

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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The legislature and Indiana's appellate courts confronted several significant issues during the survey period October 1, 2008, to September 30, 2009. The General Assembly created new crimes and altered penalties for existing crimes, while the Indiana Supreme Court and Indiana Court of Appeals addressed a variety of issues ranging from the traditional fare of sentencing, sufficiency of evidence, and speedy trials, to more novel and far-reaching claims involving the sex offender registry and the propriety of *Anders* briefs.

I. LEGISLATIVE DEVELOPMENTS

Passing a budget in the midst of economic difficulty dominated the General Assembly's long session in 2009.¹ A special session was required in June to complete the process,² but surprisingly little attention was given to changes in criminal statutes that could have positively affected the budget. Rather, the legislature added new crimes and enhanced existing penalties, which likely means the need for additional prison space in the future.

A. New Offenses

As technology and the times change, so do the ways to commit crimes. The 2009 General Assembly addressed this evolving criminal behavior by enacting several new criminal offenses. Among the new offenses created by the General Assembly, a person who "knowingly or intentionally obtains, possesses, transfers, or uses the synthetic identifying information" commits a Class D felony.³ Synthetic identifying information is defined as information that identifies: "(1) a false or fictitious person; (2) a person other than the person who is using the information; or (3) a combination of persons described under subdivisions (1) and (2)."⁴ The offense is a Class C felony if the information comes from more than 100 persons or the fair market value of the harm exceeds \$50,000.⁵ The statute exempts minors using fake identification to attempt to buy alcohol or tobacco;⁶ however, the State may prosecute them under the separate statute criminalizing

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1. Matthew Tully, *Let's Hope This Is the End of Excruciatingly Bad Session*, INDIANAPOLIS STAR, June 30, 2009, at A1.

2. Mary Beth Schneider & Bill Ruthhart, *Budget Brings Good, Bad News for State Schools*, INDIANAPOLIS STAR, July 1, 2009, at A1.

3. IND. CODE § 35-43-5-3.8(a) (Supp. 2009).

4. *Id.* § 35-43-5-1(r).

5. *Id.* § 35-43-5-3.8(b).

6. *Id.* § 35-43-5-3.8(c).

the use of false information to obtain alcohol as a Class C misdemeanor.⁷

The General Assembly also created new offenses for computer merchandise hoarding⁸ and the unlawful distribution of a hoarding program,⁹ both Class A misdemeanors.¹⁰

It has long been a crime to impersonate a public servant or police officer,¹¹ but Indiana now has a separate crime for those who manufacture or sell police or fire insignia.¹² The offense begins as a misdemeanor but may be charged as a felony if the person knows or intends the badge to be used to commit impersonation of a public servant.¹³

Although the age of consent for sexual relations in Indiana is generally sixteen,¹⁴ the child seduction statute criminalizes sex with children who are sixteen and seventeen when the adult is in a relationship of special trust, such as a teacher or custodian.¹⁵ The statute was broadened in 2009 to include persons employed by charter schools, special education cooperatives, and those otherwise affiliated with schools or cooperatives when the person: (1) occupies a position of trust with the student, (2) provides care or supervision to the student, and (3) is at least four years older than the student.¹⁶ The statute also criminalizes sex between children sixteen or seventeen years old and military recruiters who are attempting to enlist them.¹⁷

Finally, although not a new offense, the assisting a criminal statute was clarified, and perhaps broadened, by adding a new section on defenses:

(b) It is not a defense to a prosecution under this section that the person assisted:

- (1) has not been prosecuted for the offense;
- (2) has not been convicted of the offense; or
- (3) has been acquitted of the offense by reason of insanity.

However, the acquittal of the person assisted for other reasons may be a defense.¹⁸

7. *Id.* § 7.1-5-7-1(a).

8. *Id.* § 35-43-2-3(c).

9. *Id.* § 35-43-2-3(d).

10. *Id.* § 35-43-2-3(c), (d).

11. IND. CODE § 35-44-2-3 (2008).

12. IND. CODE § 35-44-2-5 (Supp. 2009).

13. *Id.* § 35-44-2-5(a), (b).

14. IND. CODE § 35-42-4-9(a) (2008).

15. IND. CODE § 35-42-4-7 (Supp. 2009).

16. *See id.* § 35-42-4-7(d)(3).

17. *Id.* § 35-42-4-7(k)(2)(B). The term military recruiter is defined in subsection (f). *See id.* § 35-42-4-7(f).

18. *Id.* § 35-44-3-2(b).

B. Enhanced Penalties

In addition to creating new crimes and expanding existing ones, the General Assembly also enhanced penalties for several crimes. A first offense for animal cruelty is now a Class A, instead of Class B, misdemeanor; a second unrelated offense is a Class D felony.¹⁹ A second, unrelated animal cruelty offense in conjunction with the offense of attending a fight involving animals is now a Class D felony instead of a Class A misdemeanor.²⁰ The legislature amended the trafficking with an inmate statute to increase the penalty from a Class A misdemeanor to a Class C felony if the item trafficked was a cellular phone.²¹ Identity deception remains a D felony in most instances, but a parent's commission of identity deception against his or her child is now a Class C felony.²² Finally, in response to a high profile bank robbery in which a bank teller's twin fetuses were killed,²³ the legislature enhanced the penalty for feticide from a Class C to a Class B felony.²⁴

II. SIGNIFICANT CASES

The Indiana Supreme Court and Indiana Court of Appeals addressed a wide range of issues that impact criminal cases from their inception to their conclusion. This section attempts to summarize the most significant of these decisions and offer some observations about the likely future impact of the decisions.

A. Lab Reports and the Confrontation Clause

In terms of breadth and the number of cases affected, the most significant opinion during the survey period is *Melendez-Diaz v. Massachusetts*.²⁵ There, the U.S. Supreme Court made clear that lab reports prepared for use in criminal prosecutions fall within the "core class of testimonial statements" protected by the Confrontation Clause.²⁶ Such reports are inadmissible at trial "[a]bsent a showing that the analysts were unavailable to testify at trial *and* that [the defendant] had a prior opportunity to cross-examine them."²⁷

Lab reports have long been crucial to proving drug and other cases with ease and without the need for live expert testimony. In the wake of *Melendez-Diaz*, prosecutors are seemingly required to produce a witness instead of a report. The

19. *Id.* § 35-46-3-7.

20. *Id.* § 35-46-3-10.

21. *Id.* § 35-44-3-9(d)(3).

22. *Id.* § 35-43-5-3.5(b)(3)(A).

23. Jon Murray, *Legislators Seek Longer Sentence for Killing Fetus*, INDIANAPOLIS STAR, Feb. 1, 2009, at A1.

24. IND. CODE § 35-42-1-6.

25. 129 S. Ct. 2527 (2009).

26. *Id.* at 2531-32.

27. *Id.* at 2532 (emphasis in original) (citing *Crawford v. Washington*, 541 U.S. 36, 54 (2004)).

executive director of the National District Attorneys Association described the decision as “a train wreck in the making.”²⁸ As he put it: “The court is saying you can’t submit an affidavit saying that the cocaine is cocaine. The criminalist must be there to testify the cocaine is cocaine. Particularly in rural states and in smaller communities, this is going to be a major problem.”²⁹ Within weeks, the Indiana Supreme Court addressed *Melendez-Diaz*, albeit largely on the more nuanced issue of *which witness* the State must call. In *Pendergrass v. State*,³⁰ the State called a DNA laboratory supervisor instead of the technician.³¹ The majority found this sufficient based on language from *Melendez-Diaz*, explaining that the right to confrontation “‘does not mean that everyone who laid hands on the evidence must be called,’” which it concluded “leaves discretion with the prosecution on which evidence to present.”³² “The laboratory supervisor who took the stand did have a direct part in the process by personally checking [the technician’s] test results,” the majority reasoned.³³ On the same day the court decided *Pendergrass*, however, the court denied transfer in *Jackson v. State*,³⁴ which held that calling a supervisor was insufficient because he had performed none of the tests and only the technician could testify “whether she correctly followed each step in the testing process.”³⁵ *Jackson* is difficult to reconcile with the majority opinion in *Pendergrass*. Rather, the *Pendergrass* dissent (by Justice Rucker, joined by Justice Boehm) offers a stronger argument and is consistent with *Jackson*:

Although a supervisor might be able to testify to her charge’s general competence or honesty, this is no substitute for a jury’s first-hand observations of the analyst that performs a given procedure; and a supervisor’s initials are no substitute for an analyst’s opportunity to carefully consider, under oath, the veracity of her results.³⁶

Thus, if the State calls a technician instead of a supervisor, it may avoid the uncertainty of a reversal if the specific facts are closer to *Jackson* than to *Pendergrass*. This construction is seemingly the safer course, especially if the *Pendergrass* approach does not withstand later U.S. Supreme Court review.

28. See David G. Savage, *Court Ruling Shakes Up Criminal Trials*, L.A. TIMES, July 26, 2009, at A3.

29. See *id.*

30. 913 N.E.2d 703 (Ind. 2009).

31. *Id.* at 704.

32. *Id.* at 707 (quoting *Melendez-Diaz*, 129 S. Ct. at 2532 n.1).

33. *Id.*

34. 891 N.E.2d 657 (Ind. Ct. App. 2008), *trans. denied*, 2009 Ind. LEXIS 1323 (Ind. Sept. 24, 2009).

35. *Id.* at 661.

36. *Pendergrass*, 913 N.E.2d at 711 (Rucker, J., dissenting).

B. Guilty Pleas

In many cases, there is little or no doubt that the State can prove the facts necessary to secure a conviction. Therefore, a guilty plea may seem like the only sensible solution. However, the defendant may have a strong claim to suppress evidence because the police violated his or her Fourth or Fifth Amendment rights in securing the evidence. In those cases, defense counsel will likely file a motion to suppress, and the trial court will enter a ruling after hearing evidence and arguments.

If the trial court suppresses the evidence, the State may appeal as a matter of right if the ultimate effect is to preclude prosecution.³⁷ If the trial court does not suppress the evidence, the defendant may ask permission to pursue an interlocutory appeal.³⁸ For an interlocutory appeal to proceed, the trial court must certify the question, and the court of appeals must then accept the appeal.³⁹ In recent years, the court of appeals has accepted little over a quarter of such appeals.⁴⁰ If an interlocutory appeal is not granted or not pursued, the defendant could plead guilty or go to trial. In light of *Alvey v. State*,⁴¹ going to trial is the only option.

In *Alvey*, the defendant entered into a plea agreement that expressly reserved the right to appeal the denial of his motion to suppress.⁴² The Indiana Supreme Court, however, held that provision invalid and unenforceable: “A trial court lacks the authority to allow defendants the right to appeal the denial of a motion to suppress evidence when a defendant enters a guilty plea, even where a plea agreement maintains that such an appeal is permitted.”⁴³ The court reasoned that a guilty plea is a significant event and includes consequences—specifically, a conviction and inability to appeal.⁴⁴ Allowing an appeal “would make settlements difficult to achieve and dramatically increase the caseload of the appellate courts.”⁴⁵ The court concluded that defendants “cannot benefit from both the advantages of pleading guilty and the right to raise allegations of error with respect to pre-trial rulings.”⁴⁶

Although the majority’s opinion is well-grounded in precedent, Justice Boehm’s dissent highlights many of the practical problems with the majority’s

37. See IND. CODE § 35-38-4-2(5) (2008).

38. See IND. APP. R. 14(B).

39. *Id.*

40. For example, 261 motions for permissive interlocutory appeal were filed with the Indiana Court of Appeals in 2008. 2008 COURT OF APPEALS OF INDIANA, ANN. REP. 10 (2009), available at <http://www.in.gov/judiciary/appeals/docs/2008report.pdf>. Less than twenty-seven percent, or seventy, of these appeals were granted. *Id.*

41. 911 N.E.2d 1248 (Ind. 2009).

42. *Id.* at 1249.

43. *Id.* at 1250 (citing *Lineberry v. State*, 747 N.E.2d 1151, 1155 (Ind. Ct. App. 2001)).

44. *Id.* at 1249.

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

46. *Id.* at 1251.

approach. Most notably, on the point of judicial economy, “the majority’s refusal to permit a guilty plea reserving the right to appeal a denial will force the prosecution, the defendant and the court to go through the motions of a wholly unnecessary trial.”⁴⁷ Several states and the federal judiciary allow such appeals,⁴⁸ and those courts do not appear to be overwhelmed with appeals. Rather, the issue is one of timing—will the appeal occur after a plea agreement or after a trial? Moreover, allowing plea agreements with a right to appeal “gives the defendant whatever benefit a guilty plea provides in sentencing.”⁴⁹

Barring legislative action or a significant change in the membership of the Indiana Supreme Court, the issue appears settled. Thus, parties cannot make agreements reserving the right to appeal a suppression claim, and defense counsel must insist on a trial in order to preserve the suppression issue for appeal. Waiving the right to jury trial may be advisable, and a liberal use of stipulations could help with concerns for judicial economy. If a defendant simply wants to preserve a suppression claim and otherwise accepts responsibility for the offense, it remains to be seen what mitigating weight might be afforded at sentencing. Courts have held that an early guilty plea saves victims from going through a full-blown trial and conserves limited prosecutorial and judicial resources; therefore, it is a mitigating circumstance entitled to significant weight.⁵⁰

In the same guilty-plea-means-finality vein, the Indiana Supreme Court in *Norris v. State*⁵¹ held that a guilty plea could not be challenged on post-conviction relief based on newly discovered evidence.⁵² The court reiterated that a guilty plea “conclusively establishes the fact of guilt, a prerequisite in Indiana for the imposition of criminal punishment.”⁵³ Defendants know of their guilt when they enter a guilty plea, and upon the trial court’s acceptance of that plea, the defendant waives the right to later present evidence of innocence.⁵⁴

Justice Boehm, joined by Justice Rucker, concurred in a separate opinion. “Any system of justice must allow for correction of injustice based on clear and convincing evidence of innocence, even if the defendant can be said to have contributed to his own plight by pleading guilty.”⁵⁵ Justice Boehm opined it was proper to “upset a guilty plea only where we have a very high degree of confidence that it was in fact incorrect,”⁵⁶ such as a claim of actual innocence supported by DNA evidence.⁵⁷

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

48. *See id.*

49. *Id.*

50. *See, e.g.,* *Francis v. State*, 817 N.E.2d 235, 237-38 (Ind. 2004).

51. 896 N.E.2d 1149 (Ind. 2008).

52. *Id.* at 1152.

53. *Id.*

54. *Id.* at 1153.

55. *Id.* at 1154 (Boehm, J., concurring).

56. *Id.* at 1155.

57. *See id.* at 1154.

C. Speedy Trials Under Criminal Rule 4

Indiana Criminal Procedure Rule 4 sets strict deadlines for bringing defendants to trial and has led to the reversal of convictions or discharge of many defendants over the years.⁵⁸ Although the rule makes clear it is the State's duty to bring a defendant to trial, exceptions have diminished, if not begun to swallow, the rule.⁵⁹

In *Pelley v. State*,⁶⁰ the State sought counseling records from a third party nearly a decade and a half after multiple murders for which the defendant had been recently charged.⁶¹ The trial court quashed the subpoena, and a lengthy interlocutory appeal was pursued.⁶² Pelley was later tried and convicted of the murders, but the court of appeals reversed, concluding that Criminal Rule 4(C) contains no exception for interlocutory appeals and that Pelley was not responsible for the delay.⁶³

The Indiana Supreme Court disagreed and reinstated the convictions.⁶⁴ It reasoned that the trial court proceedings had been stayed pending the interlocutory appeal, which rendered the trial court without jurisdiction to try the defendant.⁶⁵ The court emphasized that time is excluded from Criminal Rule 4 only when trial court proceedings are stayed, and the court noted that trial and appellate courts have discretion to deny stays when they are sought for inappropriate reasons or the issues involved are not critical to the case.⁶⁶ Although the records sought in *Pelley* were not critical to the case, the rule announced appeared to apply only prospectively.⁶⁷

Beyond the fairly uncommon scenario of stays and interlocutory appeals in *Pelley*, the court of appeals addressed the broader issue of proving a speedy trial violation in *Gibson v. State*,⁶⁸ where the defendant argued that the State failed to bring him to trial within one year as required by Criminal Rule 4(C).⁶⁹ Although

58. See generally Joel M. Schumm & James A. Garrard, *Recent Developments in Criminal Law and Procedure*, 33 IND. L. REV. 1197, 1215-20 (2000).

59. For example, the court of appeals reiterated in *Wilkins v. State*, 901 N.E.2d 535 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 986 (Ind. 2009), that trial courts may make a finding of congestion, thus stopping the Criminal Rule 4 clock, without an assessment of its docket to ensure a speedy trial. A defendant whose case is continued "has priority over another speedy trial whose trial had been previously scheduled on that date." *Id.* at 538 (quoting *Bowers v. State*, 717 N.E.2d 242, 245 (Ind. Ct. App. 1999)).

60. 901 N.E.2d 494 (Ind. 2009).

61. *Id.* at 497-98.

62. *Id.*

63. *Id.* at 498 (citing *Pelley v. State*, 883 N.E.2d 874, 885 (Ind. Ct. App. 2008)).

64. *Id.* at 508.

65. *Id.* at 499.

66. *Id.* at 500.

67. *Id.* at 500, 508.

68. 910 N.E.2d 263 (Ind. Ct. App. 2009).

69. *Id.* at 266.

the Chronological Case Summary (CCS) entries showed he was granted several continuances, the defendant demonstrated that those entries were not correct.⁷⁰ The “bench trial/status” hearings scheduled throughout the period were merely pre-trial conferences for plea negotiations and not trial dates.⁷¹ At another hearing, the prosecutor was not even present.⁷² The court reiterated the State’s duty to bring a defendant to trial and found “no indication that Gibson ever did anything within the one-year period to prevent the State from bringing him to trial.”⁷³

Gibson serves as a useful reminder to both trial judges and prosecutors of the importance of setting early trial dates and keeping careful and accurate track of delays under Criminal Rule 4. Defendants do not have the duty to bring themselves to trial, and demonstrating a violation of the rule may be relatively easy with the use of transcripts and the CCS.

D. Crime or Not a Crime?

Practitioners and judges often view challenges to the sufficiency of the evidence 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.⁷⁴ As the following cases demonstrate, though, Indiana’s appellate courts will sometimes reverse convictions based upon insufficient evidence. These reversals sometimes suggest the issue is a legal one of broader applicability than the facts of the particular case.

1. *Insufficient Evidence*.—The appellate courts found insufficient evidence in cases involving the fairly common charges of resisting law enforcement, public intoxication, and criminal recklessness, while similarly finding the same with seldom-charged cases of official misconduct and possession of more than three grams of ephedrine.

Resisting law enforcement requires proof that a defendant “forcibly” resisted.⁷⁵ In several cases, courts have reversed convictions because the

70. *Id.* at 268.

71. *Id.* at 267-68.

72. *Id.* at 267.

73. *Id.* at 268.

74. *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.

Id. (internal citations and footnotes omitted).

75. IND. CODE § 35-44-3-3(a)(1) (2008).

defendant's resistance was passive or otherwise did not involve force directed to the officer.⁷⁶ In *Graham v. State*,⁷⁷ the Indiana Supreme Court added to this string of reversals because the defendant's "refusing to present [his] arms for cuffing" did not constitute forcible resistance.⁷⁸ The court acknowledged that a decade and a half earlier, it had interpreted the term "forcibly resists" to require "strong, powerful, violent means . . . to evade a law enforcement official's rightful exercise of his or her duties."⁷⁹ In *Graham*, however, the court appeared to take a step back from that sweeping language, noting that "even 'stiffening' of one's arms when an officer grabs hold to position them for cuffing" would qualify as forcible resistance.⁸⁰

Courts cited *Graham* just once during the survey period. In *Berberena v. State*,⁸¹ the police officer offered no testimony about the defendant's use of force:

And I was struggling to gain control of his hands to place them behind his back.

* * *

I just forcibly placed his hands [sic] and put them in handcuffs.

* * *

Q: Officer, what was Mr. Barbarena [sic] doing with his hands when you tried to place him in handcuffs?

A: Sir, I don't exactly know. I know I was struggling with him to get control of his hands.

Q: Where did he have his hands?

A: Once again I can't recall.⁸²

The court emphasized there was "no evidence of force," which remains a required element of the statute and decisional law interpreting it.⁸³

In future cases, one might expect prosecutors not to charge resisting arrest when the officer cannot recall whether the defendant used any force. Alternatively, police officers may have a better recollection of some action, even

76. See, e.g., *Spangler v. State*, 607 N.E.2d 720, 724-25 (Ind. 1993); *Ajabu v. State*, 704 N.E.2d 494, 496 (Ind. Ct. App. 1998); *Braster v. State*, 596 N.E.2d 278, 280 (Ind. Ct. App. 1992).

77. 903 N.E.2d 963 (Ind. 2009).

78. *Id.* at 966.

79. *Id.* at 965 (quoting *Spangler v. State*, 607 N.E.2d 720, 723 (Ind. 1993)).

80. *Id.* at 966 (citing *Johnson v. State*, 833 N.E.2d 516, 517 (Ind. Ct. App. 2005)).

81. 914 N.E.2d 780 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 559 (Ind. 2009).

82. *Id.* at 782.

83. *Id.* at 783.

tensing up, to offer in support of “forcible” resistance.

Although defendants usually face bench trials on misdemeanor charges of resisting arrest,⁸⁴ they may consider requesting a jury trial when the evidence is merely that the defendant stiffened up, which may be viewed as an involuntary reaction to being grabbed by an officer effectuating an arrest. The pattern jury instruction merely lists, without elaboration, the “forcibly” requirement.⁸⁵ Moreover, the Indiana Supreme Court has made it clear that language from an appellate opinion, especially when it merely highlights a piece of evidence, is not appropriate fodder for a jury instruction.⁸⁶ If such cases went before juries that were given only a general definition of force, an acquittal might be more likely than in a bench trial.

Public intoxication requires a person to be intoxicated in a public place, i.e., a “place that is visited by many persons, and usually accessible to the neighboring public.”⁸⁷ In *Christian v. State*,⁸⁸ the court of appeals held that a driveway between two residences was not a public place.⁸⁹ The court reasoned that “[t]he State presented no evidence that the parking area was used by the public in general rather than only the residences next to the area.”⁹⁰

Although resisting law enforcement and public intoxication charges are fairly common, charges of official misconduct are filed much less frequently. “A public servant who: knowingly or intentionally performs an act that the public servant is forbidden by law to perform . . . commits official misconduct, a Class D felony.”⁹¹ The statutory language is broad and general, but “the heart of the issue in an official misconduct charge is explicit: whether the act was done by a public official in the course of his official duties.”⁹² In *Heinzman v. State*,⁹³ the court reversed several convictions for official misconduct involving a Child Protective Services caseworker because he was no longer working in his official capacity when he molested a child.⁹⁴

Continuing with uncommon crimes, although few people would think that buying two boxes of cold medicine is a crime, it can be a Class C misdemeanor.⁹⁵ Title 35, section 48-4-14.7(d) of the Indiana Code prohibits the purchase within

84. Defendants may request a jury trial in misdemeanor cases “by filing a written demand therefor not later than ten (10) days before [the] first scheduled trial date.” IND. CRIM. R. 22.

85. See IND. PATTERN JURY INSTRUCTIONS (CRIMINAL) § 5.23 (2008).

86. See generally Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 36 IND. L. REV. 1003, 1021-22 (2003).

87. *Christian v. State*, 897 N.E.2d 503, 505 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 983 (Ind. 2009) (quoting *Jones v. State*, 881 N.E.2d 1095, 1097 (Ind. Ct. App. 2008)).

88. *Id.*

89. *Id.* at 505.

90. *Id.*

91. IND. CODE § 35-44-1-2(1) (2008).

92. *State v. Dugan*, 793 N.E.2d 1034, 1039 (Ind. 2003).

93. 895 N.E.2d 716 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 978 (Ind. 2009).

94. *Id.* at 724.

95. See IND. CODE § 35-48-4-14.7(d) (2008).

one week of medication containing more than three grams of ephedrine, pseudoephedrine, or both.⁹⁶ In *Slone v. State*,⁹⁷ the defendant stipulated that she had bought two twenty-count packages of medication containing pseudoephedrine within one week and had taken the medication at a quicker rate than the recommended dosage.⁹⁸ Nevertheless, the court of appeals found insufficient evidence that Slone “knowingly” purchased more than three grams of pseudoephedrine.⁹⁹ The court reasoned that “consumers may be required to use the metric system making unit conversions and multiply quantities . . . none of which has the State proved Slone capable of doing.”¹⁰⁰ Moreover, it faulted the State for failing to “enter into evidence either of the packages of drugs which Slone purchased, so [the court could not] review what information regarding the contents those drugs was contained on the packaging or how such information was displayed on the packaging.”¹⁰¹

Slone appears to be anomalous of the usual approach to sufficiency review, in which the appellate court draws all inferences in support of the verdict.¹⁰² Requiring the State to produce the medication boxes or to somehow demonstrate a defendant’s subjective knowledge poses a substantial, if not insurmountable, burden. In the context of many street drugs, where offenses are enhanced for the possession or sale of more than three grams,¹⁰³ *Slone* may lead defendants to argue, for example, that they thought they only possessed two and a half grams or did not understand the metric system.

The criminal offenses described above—indeed, almost every criminal offense in the Indiana Code—requires knowledge or intentional conduct. Relatively few offenses require only reckless conduct, which is when a person engaged in conduct “in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.”¹⁰⁴ *State v. Boadi*¹⁰⁵ surveyed and synthesized significant cases of vehicular reckless homicide before concluding that “failing to stop at an intersection cannot, without more, constitute criminally reckless conduct.”¹⁰⁶ In *Boadi*, a semi-truck driver ran a red light at forty miles per hour on a clear day.¹⁰⁷ His vehicle was properly maintained, he had not been driving longer than

96. *Id.* The 2010 Indiana General Assembly amended this section, and the new provisions went into effect July 1, 2010. See 2010 Ind. Legis. Serv. P.L. 97-2010 (H.E.A. 1320) (West).

97. 912 N.E.2d 875 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 559 (Ind. 2009).

98. *Id.* at 880.

99. *Id.* at 881.

100. *Id.*

101. *Id.* at 880.

102. See, e.g., *id.* at 878-79 (quoting *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007)).

103. See, e.g., IND. CODE §§ 35-48-4-1(b), -6(b) (2008).

104. *Id.* § 35-41-2-2(c).

105. 905 N.E.2d 1069 (Ind. Ct. App. 2009).

106. *Id.* at 1074.

107. *Id.* at 1070.

regulations allowed, nor was he under the influence of any alcohol or drugs.¹⁰⁸ The court suggested that a different result could occur if a driver was speeding, had violated trucking regulations on rest, or was driving in poor weather conditions.¹⁰⁹

2. *Sufficient Evidence.*—The appellate courts found sufficient evidence to support convictions for disorderly conduct by means of tumultuous conduct¹¹⁰ and battery in a case involving purportedly consensual sadomasochism.¹¹¹ In *Bailey v. State*,¹¹² the Indiana Supreme Court upheld a conviction for disorderly conduct because the defendant engaged in “tumultuous conduct.”¹¹³ The statute defines tumultuous conduct as conduct likely to result in serious bodily injury or substantial property damage.¹¹⁴ In *Bailey*, a high school student threw down his drink and coat, stepped toward the dean of students “in an angry manner, clinched up his fists at his sides and let out a series of obscenities all within inches of [the dean’s] face.”¹¹⁵ The student backed away upon seeing a police officer, but the dean testified that he “felt like [the student] was ready to hit me.”¹¹⁶

In *Govan v. State*,¹¹⁷ the court of appeals revisited the contours of consent as a defense to battery.¹¹⁸ In 1993, the court of appeals rejected consent as a defense to a gang initiation that included “twenty bare-fisted, hard blows” to the victim’s head.¹¹⁹ In that case, the court made clear that consent may sometimes be a defense to battery, although it is not a defense where (1) “the defendant goes beyond acts consented to and beats to death the victim who consented only to the defendant’s execution of the organization’s initiation ritual of being struck in the stomach until he passed out”; (2) the conduct is “against public policy,” such as

108. *Id.* at 1071.

109. *Id.* at 1075.

110. *See* *Bailey v. State*, 907 N.E.2d 1003, 1006-07 (Ind. 2009).

111. *See* *Govan v. State*, 913 N.E.2d 237, 241, 243 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 558 (Ind. 2009). Although not expressly a sufficiency case, in *State v. Manuwal*, the Indiana Supreme Court addressed the fairly common offense of operating a vehicle while intoxicated but in the context of off-road driving. *Manuwal*, 904 N.E.2d at 657. The court held that operating an all-terrain vehicle on private property while intoxicated could be prosecuted under the general statutes prohibiting the operation of vehicles while intoxicated. *Id.* at 658-59; *see* IND. CODE §§ 9-30-5-1(b), -2 (2004). Such prosecution is possible because neither statute limits its application to public highways, nor does either statute reference “operator” or “highway,” which have separate statutory definitions that refer to public roadways. *Manuwal*, 904 N.E.2d at 658. Finally, the decision was consistent with prior court of appeals decisions that applied the operating-a-vehicle-while-intoxicated (OVWI) statutes to driving on private property. *Id.* at 659.

112. 907 N.E.2d 1003 (Ind. 2009).

113. *Id.* at 1007.

114. *Id.* at 1006 (citing IND. CODE § 35-45-1-1 (2008)).

115. *Id.* at 1007.

116. *Id.*

117. 913 N.E.2d 237 (Ind. Ct. App. 2009).

118. *Id.* at 241-43.

119. *Id.* at 241 (citing *Helton v. State*, 624 N.E.2d 499, 515 (Ind. Ct. App. 1993)).

when “there are no sexual overtones and the battery is a severe one which involves a breach of the public peace as well as an invasion of the victim’s physical security”; (3) consent was obtained by fraud or from a person lacking legal capacity; (4) a deadly weapon is used; (5) the victim is killed; or (6) “the battery is atrocious or aggravated.”¹²⁰

Applying this precedent in *Govan*, the court concluded that the defense of consent was unavailable, even though the defendant claimed his girlfriend had consented to sadomasochistic sexual practices that included beating with an extension cord and branding with a hot knife.¹²¹ Even though the case had sexual overtones, the use of a deadly weapon rendered consent unavailable.¹²² Moreover, the court reasoned that the jury could have reasonably found a lack of consent based on testimony that the beating occurred because the victim had been with another man, that the victim subsequently locked herself in a closet where she tried to kill herself, and that the victim never mentioned consent when reporting the incident.¹²³

No challenge was made to the jury instructions in *Govan*, and the opinion does not mention how the judge instructed the jurors. The opinion concludes, “[i]n such a highly charged domestic case as this, the jury is in the best position to make credibility determinations.”¹²⁴ In cases where the testimony is conflicting on consent, a jury is certainly well-positioned to make credibility determinations. However, it is unclear how the court would instruct the jury about the contours of consent as a defense. Furthermore, it is unclear if courts would even give an instruction in cases in which a deadly weapon was used, the battery was “atrocious or aggravated,” or the victim lacked capacity.¹²⁵ The jury would presumably be able to determine issues of capacity or atrociousness,¹²⁶ although the use of a deadly weapon might be deemed disqualifying by a trial court in refusing an instruction.¹²⁷

3. *Move to Dismiss—or Wait for Trial?*—As a final point, these cases raise the issue of the means by which a defendant may challenge the sufficiency of the evidence to support a charge. In some cases, such as *Graham* and *Heinzman*, the defendants went to trial, were found guilty, and raised a sufficiency claim on appeal.¹²⁸ In other cases, such as *Boadi*, however, the defendants sought

120. *Id.* at 242 (citing *Helton*, 624 N.E.2d at 514).

121. *Id.* at 238, 242-43.

122. *Id.* at 242-43.

123. *Id.* at 243.

124. *Id.*

125. *See id.* at 242 (citing *Helton*, 624 N.E.2d at 514).

126. *See Harvey v. State*, 652 N.E.2d 876, 877 (Ind. Ct. App. 1995) (observing that defendants are “entitled to an instruction on any defense which has some foundation in the evidence, even when that evidence is weak or inconsistent”).

127. *See Mayes v. State*, 744 N.E.2d 390, 394 (Ind. 2001) (summarizing the requirements for instructions, including “whether there was evidence presented at trial to support giving the instruction”).

128. *See supra* notes 76-82, 92-93, and accompanying text.

dismissal of the charges in the trial court.¹²⁹ According to statute, dismissal of an information is required when the “facts stated do not constitute an offense.”¹³⁰ In cases in which the State’s evidence does not support the charged offense—or any other offense—a motion to dismiss would seem most appropriate to avoid the time, expense, and stress of a trial.

In other cases, however, if the State has filed the wrong charge, the best defense is to do nothing. When the State submits its evidence at trial, the defense can argue for an acquittal. If that fails, *Atteberry v. State*¹³¹ provides an example of the appellate court reversing a conviction because the prosecutor filed the wrong charge.¹³² There, the State charged rape although the evidence supported criminal deviate conduct.¹³³ “Fundamental due process and common sense both require that the State must prove the elements of the crime it charged, not the elements of some other crime”¹³⁴ The court concluded that “trauma to L.L.’s anus, plus the presence of semen stains in her underwear,” which would have supported a criminal deviate conduct charge, were insufficient to support a rape conviction.¹³⁵ Had the defendant filed a pretrial motion to dismiss, the State would surely have amended the charge. By waiting to raise the issue until the end of trial, however, the State lost the ability to amend the charge and double jeopardy principles barred a new trial on the correct charge.

E. Dismissal of Charges for Incompetence to Stand Trial

In *State v. Davis*,¹³⁶ a woman charged with Class D felony criminal recklessness was found incompetent to stand trial and committed to the Division of Mental Health and Addiction.¹³⁷ Three years later, a psychiatrist opined that the defendant “cannot be restored to competence,” and defense counsel moved to dismiss the charge.¹³⁸ The trial court granted the motion to dismiss, and the Indiana Supreme Court affirmed.¹³⁹ The court acknowledged that trial courts have “inherent authority to dismiss criminal charges where the prosecution of such charges would violate a defendant’s constitutional rights.”¹⁴⁰ The maximum

129. See *supra* notes 105-09 and accompanying text.

130. IND. CODE § 35-34-1-4(a)(5) (2008).

131. 911 N.E.2d 601 (Ind. Ct. App. 2009).

132. *Id.* at 603. Although *Atteberry* was a sufficiency case, a related theory is material variance, i.e., that the evidence at trial did not match the charge. See generally Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 34 IND. L. REV. 645, 659-61 (2001) (discussing *Allen v. State*, 720 N.E.2d 707 (Ind. 1999)).

133. *Atteberry*, 911 N.E.2d at 611.

134. *Id.*

135. *Id.*

136. 898 N.E.2d 281 (Ind. 2008).

137. *Id.* at 283-84.

138. *Id.* at 284.

139. *Id.* at 284, 290.

140. *Id.* at 285.

period of incarceration for a Class D felony is three years (with credit for time served¹⁴¹), which had long passed at the time of dismissal.¹⁴²

Davis seems unlikely to lead to dismissals in many future cases. Many defendants found incompetent are restored to competence within months through medication. The relatively few who are not likely to be restored to competence will be able to secure dismissal only if charged with a relatively minor offense, as in *Davis*; those charged with more serious offenses will presumably need to wait until the maximum term of incarceration arrives before seeking dismissal.¹⁴³ Finally, as the court acknowledged in *Davis*, even in cases with a short period of incarceration, the State may argue against dismissal if it can point to a “substantial public interest” in securing a conviction,¹⁴⁴ such as the ability to use the conviction for a later enhancement or requirement of registration as a sex offender.

F. Sentencing

Sentencing challenges come in many shapes and sizes, with some grounded in statutory provisions, others in the appellate rules, and some in constitutional provisions. Regardless of their basis, though, sentencing claims continue to be the most frequently raised and are often successful on appeal.

1. *Consecutive Sentences*.—Before discussing the significant developments during the survey period, this section begins with the biggest non-development. In *Oregon v. Ice*,¹⁴⁵ the U.S. Supreme Court considered whether the Sixth Amendment right to a jury trial limited the ability to impose consecutive sentences.¹⁴⁶ The majority acknowledged that the prohibition on judicial factfinding to increase punishments beyond the statutory maximum beginning in *Apprendi v. New Jersey*¹⁴⁷ had since been applied in other contexts, including the death penalty, state “standard” range sentencing, the Federal Sentencing Guidelines, and “upper term” sentences in a determinate sentencing scheme.¹⁴⁸ However, the Court refused to apply the same limitations to consecutive sentences, holding that “historical practice and respect for state sovereignty” counseled against extending *Apprendi*’s rule.¹⁴⁹ Agreeing with the majority’s stated concern for a “principled rationale,” Justice Scalia, writing for the four dissenters, aptly concluded “[t]he Court’s reliance upon a distinction without a difference, and its repeated exhumation of arguments dead and buried by prior

141. *Id.* at 289 (citing IND. CODE §§ 35-50-2-7, -6-3(a) (Supp. 2008)).

142. *Id.*

143. *See Davis*, 898 N.E.2d at 289.

144. *Id.* at 289-90.

145. 129 S. Ct. 711 (2009).

146. *Id.* at 714.

147. 530 U.S. 466, 490 (2000).

148. *Ice*, 129 S. Ct. at 716-17.

149. *Id.* at 717.

cases, seems to me the epitome of the opposite.”¹⁵⁰ The Oregon statutory scheme in *Ice* bore remarkable similarity to the one in Indiana, and the Indiana Supreme Court refused to apply *Apprendi* to consecutive sentences nearly five years ago in *Smylie v. State*.¹⁵¹

Indiana’s courts, however, consider limits on consecutive sentences based on statutory provisions. Defendants convicted of multiple, non-violent felonies as part of an episode of criminal conduct cannot be sentenced to an aggregate term greater than the advisory sentence for a felony one class higher than the most serious of their offenses.¹⁵² For example, a defendant convicted of three non-violent Class D felonies as part of the same episode of conduct could face no more than four years, the advisory sentence for a Class C felony.¹⁵³ In *Dunn v. State*,¹⁵⁴ the defendant was convicted of three Class A misdemeanors and argued that his sentence could not exceed one and a half years, the advisory sentence for a Class D felony.¹⁵⁵ He relied on *Purdy v. State*,¹⁵⁶ which imposed a four-year cap on the sentence for a defendant convicted of one Class D felony and two Class A misdemeanors.¹⁵⁷ In *Dunn*, however, the court focused on the misdemeanor-only nature of the offenses and upheld the three-year sentence.¹⁵⁸ The court left a window open, though: “Dunn cites no other statutory, constitutional, or common law restrictions on consecutive sentences for misdemeanor[s].”¹⁵⁹ Defendants in the future may be better advised to argue the sentence is inappropriate under Indiana Appellate Rule 7(B), which affords a generous standard of review and plenty of examples of limitations on consecutive sentences.¹⁶⁰

Although trial courts generally have discretion to impose consecutive sentences,¹⁶¹ longstanding precedent forbids imposition of consecutive habitual offender enhancements. In *Breaston v. State*,¹⁶² the supreme court reaffirmed those cases and made clear that the limitation applies even when a defendant is sentenced for crimes that are mandatorily consecutive under Indiana Code section 35-50-1-2(d) because that statute does not provide the requisite “express statutory

150. *Id.* at 723 (Scalia, J., dissenting).

151. 823 N.E.2d 679, 686 (Ind. 2005), *superseded by statute as noted in* Anglemeyer v. State, 868 N.E.2d 482 (Ind. 2007).

152. IND. CODE § 35-50-1-2(c) (2008).

153. *Id.* § 35-50-2-6(a).

154. 900 N.E.2d 1291 (Ind. Ct. App. 2009).

155. *Id.* at 1291.

156. 727 N.E.2d 1091 (Ind. Ct. App.), *trans. denied*, 741 N.E.2d 1251 (Ind. 2000).

157. *Dunn*, 900 N.E.2d at 1292 (citing *Purdy*, 727 N.E.2d at 1094).

158. *Id.*

159. *Id.*

160. *See, e.g.,* Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008) (“Whether the counts involve one or multiple victims is highly relevant to the decision to impose consecutive sentences”); *see also infra* Part II.F.2 (discussing 7(B) cases decided during the survey period).

161. IND. CODE § 35-50-1-2(c) (2008).

162. 907 N.E.2d 992 (Ind. 2009).

authorization for . . . a tacking of habitual offender sentences.”¹⁶³ Citing *Breaston*, the supreme court found ineffective assistance of counsel in *Farris v. State*,¹⁶⁴ where counsel did not object to consecutive habitual offender enhancements imposed in separate trials on related charges.¹⁶⁵

2. *Rule 7(B) Cases.*—Beyond the statutory limitations, many sentencing challenges are grounded in the court’s constitutional power to review and revise sentences, as implemented through Appellate Rule 7(B).¹⁶⁶ This is different from a challenge to the adequacy of the reasons stated by the trial court in imposing a sentence. As reiterated in *King v. State*,¹⁶⁷ a sentencing challenge may allege trial court error in its sentencing statement, which is reviewed for an abuse of discretion, or it may challenge the number of years or placement as inappropriate.¹⁶⁸ As to the latter, appellants must convince the appellate court a sentence is inappropriate in light of the nature of the offense and the character of the offender under Appellate Rule 7(B).¹⁶⁹ This is an independent review by the appellate court and not reviewed under an abuse of discretion standard.¹⁷⁰

In *Cardwell v. State*,¹⁷¹ the Indiana Supreme Court was remarkably candid about appellate sentence review in reducing a sentence from thirty-four years to seventeen for two counts of Class B felony neglect of a dependent.¹⁷² The court acknowledged that “there is thus no right answer as to the proper sentence in any given case” and that it had “not adopted a consistent methodology in reviewing sentences.”¹⁷³ Rather, in reviewing sentences, the court usually describes “the nature of the offense and character of the offender (13 cases), but sometimes independently assign[s] weights to aggravators and mitigators (5 cases) or compare[s] the defendant’s sentence to others’ or the hypothetical ‘worst

163. *Id.* at 995 (quoting *Starks v. State*, 523 N.E.2d 735, 737 (Ind. 1988)).

164. 907 N.E.2d 985 (Ind. 2009).

165. *Id.* at 987-88.

166. *See* IND. CONST. art. 7, §§ 4, 6; IND. R. APP. P. 7(B). The Indiana Supreme Court has made clear that this provision allows for extensive sentence review “when certain broad conditions are satisfied.” *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 the Indiana Supreme Court has reduced eleven of twenty-two sentences reviewed under Appellate Rule 7(B) since January 2003).

167. 894 N.E.2d 265 (Ind. Ct. App. 2008).

168. *Id.* at 267.

169. *Id.*

170. *Id.* In addition, *King* exemplified the difficulty in challenging the place a sentence is ordered to be served. As explained in last year’s survey, the court of appeals requires defendants challenging a placement to convince the court the placement is inappropriate, which is especially difficult because trial courts know the availability, costs, and entrance requirements for community corrections in a specific county. *See* Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 42 IND. L. REV. 937, 951 (2009) [hereinafter Schumm, 2009 *Recent Developments*] (discussing *Fonner v. State*, 876 N.E.2d 340 (Ind. Ct. App. 2007)).

171. 895 N.E.2d 1219 (Ind. 2008).

172. *Id.* at 1224-27.

173. *Id.* at 1224.

offender' (4 cases)."¹⁷⁴ The court emphasized that "[t]he principal role of appellate [sentence] review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case."¹⁷⁵ Because the number of counts "is virtually entirely at the discretion of the prosecution[,] . . . appellate review should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count."¹⁷⁶ In reducing the sentence, the court noted that the defendant's knowledge of the temperature of the water that burned the child's hands was "vigorously contested," the trial court made "no findings" about prior abuse, and the disparity with the co-defendant's sentence was "stark."¹⁷⁷ Although cases like *Cardwell* highlight the willingness of appellate courts to reduce sentences, it also underscores the difficulty for defense counsel in advising a client about a plea agreement that includes a sentence waiver provision¹⁷⁸ when there is "no right answer" about sentencing in any case.¹⁷⁹ Nevertheless, *Cardwell* could be cited in future cases to argue the significance of disparity with a co-defendant's sentence or to diminish the impact of evidence offered by the State at sentencing when the trial court made no findings on the issue.

Other cases decided during the survey period provide examples of the parameters for 7(B) review. In *Tyler v. State*,¹⁸⁰ the Indiana Supreme Court emphasized that the defendant was emotionally troubled, had been in institutional placements for much of his childhood, and had an IQ in the range of sixty-one to seventy-two.¹⁸¹ The court reduced the 110-year sentence to sixty-seven and a half years.¹⁸² In *Mishler v. State*,¹⁸³ the court of appeals reduced a sentence in a child molestation case.¹⁸⁴ Although the court found that the two separate acts of molestation were "monstrous," it reduced the fifty-year maximum concurrent sentences to thirty-eight years based on the defendant's limited criminal history of possession of marijuana ten years earlier.¹⁸⁵ Cases like *Tyler* and *Mishler* should give defense counsel some pause when waiving the right to appeal a

174. *Id.* (citations and footnotes omitted)

175. *Id.* at 1225.

176. *Id.*

177. *Id.* at 1226.

178. In *Creech v. State*, 887 N.E.2d 73 (Ind. 2008), the Indiana Supreme Court held that "a defendant may waive the right to appellate review of his sentence as part of a written plea agreement." *Id.* at 75. The matter need not be discussed on the record if other evidence demonstrates the defendant entered into the agreement knowingly and voluntarily. *Id.* at 76.

179. *Cardwell*, 895 N.E.2d at 1224.

180. 903 N.E.2d 463 (Ind. 2009).

181. *Id.* at 469.

182. *Id.* at 468-69.

183. 894 N.E.2d 1095 (Ind. Ct. App. 2008).

184. *Id.* at 1097.

185. *Id.* at 1104.

sentence in a child molestation case. If the defendant has only a minimal criminal history, the maximum sentence will seldom be appropriate.

Although most 7(B) cases involve only an executed sentence, some challenged sentences include years suspended to probation. A significant split in the court of appeals has developed regarding the suspension of sentences under Rule 7(B) reviews. This issue first surfaced in *Beck v. State*.¹⁸⁶ There, the court observed the defendant's "suspended sentence of 365 days is not the maximum sentence permitted by statute."¹⁸⁷ Judge Mattingly-May wrote a concurring opinion in which she observed, "[a] 365-day sentence, whether suspended or served in the Department of Correction, is the 'maximum sentence.' A year is still a year, and a sentence is still a sentence. A suspended sentence is one actually imposed but the execution of which is thereafter suspended."¹⁸⁸ Judge Mattingly-May's position was adopted with little discussion in *Cox v. State*¹⁸⁹ and *Pagan v. State*.¹⁹⁰ Judge Sullivan wrote separately in *Cox* to express agreement with Judge Mattingly-May's view by noting, "[t]o be sure, a suspended maximum sentence is less onerous in its penal impact upon a defendant than a fully executed sentence, but it is not a sentence for less than the maximum number of years called for by statute."¹⁹¹ Again the next year, another panel of the court of appeals in *Eaton v. State*¹⁹² agreed with Judge Mattingly-May's view. Judge Kirsch dissented, expressing the view that "a suspended sentence is not the same as an executed sentence, and time spent on work release through a community corrections program is not the same as time spent in a state prison."¹⁹³ The issue did not arise again in a published opinion until July of 2009, where a unanimous panel in *Jenkins v. State* adopted the minority approach.¹⁹⁴ There, the court adopted Judge Kirsch's view in *Eaton*, concluding "[m]ost would agree that prison is worse than probation, and it is simply not realistic to consider a year of probation, a year in community corrections, and a year in prison as equivalent."¹⁹⁵

The *Jenkins* approach, however, may not ultimately withstand Indiana Supreme Court scrutiny for several reasons. First, treating suspended sentences differently than executed sentences finds no support in the sentencing statutes, which should be of primary importance. The sentencing statutes focus on a number of years, with no mention of whether they are executed or suspended.¹⁹⁶ The sentencing range and advisory sentence for each class of felony is simply a

186. 790 N.E.2d 520, 523 (Ind. Ct. App. 2003).

187. *Id.* at 522.

188. *Id.* at 523 (Mattingly-May, J., concurring in result).

189. 792 N.E.2d 898, 904 n.6 (Ind. Ct. App. 2003).

190. 809 N.E.2d 915, 926 n.9 (Ind. Ct. App. 2004).

191. *Cox*, 792 N.E.2d at 906 (Sullivan, J., concurring in part and dissenting in part).

192. 825 N.E.2d 1287, 1290-91 (Ind. Ct. App. 2005), *overruled on other grounds by* Childress v. State, 848 N.E.2d 1073, 1077 n.2 (Ind. 2006).

193. *Id.* at 1291 (Kirsch, C.J., dissenting).

194. 909 N.E.2d 1080 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 555 (Ind. 2009).

195. *Id.* at 1084.

196. *See* IND. CODE § 35-50-2-1(c) (2008) (defining minimum sentences).

number of years—not a number of years suspended or executed.¹⁹⁷ For example, a “person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years.”¹⁹⁸ A separate statute makes clear that trial courts “may suspend any part of a *sentence* for a felony, except as provided in this section or in section 2.1 of this chapter.”¹⁹⁹

Next, although the Indiana Supreme Court has not squarely addressed the issue, making no distinction between executed and suspended sentences finds support in the court’s 7(B) decisional law. Although 7(B) reductions have primarily involved fully executed (and often maximum or consecutive) sentences, when a portion of the sentence has been suspended, the court has viewed suspended time no differently than executed time.²⁰⁰ Moreover, in *Mask v. State*,²⁰¹ the court cited with approval Judge Mattingly-May’s concurring opinion in *Beck*.²⁰² Specifically, in addressing whether any suspended portion of a sentence must be considered a period of “incarceration” or “imprisonment” under Indiana Code section 35-50-1-2(c), the court concluded:

Incarceration in the context of subsection (c) does not mean the period of executed time alone. A suspended sentence differs from an executed sentence only in that the period of incarceration is delayed unless, and until, a court orders the time served in prison. In other words, the imposition of a suspended sentence leaves open the real possibility that an individual will be “sent to incarceration for some period” before being released from any penal obligation. This commonly occurs when probation or parole is revoked, and a defendant who received probation or parole is subject to incarceration until released.²⁰³

Finally, making no distinction between suspended and executed time is necessary to ensure defendants receive meaningful sentencing review. The Indiana Constitution provides for the review and revision of sentences.²⁰⁴ It makes no distinction between sentences imposed on direct appeal or after a probation violation. A term of incarceration after a probation violation is no different from one imposed at a sentencing hearing; both defendants are at the Department of Correction for a fixed period where their liberty is restricted in significant ways. However, in *Prewitt v. State*,²⁰⁵ the court adopted an abuse of

197. *Id.* §§ 35-50-2-3 to -7.

198. *Id.* § 35-50-2-6(a).

199. *Id.* § 35-50-2-2(a) (emphasis added).

200. *See, e.g.,* Neale v. State, 826 N.E.2d 635, 636, 639 (Ind. 2005) (reducing “the maximum” sentence of fifty years with ten suspended to forty years with ten suspended).

201. 829 N.E.2d 932 (Ind. 2005).

202. *Id.* at 936 (citing Beck v. State, 790 N.E.2d 520, 523 (Ind. Ct. App. 2003) (Mattingly-May, J., concurring in result)).

203. *Id.* (citation omitted).

204. *See* IND. CONST. art. 7, §§ 4, 6.

205. 878 N.E.2d 184 (Ind. 2007).

discretion standard for reviewing sentences after the revocation of probation.²⁰⁶ This has been an especially high bar that no defendant has been able to meet before either the court of appeals or supreme court.²⁰⁷

Under the *Jenkins* approach, trial courts have a blank check to impose the full back-up time after the revocation of probation. Whether “almost any defendant, given the choice, would gladly accept a partially suspended sentence over a fully executed one of equal length”²⁰⁸ is simply not relevant to the issue. Rather, the reality and consequences of a suspended sentence are crucial, and suspended sentences may—and often are—ordered served as executed sentences.²⁰⁹

3. *Increasing Sentences on Appeal*.—Defendants generally exercise their constitutional right to appeal with the presumption the worst that can happen is an “affirmed” at the bottom of the opinion and a continuation of the status quo. That understanding changed with *McCullough v. State*.²¹⁰ There, the Indiana Supreme Court offered a comprehensive review of article 7, section 6 of the Indiana Constitution, which created the power to review and revise sentences in 1970.²¹¹ Although that provision had been applied exclusively for the benefit of defendants seeking a reduction in their sentence, the court concluded that “‘revise’ is not synonymous with ‘decrease,’ but rather refers to any change or alteration.”²¹² This is consistent with the ABA Model Judicial Article and the British system on which the Indiana provision was based, which allows increased sentences on appeal.²¹³ The appellate courts, however, do not have an unfettered right to increase sentences on appeal.²¹⁴ Rather, only when a defendant seeks

206. *Id.* at 188.

207. *See, e.g., Jones v. State*, 885 N.E.2d 1286, 1290 (Ind. 2008) (affirming the court of appeals’s rejection of defendant’s abuse of discretion claim); *Podlusk v. State*, 839 N.E.2d 198 (Ind. Ct. App. 2005) (affirming revocation of probation and imposition of previously-suspended sentence, where notice of probation violation was filed five days after defendant left treatment facility and failed to inform probation department that probationer had moved back to her apartment, the address on file with the probation department).

208. *Jenkins v. State*, 909 N.E.2d 1080, 1084 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 555 (Ind. 2009).

209. *See id.* at 1084-85.

210. 900 N.E.2d 745 (Ind. 2009).

211. *Id.* at 746-49.

212. *Id.* at 749.

213. *Id.* at 749-50.

214. *See id.* at 750-51 (noting that defendant must first seek appellate review and revision of his sentence before an appellate court can even consider increasing the sentence). The court is free, however, to correct an illegal sentence, as in *Young v. State*, 901 N.E.2d 624 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 552 (Ind. 2009). In *Young*, the defendant was convicted of Class D felony operating a vehicle while intoxicated (OVWI) and of being an habitual substance offender (HSO). *Id.* at 625. Most of the OVWI time and all of the HSO time were suspended. *Id.* The mandatory HSO term is three to eight years, “[a]nd the trial court can only suspend that portion of the sentence in excess of three and a half years.” *Id.* at 626 (citing *Bauer v. State*, 875 N.E.2d 744, 750 (Ind. Ct. App. 2007)). Therefore, the case was remanded with instructions to order three and a half years

revision of the sentence will the court consider “whether to affirm, reduce, or increase the sentence.”²¹⁵ In responding to such a challenge, the State may present reasons for an increased sentence.²¹⁶ The State may not initiate a sentencing challenge on appeal or cross-appeal, however.²¹⁷

Justice Boehm, joined by Justice Rucker, wrote a separate concurring opinion aptly noting that the majority’s approach “puts the defendant’s counsel in a very awkward position if upward revision by an appellate court is a realistic prospect.”²¹⁸ He counseled against forcing lawyers “to choose among raising the issue and obtaining an increased sentence, or foregoing the issue and either waiving appeal or raising frivolous issues.”²¹⁹ He concluded the court should “forthrightly” acknowledge its power to increase a sentence but make clear “we have never exercised it and do not expect to exercise it in the future except in the most unusual case.”²²⁰

In the six months of the survey period following *McCullough*, neither the supreme court nor court of appeals increased a sentence.²²¹ The court of appeals showed some reluctance to consider an increase in a case in the appellate pipeline at the time *McCullough* was issued. For example, in *Atwood v. State*,²²² the defendant requested a reduction in his twelve-year sentence for B felony possession of cocaine.²²³ The sentencing range for a Class B felony is six to twenty years,²²⁴ and the State requested an increase in the sentence.²²⁵ However, Atwood’s initial brief was filed days before the supreme court issued *McCullough*.²²⁶ Concerned that Atwood would not have raised the issue had he known his sentence could be increased, the court refused to consider the State’s request for an increase.²²⁷ As to Atwood’s argument for a reduction, the court had

executed time. *Id.* This meant the defendant, who had completed his 240-day sentence, would have to serve nearly a year and a half additional executed time in jail or community corrections even with credit for good behavior.

215. *McCullough*, 900 N.E.2d at 750.

216. *Id.* at 751.

217. *Id.* at 750.

218. *Id.* at 753 (Boehm, J., concurring).

219. *Id.*

220. *Id.*

221. *See, e.g., Moore v. State*, 907 N.E.2d 179, 183 (Ind. Ct. App.) (“*McCullough* was handed down twenty-seven days *after* Moore’s counsel briefed this case, and we are not inclined to apply *McCullough* retroactively without specific direction from our supreme court allowing us to do so.”), *trans. denied*, 919 N.E.2d 555 (Ind. 2009).

222. 905 N.E.2d 479 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 556 (Ind. 2009).

223. *Id.* at 486.

224. *Id.* (citing IND. CODE § 35-50-2-5 (2008)).

225. *Id.* at 487.

226. *Id.*

227. *Id.* at 488. The court did not mention the possibility of filing an amended brief. Had Atwood been concerned about the possibility of an increase in the wake of *McCullough*, Appellate Rule 47 would have allowed him the opportunity to seek to amend his brief and abandon the

little trouble finding a two-year enhancement to the ten-year advisory term appropriate in light of his extensive criminal history of twenty-three adult convictions, including eight felony convictions.²²⁸

McCullough can be fairly criticized by both the defense bar and prosecutors. Defendants and defense lawyers are put in an odd position of trying to decide what could happen on appeal when the Indiana Supreme Court held just months earlier that there is no correct sentence in any case.²²⁹ Fulfilling defense counsel's ethical duty to provide competent advice is difficult, to say the least. Ultimately, defense lawyers must describe and explain all of the options and let the client decide whether to roll the dice. In cases like *Atwood*, where the defendant has a lengthy criminal history and could face an increase of eight years, the best advice would seem to be not to press one's luck. The court of appeals would not likely reduce a sentence that is just two years above the advisory term when the defendant has a lengthy criminal history.

Moreover, prosecutors could understandably be unhappy with the inability to challenge a sentence, except when the defense makes the first move. The goal of consistency in sentencing seems unachievable by considering sentencing appeals only on a one-way street.²³⁰ No matter how lenient a trial court is at sentencing, under *McCullough* the State cannot initiate an appeal of a sentence unless authorized to do so by statute. This differs from the federal system and some states.²³¹ The State has no opportunity to "leaven the outliers,"²³² on the low end of the range. If a court imposes a minimum sentence, the defendant would have nothing to appeal, and *McCullough* prohibits the State from initiating on appeal.

Finally, *McCullough* could have a mixed effect on trial court judges. On one hand, it may lead judges to be more meticulous in explaining reasons for sentences at or below the advisory range to stave off a potential increase on appeal. Alternatively, it may lead to longer sentences. Trial judges, who must face the electorate every six years, could understandably be concerned by the prospect of one of their sentences being reversed as too lenient. However, having a lengthy sentence reduced on appeal would certainly play better with the electorate than having a lenient sentence increased on appeal.

sentencing issue. See IND. APP. R. 47.

228. *Atwood*, 905 N.E.2d at 488.

229. See *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008) ("There is . . . no right answer as to the proper sentence in any given case."); see also *supra* text accompanying notes 171-79.

230. See generally *Serino v. State*, 798 N.E.2d 852, 854 (Ind. 2003) (observing that "a respectable legal system attempts to impose similar sentences on perpetrators committing the same acts who have the same backgrounds").

231. See 18 U.S.C. § 3742(b) (2006); see also Christina N. Davilas, Note, *Prosecutorial Sentence Appeals: Reviving the Forgotten Doctrine in State Law as an Alternative to Mandatory Sentencing Laws*, 87 CORNELL L. REV. 1259, 1265-66 (2002) (explaining the prosecutorial appeal legislation enacted by Congress in the last thirty years).

232. See *Cardwell*, 895 N.E.2d at 1225.

G. No Anders Briefs in Indiana

Previous survey articles have discussed the propriety of *Anders* briefs in Indiana.²³³ The court of appeals suggested in 2002 that appointed counsel should file such a brief and seek to withdraw in cases with frivolous issues,²³⁴ although a few years later the court found counsel had inappropriately invoked the procedure in a case with a meritorious sentencing issue.²³⁵ Those articles concluded that counsel should never file an *Anders* brief because doing so would be inconsistent with longstanding precedent and would conflict with provisions of both the rules of professional conduct and the appellate rules.²³⁶

Although taking a slightly different path, the Indiana Supreme Court reached the same conclusion in *Mosley v. State*.²³⁷ The court held, “in any direct criminal appeal as a matter of right, counsel must submit an advocative brief in accordance with Indiana Appellate Rule 46.”²³⁸ The court explained that requiring such briefs—“no matter how frivolous counsel regards the claims to be—is quicker, simpler, and places fewer demands on the appellate courts.”²³⁹ Moreover, this requirement avoids the prejudice to defendants caused “by flagging the case as without merit, which invites perfunctory review by the court.”²⁴⁰ As Justice Boehm’s unanimous opinion put it, “in a direct appeal a convicted defendant is entitled to a review by the judiciary, not by overworked and underpaid public defenders.”²⁴¹

Not only must appointed counsel file an advocative brief, but counsel must also be deliberate about choosing issues to make sure the client does not end up worse off after the appeal. As summarized above, the Indiana Supreme Court’s recent opinion in *McCullough* allowed appellate courts to *increase* sentences on appeal.²⁴² Although the court in *Mosley* suggested “in those few cases that offer no colorable argument of trial court error whatsoever, counsel may still be able to solicit a sentence revision or even a change in the law.”²⁴³ In light of

233. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 40 IND. L. REV. 789, 818-20 (2007) [hereinafter Schumm, 2007 *Recent Developments*]; Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 37 IND. L. REV. 1003, 1016-19 (2004) [hereinafter Schumm, 2004 *Recent Developments*].

234. See *Packer v. State*, 777 N.E.2d 733, 737 (Ind. Ct. App. 2002), *overruled by Mosley v. State*, 908 N.E.2d 599 (Ind. 2009).

235. See *Seals v. State*, 846 N.E.2d 1070, 1076 (Ind. Ct. App. 2006), *overruled by Mosley*, 908 N.E.2d at 599.

236. Schumm, 2007 *Recent Developments*, *supra* note 233, at 818-20; Schumm, 2004 *Recent Developments*, *supra* note 233, at 1016-19.

237. 908 N.E.2d 599 (Ind. 2009).

238. *Id.* at 602.

239. *Id.* at 608.

240. *Id.*

241. *Id.*

242. See *supra* notes 210-20 and accompanying text.

243. *Mosley*, 908 N.E.2d at 608.

McCullough, arguing for a change in the law is surely the lower-risk route.

H. Probation

During the survey period, the court of appeals clarified an important change to longstanding practice about the addition of probation conditions,²⁴⁴ continued its trend of finding probation conditions unconstitutionally vague,²⁴⁵ and reversed the revocation of probation in a case in which the State relied solely on a probation officer's unsworn testimony.²⁴⁶

Before 2005, the probation statute and case law interpreting it did not allow trial courts to impose additional terms of probation in the absence of a probation violation.²⁴⁷ Effective in 2005, Indiana Code section 35-38-2-1.8 now provides:

- (b) The court may hold a new probation hearing at any time during a probationer's probationary period:
 - (1) upon motion of the probation department or upon the court's motion; and
 - (2) after giving notice to the probationer.
- (c) At a probation hearing described in subsection (b), the court may modify the probationer's conditions of probation. If the court modifies the probationer's conditions of probation, the court shall:
 - (1) specify in the record the conditions of probation; and
 - (2) advise the probationer that if the probationer violates a condition of probation during the probationary period, a petition to revoke probation may be filed . . .
- (d) The court may hold a new probation hearing under this section even if:
 - (1) the probationer has not violated the conditions of probation; or
 - (2) the probation department has not filed a petition to revoke probation.²⁴⁸

In *Collins v. State*, the court of appeals made clear that those earlier precedents had been superseded by the 2005 amendment, which means just what it says: trial courts may "revise the terms of probation regardless of whether a probation violation has occurred."²⁴⁹ Moreover, the amendment was remedial and therefore applied to *Collins* even though it was not in effect at the time of his offense.²⁵⁰

244. See *infra* text accompanying notes 252-58.

245. See *infra* text accompanying notes 259-61.

246. See *infra* text accompanying notes 262-65.

247. See, e.g., *Jones v. State*, 789 N.E.2d 1008, 1012 (Ind. Ct. App. 2003), *superseded by statute*, Act of Apr. 7, 2005, 2005 Ind. Acts 14, *as recognized in Collins v. State*, 911 N.E.2d 700, 708 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 559 (Ind. 2009).

248. IND. CODE § 35-38-2-1.8 (2008).

249. *Collins*, 911 N.E.2d at 708.

250. *Id.*

It posed no ex post facto problem because it did “not increase the punishment for or change the elements of any crime or deprive anyone of a defense or lesser punishment.”²⁵¹ The court correctly declined to follow another case decided during the survey period, *Ferrill v. State*,²⁵² which concluded that trial courts were without authority to modify probation terms absent a probation violation.²⁵³

In addition to clarifying this important statutory change, *Collins* followed earlier precedent in finding several special conditions of probation unconstitutionally vague.²⁵⁴ *McVey v. State* had struck down many of the conditions two years earlier.²⁵⁵ Specifically, the court in *Collins* remanded the following conditions for the trial court to reconsider and clarify with greater specificity: (1) restrictions on “dating” relationships; (2) a prohibition on “cruising”; (3) restrictions on engaging in “activities that could be construed as enticing children”; (4) a ban on possession of “sexually arousing materials”; and (5) a requirement to report “incidental contact with persons under age 18.”²⁵⁶

Finally, beyond addressing the appropriateness of probation conditions, the court also issued an important reminder on appropriate procedures and evidence at probation hearings. In *Tillberry v. State*,²⁵⁷ the court reversed a probation revocation that occurred without any evidence or sworn testimony.²⁵⁸ Although the petition to revoke the defendant’s probation alleged a new arrest, “an arrest standing alone will not support the revocation of probation. ‘Evidence must be presented from which the trial judge could reasonably conclude that the arrest was appropriate and that there is probable cause to believe the defendant violated a criminal law before the revocation may be sustained.’”²⁵⁹ Moreover, the unsworn statement of a probation officer that the defendant had shown up only once was insufficient because it did not demonstrate that any appointments had been scheduled or missed.²⁶⁰

I. Sex Offender Registry

With *Wallace v. State*,²⁶¹ the Indiana Supreme Court joined a small minority

251. *Id.* at 712.

252. 904 N.E.2d 323 (Ind. Ct. App. 2009).

253. *Collins*, 911 N.E.2d at 708 n.2 (citing *Ferrill*, 904 N.E.2d at 325).

254. *Id.* at 713-16.

255. *Id.* at 713-15 (citing *McVey v. State*, 863 N.E.2d 434, 447-50 (Ind. Ct. App. 2007)). Previous survey articles discussed unconstitutionally vague probation conditions. *See, e.g.*, Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 41 IND. L. REV. 955, 970-71 (2008).

256. *Collins*, 911 N.E.2d at 713-16.

257. 895 N.E.2d 411 (Ind. Ct. App. 2008).

258. *Id.* at 417.

259. *Id.* (quoting *Weatherly v. State*, 564 N.E.2d 350, 352 (Ind. Ct. App. 1990)).

260. *Id.*

261. 905 N.E.2d 371 (Ind. 2009).

of courts in striking down the sex offender registry on ex post facto grounds.²⁶² Justice Rucker's opinion for a unanimous court begins with a comprehensive history of Indiana's sex offender registry and the increasingly onerous and punitive requirements imposed since its initial enactment in 1994.²⁶³ Wallace, who was charged with child molesting in 1988 and pleaded guilty in 1989, was required to register based on a 2001 amendment that required all sex offenders, regardless of the date of the offense, to register.²⁶⁴ After he failed to register, he was charged with failing to register as a sex offender and unsuccessfully sought to dismiss the charge in the trial court.²⁶⁵

The federal and state ex post facto clauses forbid "punishment for an act which was not punishable at the time it was committed[, and laws that] impose[] additional punishment to that then prescribed."²⁶⁶ The underlying principle is to provide "fair warning of that conduct which will give rise to criminal penalties."²⁶⁷ Although the Indiana Court of Appeals had long held the federal and state analysis to be the same, the Indiana Supreme Court seized the opportunity in *Wallace* to reiterate the "unique vitality" of the state constitution.²⁶⁸ Rather than adopting a separate test or analysis for the state constitutional provision,²⁶⁹ the court applied the same analysis used by the U.S. Supreme Court and reached a different result.²⁷⁰ Specifically, the court applied the "intent-effects" test, focusing on the statute's effects under the seven-factor test from *Kennedy v. Mendoza-Martinez*.²⁷¹ The court concluded that only one factor advanced a non-punitive interest while the others evinced a punitive effect, particularly the seventh factor of excessiveness.²⁷² As to that factor, the court

262. *See id.* at 374 n.1.

263. *Id.* at 374-77.

264. *Id.* at 373.

265. *Id.*

266. *Id.* at 377 (quoting *Weaver v. Graham*, 450 U.S. 24, 28 (1981)).

267. *Id.* (citing *Armstrong v. State*, 848 N.E.2d 1088, 1093 (Ind. 2006)).

268. *Id.* at 377-78.

269. *But cf.* *Malinski v. State*, 794 N.E.2d 1071, 1079 (Ind. 2003) (explaining that unlike the federal constitution, "law enforcement officials have a duty to inform a custodial suspect immediately when an attorney hired by the suspect's family to represent him is present at the station seeking access to him" under article 1, section 13); *Richardson v. State*, 717 N.E.2d 32, 52-53 (Ind. 1999) (separate analysis of the "actual evidence test" for double jeopardy claims); *Brown v. State*, 653 N.E.2d 77, 79-81 (Ind. 1995) (separate analysis of "reasonableness" for search and seizure claims); *Collins v. Day*, 644 N.E.2d 72, 75 (Ind. 1994) (separate analysis for the equal privileges and immunities clause); *Price v. State*, 622 N.E.2d 954, 957 (Ind. 1993) (separate analysis for political speech claims); *accord* Daniel O. Conkle, *The Indiana Supreme Court's Emerging Free Speech Doctrine*, 69 IND. L.J. 857, 857 (1994) (observing that the "analytical framework" in *Price* "differs dramatically from that which informs the First Amendment doctrine of the United States Supreme Court").

270. *Wallace*, 905 N.E.2d at 378.

271. *Id.* at 379 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

272. *Id.* at 384.

expressed concern that not only is “information on all sex offenders available to the general public without restriction and without regard to whether the individual poses any particular future risk,” but offenders have no mechanism to petition for removal despite proof of rehabilitation.²⁷³

In *Jensen v. State*,²⁷⁴ decided the same day as *Wallace*, a fractured court reached a different result in addressing a challenge by a defendant classified as a sexually violent predator and required to register for life.²⁷⁵ At the time of his guilty plea in 2000, Jensen was required to register as a sex offender for ten years.²⁷⁶ The 2006 amendments, however, classified him as a “sexually violent predator” and required lifetime registration.²⁷⁷ The plurality opinion, written by Justice Rucker and joined by the Chief Justice, found some of the *Mendoza-Martinez* factors weighed differently in distinguishing *Wallace*.²⁷⁸ As to the weighty seventh factor, the plurality emphasized that the “broad and sweeping” disclosure requirements were in effect in 2000 and that sexually violent predators may petition the trial court after ten years to have their status changed, which could result in removal from the registry.²⁷⁹

Justice Sullivan concurred only in the result, opining that Jensen’s challenge was not yet ripe for adjudication.²⁸⁰ “Only when the 10 year period has run—several years from now—will Jensen be subject to a registration requirement that might arguably be *ex post facto*.”²⁸¹ Justice Boehm, joined by Justice Dickson, wrote a dissenting opinion that analyzed the *Mendoza-Martinez* factors differently, concluding that the seventh factor in particular weighed in Jensen’s favor: “the newly enacted requirement of additional lifetime publication of Jensen’s picture captioned ‘Sex Predator’ in flashing red letters surely is of some severe consequence, and requires some determination that it remains appropriate for the individual offender a decade after the crime.”²⁸²

Within two months of *Wallace*, the supreme court further limited restrictions on sex offenders imposed by the residency restriction statute, while the court of appeals invalidated a local ordinance restricting sex offenders from city parks. In *State v. Pollard*,²⁸³ the Indiana Supreme Court considered the reach of a statute that prohibits a person convicted of certain sex-related crimes from residing within 1,000 feet of school property, a youth center, or a public park.²⁸⁴ Although the statute took effect July 1, 2006, the State charged Pollard, who had owned

273. *Id.*

274. 905 N.E.2d 384 (Ind. 2009).

275. *Id.* at 388-89.

276. *Id.*

277. *Id.* at 389.

278. *Id.* at 391-94.

279. *Id.* at 394.

280. *Id.* at 396 (Sullivan, J., concurring in result).

281. *Id.*

282. *Id.* at 398 (Boehm, J., dissenting).

283. 908 N.E.2d 1145 (Ind. 2009).

284. *Id.* at 1147 (citing IND. CODE § 35-42-4-11 (2006)).

property within the prohibited area for twenty years.²⁸⁵ The court upheld the trial court's dismissal of the charge on ex post facto grounds because "it imposes burdens that have the effect of adding punishment beyond that which could have been imposed when his crime was committed."²⁸⁶ In *Dowdell v. City of Jeffersonville*,²⁸⁷ the court of appeals considered an ordinance that banned "sex offenders" from public parks and imposed fines or allowed criminal trespass prosecutions for violators.²⁸⁸ A divided panel found the ordinance unconstitutional as applied to the plaintiff, whose duty to register as a sex offender had expired and who had sought to watch his minor son's Little League games.²⁸⁹ Although the ordinance allowed offenders to petition for exemptions, the "provisions are extremely narrow at best and illusory at worst," requiring extensive documentation and accompaniment by a close relative, while imposing limitations on applications and allowing denials for virtually any reason.²⁹⁰

Although *Wallace* and its progeny resolved some significant issues, others remain as sex offender registry cases play out in a number of different ways. First, how may a person have his or her name removed from the registry? A few counties appear to have taken a proactive view by removing anyone who committed a crime before the state created the registry.²⁹¹ In other counties, however, offenders will be required to litigate the issue in a trial court.²⁹² Related to that issue, may the State prosecute someone with failure to register if his or her name is on the registry but should not be? This situation seems possible in counties that are not preemptively purging the registry, and the issue would presumably then need to be addressed through a defendant's motion to dismiss.

J. Six-for-One Credit Time for Credit Restricted Felons

Although not a registry case, *Upton v. State*²⁹³ provides important relief to many convicted of sex offenses in Indiana. There, the Attorney General conceded, and the court of appeals found, that the 2008 amendments to the credit time statute were an ex post facto violation.²⁹⁴ Before 2008, all defendants were eligible to earn two days of credit for each day served in jail or prison.²⁹⁵ The 2008 amendment created a new class of "credit restricted felons" for certain child

285. *Id.* at 1147-48.

286. *Id.* at 1154.

287. 907 N.E.2d 559 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 552 (Ind. 2009).

288. *Id.* at 562.

289. *Id.* at 563-64.

290. *Id.* at 571.

291. Jeff Wiehe & Rebecca S. Green, *Ruling Clouds Sex-Offender Registry*, J.-GAZETTE (Fort Wayne, Ind.), Jan. 8, 2010, at A1, available at <http://www.journalgazette.net/article/20100108/LOCAL/301089961/1002/LOCAL>.

292. *See id.*; *see also* IND. CODE § 11-8-8-5 (Supp. 2009) (defining "sex or violent offender").

293. 904 N.E.2d 700 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 994 (Ind. 2009).

294. *Id.* at 705-06.

295. *See* Schumm, 2009 *Recent Developments*, *supra* note 170, at 939-40.

molesting or murder defendants who would instead earn one day for each six days imprisoned.²⁹⁶ Although the legislature amended the statute to apply to “persons convicted after June 30, 2008,”²⁹⁷ after *Upton* it may only apply to those who *commit* offenses after June 30, 2008.²⁹⁸ This date is essential to both prosecutors and defense lawyers as they negotiate plea agreements in cases involving multiple counts or single counts alleged to have occurred both before and after the date. Some counts may be eligible for two-for-one credit, while others will require defendants to serve nearly eighty-five percent of their sentence under the new statute.

K. Expungement

In *State ex rel. Indiana State Police v. Arnold*,²⁹⁹ the Indiana Supreme Court offered important clarification of the expungement statute. Although the lengthy statute includes several requirements and exceptions, *Arnold* focused on subsection (f) of Indiana Code section 35-38-5-1, which states:

After a hearing is held under this section, the petition shall be granted unless the court finds:

1. the conditions in subsection (a) have not been met;
2. the individual has a record of arrests other than minor traffic offenses; or
3. additional criminal charges are pending against the individual.³⁰⁰

In *Arnold*, the defendant sought expungement of a 1993 robbery for which he was arrested but never charged.³⁰¹ Because he had arrests for several offenses beginning in 1991, the State argued the trial court could not grant expungement under subsection (f)(2).³⁰² The supreme court disagreed, focusing on the importance of the trial court’s discretion emanating throughout the statute.³⁰³

Under the plain language of subsection (f), if “the trial court finds none of the above three factors, it must grant the petition for expungement.”³⁰⁴ If, under factor one, the conditions of subsection (a) have not been met—charges were dropped because of mistaken identity, no offense was committed, or there was no probable cause³⁰⁵—the trial court must deny the petition.³⁰⁶ When only (f)(2) or (f)(3) is present, however, “the statute is silent as to whether the court is required

296. *Id.* at 940-42.

297. *Upton*, 904 N.E.2d at 704.

298. *Id.* at 706.

299. 906 N.E.2d 167 (Ind. 2009).

300. *Id.* at 169 (quoting IND. CODE § 35-38-5-1(f) (2008)).

301. *Id.* at 167.

302. *Id.* at 169.

303. *Id.* at 171.

304. *Id.* at 170.

305. IND. CODE § 35-38-5-1(a)(2) (2008).

306. *Arnold*, 906 N.E.2d at 170.

to deny the petition for expungement or whether it still has discretion to grant the petition.”³⁰⁷ Because the statute gives “trial court[s] almost unfettered discretion to grant summarily or to deny summarily a petition for expungement” elsewhere in the statute, the court concluded the legislature could not have intended “to take away that discretion completely when the court decides to conduct a fact-finding hearing.”³⁰⁸ Finally, the State’s interpretation that trial courts have no discretion in the face of a record of arrests could lead to absurd results, namely the inability to expunge an arrest of a person arrested twice (a “record of arrests”) when both arrests were the result of mistaken identity.³⁰⁹

307. *Id.*

308. *Id.* at 171.

309. *Id.*