damaged many things; however, a security system was not one of them."<sup>352</sup> The trial court could not order the defendant to pay for a new security system. Because the victims owned no security system, "their installation of a security system is not a 'repair' to their home, but an upgrade or improvement. Indeed, the victims' home is now protected from future, unrelated break-ins, and their home is in a better condition than before Rich's break-in."<sup>353</sup>

In *Lohmiller v. State*,<sup>354</sup> the court of appeals vacated a \$25,000 restitution order payable to the county general fund against a defendant who had been employed as a county nurse before being convicted of forgery and practicing nursing without a license.<sup>355</sup> Restitution awards must be based on the amount of actual loss suffered by a victim, which may only be determined by the presentation of evidence.<sup>356</sup> The order was improper there because the State had not argued the county was a victim, nor had it submitted any evidence of actual damages.<sup>357</sup>

Finally, in *Miller v. State*,<sup>358</sup> the court of appeals reiterated that trial courts may not order payment of money as a condition of probation without inquiring

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345. 883 N.E.2d 770 (Ind. 2008).

346. *Id.* at 772.

347. *Id.* at 773.

348. *Id.*

349. *Id.*

350. IND. CODE § 35-50-5-3(a) (2008).

351. 890 N.E.2d 44 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1223 (Ind. 2008).

352. *Id.* at 52.

353. *Id.*

354. 884 N.E.2d 903 (Ind. Ct. App. 2008).

355. *Id.* at 916.

356. *Id.*

357. *Id.* at 917.

358. 884 N.E.2d 922 (Ind. Ct. App.), *reh'g granted on other grounds*, 891 N.E.2d 58 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1224 (Ind. 2008).

into the defendant's ability to pay.<sup>359</sup> This is to prevent defendants from being incarcerated because of their inability to pay.<sup>360</sup> Trial courts may, however, enter a money judgment against defendants without inquiring into the ability to pay.<sup>361</sup>

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359. *Id.* at 930.

360. *Id.*

361. *Id.*