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A LOOK BACK: DEVELOPING INDIANA LAW POST-BENCH REFLECTIONS OF AN INDIANA SUPREME COURT JUSTICE

SELECTED DEVELOPMENTS IN INDIANA CRIMINAL SENTENCING AND DEATH PENALTY LAW (1993-2012)

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During my almost nineteen years (November 1, 1993, until July 31, 2012) as a Justice of the Indiana Supreme Court (the “Court”), over half of the Court’s adjudicatory work was devoted to criminal cases, including death penalty cases.¹ In this Article, I will describe some selected developments in two subsets of this criminal docket: sentencing generally and capital litigation in particular. I will not attempt to cover everything, but instead will identify and detail several major issues and developments that occupied the Court’s time and attention.

I ask the reader to appreciate that this Article contains some highly personal

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** This Article is dedicated to former Justice Roger O. DeBruler, a man for all seasons and a generous mentor. Indiana law—especially criminal and death penalty law—is imbued with his wisdom.

*** This Article is adapted from versions of remarks delivered on several occasions, including the Porter County CLE Program in Valparaiso, Indiana on July 22, 2011; Criminal Justice Summit, Notre Dame, Indiana on November 15, 2010; and Boone County Bar Association Annual CLE Program, Lebanon, Indiana on November 6, 2009. I express my appreciation to my hosts for their hospitality on those occasions. I also express my appreciation to Greta Scodro for her excellent work over many years as the Indiana Supreme Court staff attorney with principal responsibility for capital cases and for her, Ellen Pactor’s, and Dylan Pittman’s helpful comments on this Article.

1. By my count, the Court disposed of 19,490 matters during my tenure on the Court, 9932 or 53% of which were criminal cases. A “disposition” for this purpose means a published opinion of the Court or an order constituting a final decision of the Court. A “matter” means a litigated case or other proceeding, including matters involving judicial and attorney discipline, mandates of funds, and the Board of Law Examiners. As to published opinions of the Court, 60% were criminal cases and 38% were civil (including tax) cases; these percentages do not include published opinions and orders in judicial and attorney discipline cases. For statistics on death penalty cases, see *infra* Part V.

reflections. It is not an argument but neither is it entirely objective.

I. RIGHT TO TRIAL BY JURY

One major development in criminal law during my tenure on the Court occurred at the intersection of sentencing and the right to trial by jury.

A good place to start the discussion is a 1986 U.S. Supreme Court (the “Supreme Court”) decision, *McMillan v. Pennsylvania*.² Dynel McMillan shot a man in an argument over a debt and was convicted by a jury of aggravated assault.³ Pennsylvania law provided a mandatory minimum sentence of five years if the sentencing judge found the defendant “visibly possessed a firearm” during the commission of the assault.⁴ McMillan challenged the constitutionality of the statute on several grounds, including it denied him his Sixth Amendment right to a trial by jury.⁵ The Supreme Court rejected this claim, holding Pennsylvania could properly treat “visible possession of a firearm” as a sentencing consideration rather than an element of a particular offense that must be proved to a jury.⁶ “[T]here is no Sixth Amendment right to jury sentencing,” the Supreme Court said, “even where the sentence turns on specific findings of fact.”⁷

This was the state of the law when I was appointed to the Court seven years later. But change came in a 2000 decision, *Apprendi v. New Jersey*,⁸ where an enhancement to the defendant’s sentence was held unconstitutional because it was based on a fact the jury had not found beyond a reasonable doubt. The Supreme Court explicitly rejected the ground on which it had held the practice in *McMillan* to have been permissible. Rather, the Supreme Court held, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”⁹

That was a dramatic pronouncement. Could the Supreme Court really have meant the Sixth Amendment precludes a judge from making any determination that exposes a defendant to a greater punishment than that authorized by the jury’s verdict? Was a judge forbidden, for example, from increasing a sentence based on an aggravating circumstance?

The answer was “yes” and it came in a 2004 decision, *Blakely v. Washington*.¹⁰ Ralph Blakely challenged his sentence as contrary to *Apprendi* and

2. 477 U.S. 79 (1986).

3. *Id.* at 82.

4. *Id.* at 81-83.

5. *Id.* at 83.

6. *Id.* at 91.

7. *Id.* at 93.

8. 530 U.S. 466 (2000).

9. *Id.* at 490.

10. 542 U.S. 296 (2004). Ralph Blakely pled guilty to kidnaping his estranged wife. *Id.* at 298. “The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months,” but the court imposed a ninety-month sentence after finding Blakely had acted with deliberate cruelty, a statutorily enumerated ground for departing from the standard range. *Id.*

the Supreme Court agreed.¹¹ Regardless of “whether the judge’s authority to impose an enhanced sentence depends on a judge’s finding a specified fact (as in *Apprendi*), one of several specified facts . . . or *any* aggravating fact (as here), it remains the case that the jury’s verdict alone does not authorize the sentence,” the Supreme Court said.¹² “Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial.”¹³

Now there is great irony in that last quotation where the Supreme Court professed its adherence to precedent—*Apprendi*—which was only four years old and which itself reversed precedent (*McMillan*) that was at least fourteen-years-old. Nevertheless, *Blakely* directly implicated the constitutionality of Indiana’s system of sentencing. That was because Indiana’s sentencing statute established a “fixed” or “presumptive” term for each crime which a judge could increase if the judge found one or more “aggravating circumstances” existed.¹⁴ The key point to understand here is the defendant’s sentence was “fixed” at the presumptive length; the judge could increase the sentence above the presumptive term only if the judge made an additional finding of the existence of one or more “aggravating circumstances.”

The Court confronted the question of whether Indiana’s sentencing scheme violated *Apprendi* and *Blakely* in its 2005 decision, *Smylie v. State*.¹⁵ *Smylie* is a very important case warranting careful attention.

Adolphe Smylie pled guilty to two counts of Class D felony child solicitation and

At the sentencing hearing, the trial court judge found four aggravating circumstances: 1) Smylie’s pattern of criminal activity, 2) his position of trust with the victim, 3) the effect of the crime on the victim, and 4) the imposition of a reduced or suspended sentence would depreciate the seriousness of the crime.¹⁶ The court found two mitigating circumstances: 1) Smylie had no criminal history and 2) he was likely to respond to probation or short-term imprisonment.¹⁷

The trial court then sentenced him to two-year terms—to be served consecutively—on each of the counts, with six months suspended, for total executed time of three and one-half years, six months above the standard fixed term.¹⁸ The aggravating factors used to enhance the sentence were not submitted

11. *Id.*

12. *Id.* at 305.

13. *Id.*

14. See IND. CODE §§ 35-35-3-1, 35-38-1-7.1, 35-50-2-3 to -07 (2004). These statutes were in effect prior to 2005.

15. 823 N.E.2d 679 (Ind.), *cert. denied*, 546 U.S. 976 (2005).

16. *Id.* at 682.

17. *Id.*

18. *Id.*

to the jury or admitted by Smylie.¹⁹ This raised the *Apprendi-Blakely* issue.

The Court, in a decision written by Chief Justice Randall T. Shepard, began by examining the sentencing scheme in the State of Washington found unconstitutional in *Blakely*.²⁰ In *Blakely*, Washington's sentencing procedure was held to violate the Sixth Amendment to the extent it allowed a judge to increase the sentence above the "statutory maximum."²¹ Indiana's sentencing procedure, by contrast, provided a "fixed term" presumptive sentence for each class of felonies and also created upper and lower boundaries for each felony sentence.²² And in deciding whether to depart from the presumptive sentence, the trial judge was required to consider seven enumerated factors and could also consider several other aggravating and mitigating factors.²³

For the Court, Indiana's "fixed term" was the functional equivalent of Washington's "standard sentencing range," as

[b]oth established a mandatory starting point for sentencing criminals based on the elements of proof necessary to prove a particular offense and the sentencing class into which the offense [fell]. The trial court judge then [was required to] engage in judicial fact-finding during sentencing if a sentence greater than the presumptive fixed term [was] to be imposed.²⁴

This was the type of judicial fact-finding, the Court concluded, that concerned the Supreme Court in *Blakely*.²⁵ "When a judge inflicts punishment that the jury's verdict alone does not allow," *Blakely* said, "the jury has not found all the facts 'which the law makes essential to the punishment.'"²⁶ This led Chief Justice Shepard to conclude that "we see little daylight between the *Blakely* holding and the Indiana system."²⁷

That said, the State of Indiana made a respectable argument in favor of the constitutionality of its sentencing procedures. In preparing this Article, I went back and watched the oral argument from November 10, 2004,²⁸ and remembered

19. *Id.* at 687.

20. *Id.* at 681.

21. *Id.* at 683.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* (quoting *Blakely v. Washington*, 542 U.S. 296, 304 (2004)).

27. *Id.* at 684.

28. Oral Argument, *Smylie v. State*, 823 N.E.2d 679 (2005) (No. 41S01-0409-CR-408), available at <https://mycourts.in.gov/arguments/default.aspx?id=305&view=detail&yr=2004&when=&page=1&court=&search=&direction=%20ASC&future=True&sort=&judge=&county=&admin=False&pageSize=20> [<https://perma.cc/5BTW-UGG8>]. Video recordings of virtually all oral arguments before the Indiana Supreme Court dating back to September 19, 2001, are available online. See *Oral Arguments Online*, IND. JUD. BRANCH, <https://mycourts.in.gov/arguments/default.aspx?court=sup> [<https://perma.cc/AW4X-4DU3>] (last visited May 17, 2016). I would

just how impressive a case Deputy Attorney General Ellen Meilander and Indiana Prosecuting Attorneys Council Executive Director Stephen Johnson made for saving the statute.

The State contended Indiana's sentencing statutes did not violate *Blakely* because Indiana's "presumptive sentence" was not equivalent to "statutory maximum."²⁹ In *Apprendi*, the "statutory maximum" for the defendant's conviction for second-degree possession of a firearm for an unlawful purpose was five to ten years.³⁰ The court then imposed an "enhanced" sentence on grounds the defendant committed the offense with a biased purpose, for a total term of twelve years.³¹ In *Blakely*, the "statutory maximum" for the defendant's kidnapping conviction, based on the facts in the guilty plea, was fifty-three months.³² "Pursuant to state law, the court imposed an 'exceptional' sentence of 90 months after making a judicial determination that [Blakely] had acted with 'deliberate cruelty.'"³³ But Indiana's statutes operated differently, Meilander and Johnson argued.³⁴ In *Smylie*'s case, for example, the sentencing range for a Class D felony was six months to three years.³⁵ Even with the enhancement imposed by the trial court, his maximum sentence on any one count was only two years.³⁶ Both *Apprendi* and *Blakely* involved sentences that exceeded the maximum of the range for the offenses, the State argued, but because an Indiana judge can never impose a sentence above the statutory range, the Indiana procedure did not violate *Apprendi* or *Blakely*.

This was a plausible argument but the Court rejected it.³⁷ First, *Blakely* itself rejected a nearly identical argument, saying that "'the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.'"³⁸ Indiana's felony sentencing statutes provided "fixed terms" and allowed departures only if aggravating or mitigating factors were found.³⁹ These findings were made by the judge alone.⁴⁰ If the trial court added or subtracted from the standard fixed term, the judge was required to: "1) identify all significant aggravating and mitigating factors; 2) specify the findings of fact and reasons which lead the court to find such factors; and 3) articulate that the

venture few appellate courts in America have nearly fifteen years' worth of their oral arguments so readily available to the public.

29. *Smylie*, 823 N.E.2d at 684.

30. *Apprendi v. New Jersey*, 530 U.S. 466, 468 (2000).

31. *Id.* at 471.

32. *Blakely v. Washington*, 542 U.S. 296, 299 (2004).

33. *Id.* at 298.

34. *Smylie*, 823 N.E.2d at 684.

35. *Id.* at 682.

36. *Id.*

37. *Id.* at 684-85.

38. *Id.* at 684.

39. *Id.*

40. *Id.*

aggravating and mitigating factors were evaluated and balanced in determination of the sentence.”⁴¹

Beyond that, the Indiana statutory scheme “as articulated and implemented by our trial and appellate courts over parts of four decades . . . [demanded] the judge . . . find additional facts to impose a sentence higher than the presumptive sentence.”⁴² As such, the presumptive sentence was the “relevant statutory maximum” under *Blakely*.⁴³

Thus, the Indiana Supreme Court declared the Indiana sentencing system unconstitutional as violating *Blakely*.⁴⁴

Now I hope the reader will pause and reflect on the momentousness of such a decision: the Court had just held a central feature of the Indiana criminal sentencing procedure to be unconstitutional! It was not the equivalent of declaring unconstitutional public school segregation⁴⁵ or same-sex marriage

41. *Id.*

42. *Id.* Although this point was made without emphasis in *Smylie*, it is an extremely important one. Since 1983, the sentencing statute itself required a court to state for the record its reasons for selecting the sentence it imposed when the court found aggravating circumstances or mitigating circumstances. IND. CODE § 35-38-1-3 (2016). And subsequent case law made clear that a perfunctory listing of such circumstances was not enough. Rather, “[t]he statement of reasons expounded by the court must be factually specific. Some of the aggravating circumstances are by their nature factual and, if listed, require no further substantiation. . . . However, others are merely conclusory and must be substantiated by specific facts.” *Hammons v. State*, 493 N.E.2d 1250, 1254 (Ind. 1986). Over the years, the Indiana Supreme Court articulated a sophisticated and multi-faceted rationale for this requirement:

Clearly, the purpose of these sentencing provisions in our criminal code is to insure a basic fairness in the sentencing process and thereby promote respect for the law. When the sentencing judge is required to make a statement of the reasons for imposing a particular sentence, two important goals are served. First, the judge is confined to proper grounds for either increasing or decreasing the presumptive sentence provided for the offense; and, second, the appellate court is enabled to determine the reasonableness of the sentence imposed, under the circumstances.

But a statement of reasons for imposing a particular sentence serves numerous other goals beyond the two primary goals. An attempt by the sentencing judge to articulate his reasons for a sentence in each case should in itself contribute significantly to the rationality and consistency of sentences. A statement by the sentencing judge explaining the reasons for commitment can help both the defendant and the public understand why a particular sentence was imposed. An acceptance of the sentence by the defendant without bitterness is an important ingredient in rehabilitation, and acceptance by the public will foster confidence in the criminal justice system.

Abercrombie v. State, 417 N.E.2d 316, 319 (Ind. 1981) (internal citation omitted).

43. *Smylie*, 823 N.E.2d at 684 (quoting *Blakely v. Washington*, 542 U.S. 296, 302 (2004)).

44. *Id.* at 685.

45. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

prohibitions⁴⁶ or a state's property tax assessments⁴⁷—but a breath-taking exemplar of the *Marbury*⁴⁸ power all the same.

The story of *Smylie* does not, however, end here. In many respects, it is at this point that *Smylie* really gets interesting.

Before I tell that story, though, I need to take one more federal diversion.

Since the mid-1980s, federal judges have used a system of “Sentencing Guidelines” when imposing criminal sentences.⁴⁹ The Guidelines determine sentences based primarily on two factors: (1) the aspects of criminal conduct associated with the offense (the offense conduct produces an “offense level”; there are forty-three offense levels) and (2) the defendant's criminal history (there are six criminal history categories).⁵⁰ The Sentencing Table in the Guidelines Manual arrays these two factors on vertical and horizontal axes, respectively.⁵¹ For each pairing of offense level and criminal history category, the Table specifies a sentencing range, in months, within which the court may sentence a defendant.⁵²

The Guidelines were not advisory; they were mandatory and binding on all judges.⁵³ However, the Guidelines permitted departures from the prescribed sentencing range where the judge found “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”⁵⁴

The *Apprendi-Blakely* issue arising from application of the Guidelines should be clear. If a judge made an upward departure from the mandatory sentence required by the Guidelines, the *Apprendi-Blakely* requirement of a jury determination beyond a reasonable doubt would be violated. And lo and behold, in *United States v. Booker*,⁵⁵ the Supreme Court found the Guidelines violated the Sixth Amendment right to trial by jury.⁵⁶

The vote on the Supreme Court was 5-4.⁵⁷ And the justices in the majority comprised the same (unlikely) coalition that constituted the five-justice majority in both *Apprendi* and *Blakely*: Justices Stevens, Scalia, Souter, Thomas, and

46. *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015); *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003).

47. *State Bd. of Tax Comm'rs v. Town of St. John*, 702 N.E.2d 1034 (Ind. 1998).

48. *Marbury v. Madison*, 5 U.S. 137 (1803).

49. KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 2, 3 (1998).

50. *Id.* at 3.

51. *Id.* at 3.

52. *Id.* at Appx. A, 179-180.

53. *Koon v. United States*, 518 U.S. 81, 92 (1996); STITH & CABRANES, *supra* note 49, at 2.

54. *Koon*, 518 U.S. at 92 (quoting 18 U.S.C. 3553(b)); STITH & CABRANES, *supra* note 49, at 4.

55. 543 U.S. 220 (2005).

56. *Id.* at 243.

57. *Id.* at 225.

Ginsburg. The four dissenters in *Apprendi* and *Blakely* were Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Breyer.

In *Booker*, the federal sentencing guidelines case, a most interesting thing happened. After the Stevens-Scalia-Souter-Thomas-Ginsburg Court declared the Guidelines unconstitutional, Justice Ginsburg switched sides and joined Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Breyer on the question of the appropriate remedy.⁵⁸

If the Supreme Court had invalidated the Guidelines altogether, a trial court judge would have no ability to exercise discretion when it came to sentencing beyond the maximum and minimum set by federal statute for each conviction.⁵⁹ But the five justices comprising the remedy majority took a different path. Focusing on that provision of the statute that made the Guidelines unconstitutional, they concluded the Guidelines' mandatory nature should be severed from the statute.⁶⁰ The rest of the statute was constitutional and could stand.⁶¹

But—here's the crucial point to understand—as modified, the federal sentencing statute now rendered the Guidelines effectively advisory. Henceforth, a sentencing court would be required to consider Guidelines ranges but permitted to tailor the sentence in light of other statutory concerns as well.⁶²

This was a most surprising result—but an apparently satisfactory one as more than ten years have now passed and Congress has not acted on the Supreme Court's rewriting of the federal sentencing statute.⁶³

Back to Indiana and *Smylie*—where essentially the opposite occurred.

Analogous to *Booker*, as I have said, the Indiana Supreme Court declared the Indiana statutory sentencing scheme to violate the Sixth Amendment.⁶⁴ Also as in *Booker*, the Court was faced with what remedy to apply. It considered two choices: "(1) our present arrangement of fixed presumptive terms, modified to require jury findings on facts in aggravation, or (2) a system in which there is no stated 'fixed term' (or at least none that has legally binding effect) in which judges would impose sentences without a jury."⁶⁵

The Court took the first approach: the sort of facts envisioned by *Blakely* as necessitating a jury would now be required to be found by a jury under Indiana's existing sentencing laws.⁶⁶ Under pre-*Smylie* procedures, the trial court judge decided whether to impose a sentence above (or below) the presumptive term,

58. *Id.*

59. *Id.* at 245.

60. *Id.*

61. *Id.* at 249.

62. *Id.* at 245.

63. Sara Sun Beale, *Is Now the Time for Major Federal Sentencing Reform?*, 24 FED. SENT'G REP. 382 (2012).

64. *Smylie v. State*, 823 N.E.2d 679 (Ind.), *cert. denied*, 546 U.S. 976 (2005).

65. *Id.* at 685.

66. *Id.* at 686.

based on aggravating (or mitigating) circumstances the court concluded existed.⁶⁷ *Smylie* took the judge out of the picture and mandated the jury be reconvened and asked to make a finding as to whether aggravating circumstances existed.⁶⁸ (This was not a novel procedure; the capital punishment sentencing scheme has operated in essentially this way since the 1970s; so too for habitual offender determinations.⁶⁹)

The Court said its selection of this option was

influenced by the fact that the overarching theme of Indiana's 1977 sentencing reform was a legislative decision to abandon indeterminate sentencing in favor of fixed and predictable penalties. The 1977 act assigned to judges the task of imposing penalties stated as a fixed term of years and created a structure for setting those penalties that is far more definitive than the scheme it replaced.⁷⁰

Justice Brent E. Dickson, however, dissented.⁷¹ He argued the Court should have followed the second approach and hold that going forward the "presumptive term" not be treated as a "statutory maximum" in *Blakely* parlance; that it not have any binding effect on judges.⁷² Justice Dickson had an extremely powerful separation of powers rationale for this position. The majority's approach, he pointed out, required rewriting of the language of the statute; his approach, by contrast, rewrote only judicial precedent.⁷³

Now I would take some modest issue with Justice Dickson's characterization that the use of the presumptive terms as mandatory was not grounded in the language of the statute—after all, the statute used the words "fixed term" to describe the presumptive term,⁷⁴ but his point is certainly subject to legitimate debate.

Here is where *Smylie*'s aftermath differed from *Booker*'s. Whereas Congress has for ten years acquiesced to the *Booker* Court's rewrite of the federal sentencing statute,⁷⁵ the Indiana General Assembly overruled the *Smylie* Court's rewrite of the Indiana sentencing statute—in a matter of weeks!⁷⁶

The Indiana General Assembly left intact lower and upper limits for each class of felony offenses, but eliminated fixed presumptive terms⁷⁷ in favor of

67. See generally Beale, *supra* note 63.

68. *Smylie*, 823 N.E.2d at 686.

69. IND. CODE § 35-50-2-9(d) (2016) (death penalty); IND. CODE § 35-50-2-8(h) (2016) (habitual offender).

70. *Smylie*, 823 N.E.2d at 685-86.

71. *Id.* at 691 (Dickson, J., dissenting).

72. *Id.*

73. *Id.* at 692.

74. See, e.g., IND. CODE § 35-50-2-7 (2004).

75. See generally Beale, *supra* note 63.

76. S.E.A. 96, 114th Gen. Assemb., 1st Reg. Sess. (Ind. 2004) (abolishing "presumptive" sentence terms and adopting "advisory" terms).

77. IND. CODE § 35-35-3-1 (2016); *id.* § 35-50-1-2; *id.* § 35-50-2-8.

“advisory sentences” between the minimum and maximum terms.⁷⁸ In addition, the Indiana General Assembly eliminated the requirement that trial courts must consider certain mandatory circumstances when determining the exact sentence to be imposed. Henceforth, trial courts could impose any sentence between the statutory maximum and minimum, including increasing the sentence above the advisory sentence, without any requirement they find aggravating circumstances to exist.⁷⁹

All of this, of course, was exactly what Justice Dickson had called for in his dissent.⁸⁰

In any event, rewritten in this way, Indiana’s sentencing scheme now appeared to pass *Apprendi-Blakely* muster: the trial court’s sentence would now not exceed that which could be based solely on facts reflected in the jury verdict or admitted by the defendant. And the Supreme Court referred to Indiana’s revised sentencing system in a 2007 decision, *Cunningham v. California*,⁸¹ in a way that suggests it considers the revised system to be constitutional.

I will return to this subject when I take up the critically important *Anglemyer* decision later in this Article.⁸²

II. REVIEW AND REVISE AUTHORITY

A second major development in criminal law during my tenure on the Court involved appellate court review and revision of sentences imposed by trial courts.

In 1970, the Indiana Constitution was amended to provide: “The Supreme Court shall have, in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed.”⁸³ In 1995, Indiana Court of Appeals Judge Edward W. Najam, Jr., wrote an opinion

78. *Id.* § 35-50-2-1.3.

79. *Id.* § 35-38-1-7.1

80. There is a certain irony that it was Justice Dickson who favored this particular solution to the *Apprendi-Blakely-Smylie* problem. Justice Dickson has been the Indiana Supreme Court’s foremost champion of juries in both his writings for the Court. *See, e.g.*, *Clark v. Clark*, 971 N.E.2d 58, 61 n.1 (Ind. 2012) (praising “the conscientious, insightful, and reliable efforts of those who serve as jurors”). His speeches and other activities reflect his “longstanding interest[] in . . . preserving and enhancing our jury trial system.” *Justice Brent E. Dickson*, IND. JUD. BRANCH, <http://www.in.gov/judiciary/citc/2829.htm> [<https://perma.cc/265V-NXUS>] (last visited May 17, 2016). Yet in *Smylie*, when the rest of the court fashioned a solution that placed sentencing determinations in the hands of jurors, Justice Dickson dissented and advocated that they be given to judges instead.

81. 549 U.S. 270 (U.S. 2007) (observing Indiana is one of the “States that have chosen to permit judges genuinely ‘to exercise broad discretion . . . within a statutory range,’ which, ‘everyone agrees,’ encounters no Sixth Amendment shoal” (footnote omitted)).

82. *See infra* text following note 117.

83. IND. CONST. art. VII, § 4. In *Abercrombie v. State*, the Court said that “the appellate courts are authorized to review sentences” “[i]n order to further implement the constitutional mandate” “that ‘The penal code shall be founded on the principles of reformation, and not of vindictive justice.’” 417 N.E.2d 316, 318 (Ind. 1981) (quoting IND. CONST. art. I, § 18).

recounting the history of this constitutional provision.⁸⁴ This provision, he said,

originated in *the Report of the Judicial Study Commission* (1966). The Commission explained that “the proposal that the appellate power in criminal cases include[s] the power to review sentences is based on the efficacious use to which that power has been put by the Court of Criminal Appeals in England.”⁸⁵

Judge Najam continued,

The English system was established in 1907. Appellate review of a sentence in England is essentially de novo. . . . [But w]hile the English experience inspired the Judicial Study Commission recommendation for appellate review of sentences, unlike the English system, we do not conduct de novo review of a sentence or assess and reweigh the trial court’s findings and conclusions.⁸⁶

Indeed we did not. At the time, the Court had in effect a rule⁸⁷ implementing its review and revise authority that was highly deferential to the sentence imposed by the trial court. First, the rule provided, “The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.”⁸⁸ Second, “A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and the offender for which such sentence was imposed.”⁸⁹

One could hardly imagine a more restrictive standard of review.⁹⁰ But the reality was somewhat different from the written rule. In 1989, the Court reduced a death sentence to a term of years in highly publicized case, *Cooper v. State*.⁹¹

84. *Hardebeck v. State*, 656 N.E.2d 486 (Ind. Ct. App. 1995).

85. *Id.* at 489 (internal citations omitted).

86. *Id.* at 489-90.

87. IND. APP. REV. SENTENCES R. 1, 2 (re-codified as IND. APP. RULE 17, which was in effect 1978-1997).

88. *Id.*

89. *Id.*

90. In fact, when Justice DeBruler and I dissented from the affirmance of two sentences in 1994, it was unusual enough to draw comment. Susan Burke, *Criminal Justice Notes*, RES GESTAE, Sept. 1994, at 39 ((discussing *Tidmore v. State*, 637 N.E.2d 1290, 1293 (Ind. 1994) (Sullivan, J., dissenting), and *Stidham v. State*, 637 N.E.2d 140, 144 (Ind. 1994) (Sullivan, J., dissenting)).

91. *Cooper v. State*, 540 N.E.2d 1216 (Ind. 1989) (reversing death sentence of 15-year-old convicted of murder). For further discussion of this case, see *infra* note 204. There were other indicators during this time period of a greater openness to appellate sentencing review. In 1978, a judge and professor wrote a thoughtful article on the subject. J. Eric Smithburn, *Sentencing in Indiana: Appellate Review of the Trial Court’s Discretion*, 12 VALPARAISO U. L. REV. 219 (1978). And the Indiana Supreme Court had revised a sentence in a non-capital case that included an exceptionally long discussion of the subject. *Fointno v. State*, 487 N.E.2d 140 (Ind. 1986). *Fointno* is discussed with approval in *Spranger v. State*, an opinion in which the “manifestly unreasonable”

And in the mid-1990s, three additional things happened that pointed in a somewhat less restrictive direction.

First, in both 1995 and 1996, the Court reduced sentences from the maximum to the presumptive terms in cases in which juries returned verdicts of “guilty but mentally ill,” because the trial court failed to treat as a circumstance mitigating the severity of the sentence the unanimous view of the jury that the defendant was mentally ill.⁹² Although the Court did not explicitly say the sentences imposed had been “manifestly unreasonable,” that had been the claim of both appellants.⁹³

Second, beginning in a 1997 opinion, *Bacher v. State*, the Court expressed the view that “the maximum enhancement permitted by law . . . should . . . be reserved for the very worst offenses and offenders.”⁹⁴

Third, in early 1997, the Court amended the rule to delete the second sentence altogether.⁹⁵ Although the rule still specified that a reviewing court would not revise a sentence except where the sentence was “manifestly unreasonable,” it no longer defined manifestly unreasonable to be only a sentence no reasonable person could find appropriate.

But just as these three trends were coalescing to suggest a somewhat greater openness to appellate review of sentences, the Court decided *Prowell v. State*⁹⁶ in late 1997 with an opinion that imposed an even more stringent definition of manifestly unreasonable than that which had just been removed from the rule. The Court looked at the dictionary definition of “manifestly” and, based on that

standards of appellate review were held as advisory—“more as guideposts”—in capital cases. 498 N.E.2d 931, 947 n.2 (Ind. 1986). For further discussion, see *infra* Part VI.

92. *Gambill v. State*, 675 N.E.2d 668 (Ind. 1996) (reducing the sentence of a defendant found guilty but mentally ill of murder from sixty years to forty years); *Mayberry v. State*, 670 N.E.2d 1262 (Ind. 1996) (same); *Barany v. State*, 658 N.E.2d 60 (Ind. 1995) (same); *Walton v. State*, 650 N.E.2d 1134, 1137 (Ind. 1995) (reducing sentence of defendant found guilty but mentally ill of two murders from 120 years to eighty years).

93. See generally *Gambill*, 675 N.E.2d 668; *Mayberry*, 670 N.E.2d 1262; *Barany*, 658 N.E.2d 60; *Walton*, 650 N.E.2d 1134.

94. *Bacher v. State*, 686 N.E.2d 791, 802 (Ind. 1997). I authored *Bacher*. The decision affirmed the defendant’s conviction but set aside the sentence and remanded for a new sentencing hearing. *Id.* My opinion was joined in full by Chief Justice Randall T. Shepard and Justice Myra C. Selby. Justices Dickson and Theodore R. Boehm dissented as to the guilt phase analysis and apparently would have reversed the conviction. *Id.* at 802-03 (Boehm, J., dissenting). They expressed no opinion on the sentencing discussion. *Id.* It may have been that they agreed. Or it may have been that, having believed the conviction should be reversed, found it unnecessary to reach the sentencing issue at all. Justice Dickson would later use the obverse of this proposition in several opinions. See, e.g., *Evans v. State*, 725 N.E.2d 850, 851 (Ind. 2000) (“The maximum possible sentences are generally most appropriate for the worst offenders.”).

95. IND. APP. R. 17 (re-codified as IND. APP. R. 7(B), which was in effect between 1997 and 2003) (“The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.”).

96. 687 N.E.2d 563 (Ind. 1997).

definition, concluded that “the issue is not whether in our judgment the sentence is unreasonable, but whether it is clearly, plainly, and obviously so.”⁹⁷ This incredibly high barrier—“clearly, plainly, and obviously so”—was regularly invoked thereafter in rejecting claims for sentencing relief.⁹⁸

Prowell is worth a little discussion. The defendant, Vincent Prowell, 30 years old and from a disadvantaged background, had had no prior involvement with the legal system; even his driver’s license was current and had never been suspended.⁹⁹ Then one day he inexplicably murdered two young people in cold blood without any discernible motive.¹⁰⁰ He pled guilty without any agreement as to the sentence even though the prosecutor sought the death penalty.¹⁰¹ Prowell was then sentenced to death.¹⁰² My sense from studying this case with great care was that defense counsel thought there was no chance the judge—Vanderburgh Circuit Court Judge Richard Young, now the Chief Judge of the United States District Court for the Southern District of Indiana—would impose death on a first-time offender who had pled guilty, especially when the same judge had recently refused to impose a death sentence in another case even though unanimously recommended by the jury.

So this is the context in which the Court looked at Prowell’s claim that his sentence was “manifestly unreasonable.” In my view, it was manifestly unreasonable and I voted to vacate it.¹⁰³ My colleagues all voted to affirm, framing the issue, as I said above, “not whether in our judgment the sentence is unreasonable, but whether it is clearly, plainly, and obviously so.”¹⁰⁴ It sounds petulant to say, but I thought the only way Vincent Prowell’s sentence could be held not to be manifestly unreasonable was to define it in such extreme terms.

I need to add two additional points about the standard of manifest unreasonableness erected in *Prowell*—and one about Prowell himself.

The “clearly, plainly, and obviously so” standard had some legs—but only some. Chief Justice Shepard, Justice Myra C. Selby, Justice Robert D. Rucker, and (it should go without saying) I never used the phrase a single time in any opinion we wrote; only Justices Dickson and Theodore R. Boehm did. Almost every time they did, I did not join their opinions.¹⁰⁵

Vincent Prowell returned to the Court several years later on a petition for post-conviction relief.¹⁰⁶ The Court unanimously found he had been the victim of

97. *Id.* at 569.

98. *See* *Buchanan v. State*, 767 N.E.2d 967, 973 (Ind. 2002) (collecting cases).

99. *Prowell*, 687 N.E.2d at 569.

100. *Id.* at 564 (majority opinion).

101. *Id.*; *id.* at 571 (Sullivan, J., dissenting).

102. *Id.* at 564 (majority opinion).

103. *Id.* at 573.

104. *Id.* at 568 (majority opinion).

105. *E.g.*, *Buchanan v. State*, 767 N.E.2d 967, 974 (Ind. 2002) (Dickson, J., Sullivan, J., concurs in result); *McCann v. State*, 749 N.E.2d 1116, 1122 (Ind. 2001) (Boehm, J., Sullivan, J., dissenting).

106. *Prowell v. State*, 741 N.E.2d 704 (Ind. 2001).

ineffective assistance of counsel not only as to sentencing but as to his guilty plea as well.¹⁰⁷ I consider it to be the most remarkable turnaround of the Court itself during my tenure—from voting 4-1 to affirm a death sentence following a guilty plea to voting 5-0 to set aside not only the sentence but the plea as well.

The merits of the debate over how deferential appellate review of sentencing decisions should be are strong on both sides. Early on, Judge William I. Garrard said he found it “disquietingly . . . at odds” with the appellate role of “principled decision making” for a panel of appellate judges “to determine the appropriate sentence for a person where we have never seen the defendant or heard any of the witnesses.”¹⁰⁸ Justice Dickson frequently articulated a similar view.¹⁰⁹

On the other side is the view articulated by Chief Justice Shepard (in a unanimous opinion) that too high a barrier to appellate review of sentences runs “the risk of impinging on another constitutional right contained in Article 7, that the Supreme Court’s rules shall ‘provide in all cases an absolute right to one appeal.’”¹¹⁰

I myself looked to the fact that the same constitutional amendment that authorized appellate judges to review and revise sentences was the constitutional amendment that insulated appellate judges from partisan elections and concluded the review and revise authority is intended, at least in part, to temper sentences imposed by trial judges whose decisions are sometimes reviewed at the ballot box.

I was also influenced by the Court’s earlier observation that “the appellate courts are authorized to review sentences” “[i]n order to further implement the constitutional mandate” “that ‘[t]he penal code shall be founded on the principles of reformation, and not of vindictive justice.’”¹¹¹

In any event, as we have seen, Article VII, § 4, of the Indiana Constitution does authorize appellate judges to review and re-vise sentences. Effective January 1, 2003, the Court abolished the “manifestly unreasonable” standard altogether and instead promulgated the following rule: “The Court may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.”¹¹²

This changed the thrust of the rule, the Court would subsequently say in an

107. *Id.* at 718.

108. *Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App. 1999) (Garrard, J., dissenting).

109. *See, e.g., Scheckel v. State*, 655 N.E.2d 506 (Ind. 1995) (Dickson, J., dissenting) (dissenting from a sentence reduction where the sentence imposed by the trial court judge “reflect[ed] his individualized recognition and consideration of each of the alleged mitigating circumstances and his conclusion that they did not warrant a reduction in sentence”); *see also Frye v. State*, 837 N.E.2d 1012 (Ind. 2005) (Dickson, J., dissenting) (emphasizing “an appellate tribunal’s limited opportunity to fully perceive and appreciate the totality of the evidence personally observed by the trial judge at trial and sentencing”).

110. *Serino v. State*, 798 N.E.2d 852 (Ind. 2003) (quoting IND. CONST. art. VII, § 6).

111. *Abercrombie v. State*, 417 N.E.2d 316, 318 (1981) (quoting IND. CONST. art. I, § 18.)

112. IND. APP. R. 7(B) (effective 2003-present).

opinion, “from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied.”¹¹³ And in a handful of decisions following 2003, the Indiana Supreme Court and Indiana Court of Appeals invoked the new rule to grant some sentencing relief.¹¹⁴

III. SYNTHESIZING SENTENCING RELIEF CLAIMS

It should come as no surprise when I say the confluence of changes in the sentencing authority of trial court judges as a result of *Apprendi*, *Blakely*, and *Smylie*, and of the change to the standard of appellate review of trial court sentencing decisions produced some confusion. In particular, panels on the Indiana Court of Appeals found themselves divided on whether and to what extent trial judges are now required to make sentencing statements explaining their sentencing decisions and whether any such statements must include findings of aggravating and mitigating factors and also divided on the scope and role of appellate review.¹¹⁵

The Court attempted to resolve these questions in a June 2007 opinion, *Anglemyer v. State*.¹¹⁶ I would say this is the single most important opinion of the Court in my almost nineteen-year tenure. There is some empirical evidence for this; the case has been cited in nearly 2,400 subsequent appellate opinions!¹¹⁷

Written by Justice Rucker, *Anglemyer* contains a wonderfully clear history of the recent changes in sentencing law—indeed, that history informs much of this Article—before enunciating the rules for going forward. In a nutshell, *Anglemyer* held that under the new sentencing statute, a trial court may impose a sentence of any term authorized by statute, whether or not it finds that any aggravating circumstances exist.¹¹⁸ And because the statute gives trial courts complete discretion to impose sentences of any term whether aggravating circumstances exist, trial courts cannot be reversed for “abusing” their discretion in this regard.¹¹⁹

Of course, an appellate court’s constitutional authority to review and revise sentences remained. But, *Anglemyer* emphasized, to the extent an appellate court exercises this authority to modify a sentence, the appellate court is making an entirely independent determination; it is not reversing the trial court for an abuse

113. *Neale v. State*, 826 N.E.2d 635, 639 (Ind. 2005).

114. Professor Schumm’s annual report in this law review ably and comprehensively discusses these decisions. See Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 46 IND. L. REV. 1033, 1057 (2013); 45 IND. L. REV. 1067, 1091 (2012); 44 IND. L. REV. 1135, 1154 (2011); 43 IND. L. REV. 691, 707 (2010); 42 IND. L. REV. 937, 946 (2009); 41 IND. L. REV. 955, 967 (2008); 40 IND. L. REV. 789, 795 (2007); 39 IND. L. REV. 893, 907 (2006); 38 IND. L. REV. 999, 1029 (2005); and 37 IND. L. REV. 1003, 1019 (2004).

115. See, e.g., *Gibson v. State*, 856 N.E.2d 142 (Ind. Ct. App. 2006).

116. 868 N.E.2d 482 (Ind.), *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007).

117. *Id.* I Shepardized the case on April 1, 2016.

118. *Id.* at 489-90.

119. *Id.* at 491.

of discretion.¹²⁰

So when do the Indiana Court of Appeals and the Supreme Court exercise their authority to review and revise sentences? The Court attempted to answer this question in *Cardwell v. State*,¹²¹ a fetching opinion authored by Justice Boehm the next year. *Cardwell*, the reader will find, is an unusual opinion for a group of appellate judges; it is very modest—not modest in the sense of being short, but modest in the sense of not reflecting a big ego. As I say, it is an unusual opinion for a group of appellate judges.

In *Cardwell*, Justice Boehm wrote:

Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter . . . And whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case. Individual judgments as to the proper balance to be struck among these considerations will necessarily vary from person to person, and judges, whether they sit on trial or appellate benches, are no exception. There is thus no right answer as to the proper sentence in any given case.¹²²

Cardwell contains two frequently quoted passages. First, “The principal role of appellate 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.”¹²³ Second,

In the case of some crimes, the number of counts that can be charged and proved is virtually entirely at the discretion of the prosecution. For that reason, 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.¹²⁴

After *Anglemyer* and *Cardwell*, at least one issue remained unanswered. Article VII, section 4, says the Court has, “in all appeals of criminal cases, the power . . . to review and revise the sentence imposed.”¹²⁵ Could an Indiana appellate court increase a sentence imposed by a trial court? Justice Dickson’s opinion in *McCullough v. State*¹²⁶ makes clear article VII, section 4 includes the power to either reduce or increase a criminal sentence on appeal. However, the Court subsequently said, only the defendant—not the State—has standing to seek

120. *Id.*

121. 895 N.E.2d 1219 (Ind. 2008).

122. *Id.* at 1224.

123. *Id.* at 1225.

124. *Id.*

125. IND. CONST. art. VII, § 4.

126. 900 N.E.2d 745 (Ind. 2009).

a sentencing revision.¹²⁷

IV. DEATH SENTENCES

This Article has not discussed death sentences except for its treatment of *Prowell*¹²⁸ and a quick allusion to *Cooper*.¹²⁹ But in my nearly nineteen years on the Court, I voted on the death sentences of sixty-five individuals, twenty of whom were put to death. Given this volume and the obvious seriousness of these votes, an Article examining sentencing must consider capital punishment.

Indiana's current Death Penalty Act¹³⁰ was adopted in 1973 in response to *Furman v. Georgia*,¹³¹ a decision of the Supreme Court. So to understand the current statutory scheme, I think it is necessary to start with the story of the run-up to *Furman*—and its aftermath.

When the Bill of Rights was added to the Constitution in 1791, it included the Eighth Amendment's prohibition on "cruel and unusual punishments."¹³² Did this include a prohibition on the death penalty? Almost certainly not. How do we know? Because in the very same Bill of Rights, the Fifth Amendment provides that "no person shall be held to answer for a capital crime . . . nor be deprived of life, liberty, or property, without due process of law."¹³³ Thus, the same enactment that proscribed cruel and unusual punishment also recognized the legality of capital punishment so long as it was meted out in accordance with due process of law.

Both the Supreme Court and state courts interpreted the meaning of "cruel and unusual punishment" in a few cases decided between 1791 and 1910.¹³⁴ For the most part, state courts held that their constitutions authorized those punishments in use when their respective constitutions were adopted.¹³⁵

So, too, did the Supreme Court.¹³⁶

But in 1910, the Supreme Court changed course. The pivotal case was *Weems v. United States*¹³⁷ and it came out of the Philippine islands had been seized in the Spanish-American war. Although the U.S. Constitution now applied, the local administration continued to impose some penalties inherited from Spanish law, including one where criminals were "always to carry a chain at the ankle, hanging from the wrist" while working for the government at "hard and painful labor"

127. *Akard v. State*, 937 N.E.2d 811 (Ind. 2010) (reinstating the sentence of ninety-four years imposed by the trial court after the Indiana Court of Appeals increased the sentence to 118 years).

128. *See supra* text accompanying notes 96-107.

129. *See supra* 91.

130. IND. CODE § 35-50-2-9 (2016).

131. 408 U.S. 238 (1972).

132. U.S. CONST. amend. VIII.

133. U.S. CONST. amend. V.

134. MARK TUSHNET, THE DEATH PENALTY 14 (Facts on File 1994).

135. *Id.*

136. *Id.*

137. 217 U.S. 349 (1910).

with “no assistance from friend or relative.”¹³⁸

In deciding *Weems*, the Supreme Court held the penalty unconstitutional because it was “disproportionate,” that is, grossly excessive in relation to the crime.¹³⁹ “*Weems* is the source for the modern law of the Eighth Amendment,” constitutional law scholar Mark Tushnet writes. “It rejected a historical approach to the amendment . . . It adopted the view that the amendment’s interpretation was connected to the ‘enlightened’ views of ‘humane justice’ among the public.”¹⁴⁰

The Supreme Court under Chief Justice Earl Warren in the 1950s reiterated the basic insight of *Weems* in its consideration of the Eighth Amendment.¹⁴¹ Warren wrote the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,”¹⁴² which remains today the touchstone of Eighth Amendment jurisprudence.

Because the Eighth Amendment has been held to apply to the states through the Fourteenth Amendment,¹⁴³ state death penalty statutes too are measured against these evolving standards of decency. On this ground, the Supreme Court declared state death penalty statutes unconstitutional in *Furman v. Georgia*¹⁴⁴ and four other contemporaneous cases in 1972. But the decision was not clear-cut; even the five justices in the majority each wrote separate opinions.¹⁴⁵ Key were those of Justices Potter Stewart and Byron White who concluded the infrequency with which the penalty was imposed made capital punishment so arbitrary as to be unconstitutional.¹⁴⁶ Though Indiana’s statute was not among those challenged, it was sufficiently similar to those invalidated that there was no question but that it was unconstitutional.¹⁴⁷

Supporters of capital punishment immediately began to work on death penalty statutes that might eliminate the objections of Justices Stewart and White. By 1976, the legislatures of at least thirty-five states had enacted new death penalty statutes,¹⁴⁸ including Indiana.¹⁴⁹ In *Gregg v. Georgia*,¹⁵⁰ the Supreme Court upheld the constitutionality of new “guided discretion” statutes, like

138. *Id.* at 364, 366.

139. *Id.* at 368; TUSHNET, *supra* note 134, at 15.

140. TUSHNET at 15-16 (*quoting Weems*, 217 U.S. at 378).

141. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (holding unconstitutional a statute that punished soldiers who deserted in wartime by depriving them of their citizenship).

142. *Id.*

143. *Robinson v. California*, 370 U.S. 660, 666 (1962).

144. 408 U.S. 238 (1972).

145. *Id.* at 240 (Douglas, J., concurring); *id.* at 257 (Brennan, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring); *id.* at 315 (Marshall, J., concurring).

146. *Id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

147. *See Adams v. State*, 284 N.E.2d 757, 758 (1972) (vacating death sentence in light of *Furman*).

148. *Gregg v. Georgia*, 428 U.S. 153, 179 n.23 (1976).

149. IND. CODE § 35-13-4-1 (1975) (now codified at IND. CODE § 35-50-2-9 (2016)).

150. 428 U.S. 153 (1976).

Indiana's, that addressed the objections Justices Stewart and White had expressed in *Furman* by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence.¹⁵¹

Death sentences were again legal in the United States and supreme courts would soon have capital cases on their dockets.

V. MY EXPERIENCE WITH DEATH PENALTY CASES

The Indiana Death Penalty Act adopted in the wake of *Furman* was twenty-years-old when I joined the Court in 1993. At the outset of my tenure, the capital caseload came in a torrent; by the end, a trickle.

The torrent was a function of the following. Once the 1973 statute was on the books, Indiana prosecutors began seeking the death penalty in murder cases and a quantity of death sentences were imposed—approximately seventy-five—between the mid-1970s and the mid-1990s.¹⁵² But if a death sentence was affirmed on direct appeal, the litigation invariably came to a halt. This was because, Chief Justice Shepard once explained, capital litigation

proceeds in a way that is backwards from everything else we judges experience in litigation. By that I mean that in almost every other field of litigation, the moving party is anxious to complete the proceedings because he or she believes it will lead to something favorable—a personal injury jury verdict, a case settlement, a divorce, whatever.

By contrast, capital litigants gain their most important prize at the very outset of their cases – a stay of execution. Having obtained that, they have no reason to move their cases forward and every reason to resist completing them.¹⁵³

Chief Justice Shepard and the other members of the Court came to realize if capital litigation is not to get bogged down by delay, “centralized case management at the top of the judicial structure is the only effective way to manage capital cases.”¹⁵⁴ In the 1990-1993 timeframe, the Court took a number of substantial steps to centralize capital case management and otherwise reduce delay in the processing of capital cases.¹⁵⁵

151. *Id.* at 192-93.

152. See Randall T. Shepard, Capital Litigation from State Court Perspective or Rushing to Judgment in Fifteen Years 6 (May 2, 1996) (unpublished manuscript) (on file with author).

153. *Id.* at 8.

154. *Id.* at 2.

155. Rule 24 of the Indiana Rules of Criminal Procedure effectively places all capital litigation under the supervision of the Indiana Supreme Court by imposing notice requirements on prosecutors and trial court judges, and defense counsel. The Rule contains specific requirements for transcribing trial proceedings and for pursuing appeals and collateral relief. The Rule's most notable enforcement mechanism is conditioning any stays of execution on compliance by defense counsel with the Rule's time deadlines.

As to notice, a prosecutor must notify the Court whenever seeking a death sentence. IND.

With the implementation of these steps, the logjam broke and a substantial volume of capital cases, some more than a decade old, began to move through the direct appeal and, especially, the collateral review pipeline—just as I arrived at the Court in late 1993. This continued until 2007 when the pipeline cleared and

CRIM. R. 24(A). A judge must forward any order sentencing a defendant to death to the Court. IND. CRIM. R. 24(E). Defense counsel must provide the court administrator notice of any action filed with or decision by a federal court that relates to defendants sentenced to death by a court in Indiana. IND. CRIM. R. 24(H).

As to transcripts, the Rule requires computer-aided transcription of all proceedings. IND. CRIM. R. 24(D). When a trial court imposes a death sentence, it must order the court reporter and clerk to begin immediate preparation of the record on appeal and enter a written order specifically naming counsel under this provision for appeal. IND. CRIM. R. 24(I), (J). In the event post-conviction relief is sought following appeal, the post-conviction court must submit a case management schedule to the Court for approval. IND. CRIM. R. 24(H).

An order setting an execution date entered by a trial court may be stayed only by the Court. IND. CRIM. R. 24(G)(1). The Court will enter a stay while the conviction and sentence are on direct appeal. IND. CRIM. R. 24(G)(2). On the thirtieth day after completion of rehearing of a direct appeal, the Court will enter an order setting an execution date unless a stay is requested and a notice of intent to file a petition for post-conviction relief has been filed. IND. CRIM. R. 24(H). On the thirtieth day following completion of any appellate review of a post-conviction proceeding, the Court will enter an order setting an execution date. IND. CRIM. R. 24(H).

In the event that a capital litigant seeks to file a second or subsequent petition for PCR after, a special rule applies. (This most frequently occurs after an individual's claims for federal habeas relief have been rejected.) The Rule requires any such "successive" petition for post-conviction relief be authorized by the Court. IND. POST-CONV. R. 1(12). The Court will authorize the filing if, but only if, the petitioner establishes "a reasonable possibility that the petitioner is entitled to post-conviction relief." IND. POST-CONV. R. 1(12).

The Court generally decides requests to authorize filing successive petitions for post-conviction relief by a lengthy written order because such orders frequently represent the Court's final action prior to an execution. *See, e.g.,* *Wrinkles v. State*, 915 N.E.2d 963, 966 (Ind. 2009) (mem.); *Woods v. State*, 863 N.E.2d 301 (Ind. 2007) (mem.); *Wallace v. State*, 820 N.E.2d 1261 (Ind. 2005) (mem.).

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which contained a procedure for federal capital habeas corpus cases much like Indiana's requirement of appellate pre-approval prior to filing successive petitions for post-conviction relief. 28 U.S.C. § 224(b)(3)(A) (2012). The AEDPA legislation also contained a provision that required federal courts to "fast track" capital habeas corpus cases upon the request of states that met the requirements of high-quality representation in state court post-conviction cases. 28 U.S.C. § 2261(c) & (d). The Court, State Public Defender Susan K. Carpenter, and Indiana Attorney General Jeffrey Modisett examined this option in detail in 1997 and early 1998 before deciding because of a "apparent hostility of the federal courts to attempts by other states" that had attempted to utilize this provision," making such a request would not be worth the time and expense involved. Letter from Justice Randall T. Shepard, Chief Justice, Ind. Supreme Court, to Jeffrey Modisett, Ind. Attorney Gen. and Susan K. Carpenter, Ind. State Pub. Def. (June 30, 1998) (copy on file with author).

few new cases were added. In other words, in 1993, the Court was being deluged with capital cases; from 2007 on, it received only a few.

In the remainder of this Article, I will discuss the reasons this torrent was reduced to a trickle. Before doing so, I present a brief statistical overview of my death penalty docket, if you will.¹⁵⁶

As noted above, I voted on the death sentences of sixty-five individuals.¹⁵⁷ When I left the Court in 2012:

- Eleven (17%) of those individuals were on death row.
- Thirty-two (49%) of those individuals were no longer on death row and were ineligible to be returned to death row.¹⁵⁸
- Two more individuals (3%) were no longer on death row, but the State had appealed the judicial determination that removed them from death row and so they could return.
- Twenty (31%) had been executed.¹⁵⁹

Because of the availability of multiple opportunities for appellate review, I actually voted on the death sentences of a substantial number of these sixty-five individuals more than once. In point of fact, I cast, in one way or another, a total of 127¹⁶⁰ votes either to affirm or reverse a death sentence.

During the first fourteen years I was on the Court, the capital caseload was quite heavy, the Court being presented with an average of 8.6 cases per year requiring a vote on the merits. But after 2007, the caseload slowed, as mentioned above, to a trickle, averaging only 1.4 votes per year. And there was a definite pattern to the votes:

- Votes on the direct appeal of a death sentence imposed by a trial

156. A detailed spreadsheet containing citations for each of these votes is on file with the author.

In a 2006 article in a prestigious journal, Justice Dickson reflected on his experience reviewing capital cases, noting that at that point in his career, he had voted on the death sentences of 86 individuals, voting to affirm the sentence in 50 of those cases and to vacate it in the other 36. Hon. Brent E. Dickson, *Effects of Capital Punishment on the Justice System: Reflections of a State Supreme Court Justice*, 89 JUDICATURE 278, 281 (2006).

157. That is to say, I voted two or more times on the death sentences of quite a few individuals.

158. Of the thirty-two individuals upon whom I had voted who were no longer on death row and were ineligible to be returned to death row: five (16%) had their death sentences reversed on direct appeal; twelve (37%) had their death sentences reversed on PCR; eight (25%) had their death sentences reversed in federal habeas proceedings; 3 (9%) were granted gubernatorial clemency (two by Governor Kernan and one by Governor Daniels); and four (13%) died in prison.

159. This number includes one individual, Alton Coleman, who was put to death in Ohio while subject to an Indiana death sentence for another offense.

160. This number is exclusive of fourteen additional votes that occurred in close temporal proximity to one or more other votes involving essentially the same question. The best example is a vote on a request for rehearing.

court¹⁶¹ were concentrated in the time period from 1994 through 1997. Approximately 52% of my votes in such cases were cast in those four years, an average of 5.2 per year. I cast an average of only 1.3 votes per year on direct appeals during the other fifteen years.

- Votes on the grant or denial of post-conviction relief (PCR) from a death sentence by a state court¹⁶² were concentrated in the time period from 1997 through 2002. Approximately 67% of my votes in such cases were cast in those six years, an average of 6.0 per year. I cast an average of only 1.4 votes per year on PCR cases during the other thirteen years.
- Votes on requests by individuals sentenced to death to file so-called “successive petitions for PCR”¹⁶³ were concentrated in the time period from 2000 through 2005. Approximately 64% of my votes in such cases were cast in those five years, an average of 3.6 per year. I cast an average of only 0.7 votes per year on successive PCR cases during the other fourteen years.

These statistics give detail to the torrent-to-trickle history of the Court’s capital docket from the beginning to the end of my tenure. They show, for the most part, death sentence—imposed by trial courts in the 1980s that had been languishing at various points in the process— moved their way through the direct appeal, PCR, federal habeas, and successive PCR stages, ending about 2007. From 2008 through my departure, the Court considered few capital cases at all and not a single petition for successive PCR.

What accounts for this dramatic change in the annual volume of death penalty appeals? Simply put, prosecutors became far more selective in seeking the death penalty in the first place. In my estimation, four factors accounted for this increased selectivity:

- Beginning with appeals that first reached the Court in the 1980s, the Court subjected capital cases to rigorous review. The most

161. A “direct appeal” is the review by the Court of an individual’s conviction of a capital crime in and death sentence imposed by an Indiana trial court. A direct appeal is available as a matter of right. IND. CONST. art. VII, § 6.

162. If a conviction and sentence is affirmed, an individual may seek further review by filing a “petition for post-conviction relief” (PCR) in the court of conviction. IND. POST-CONV. R. 1; IND. CRIM. R. 24(H). Among the grounds for seeking PCR is presenting new evidence (including DNA) challenging a determination of guilt or the appropriateness of a death sentence. *See* IND. CODE § 35-50-2-9(k) (2016) (enacted in 2003); IND. POST-CONV. R. 1(e). The determination of the PCR court may be appealed by either the petitioner if relief is denied or the State if relief is granted. One petition for PCR is available as a matter of right. IND. POST-CONV. R. 1(7), (12).

163. An individual subject to a sentence of death who wishes to file a second or subsequent petition for PCR—called a “petition for filing a successive PCR”—may only do so with the permission of the Supreme Court. IND. POST-CONV. R. 1(12). Petitions to file a successive PCR often occur as the very last attempt by an individual sentenced to death to avoid execution.

demanding Justice in this regard was Roger O. DeBruler.¹⁶⁴

- In 1993 and again in 1994, the Death Penalty Act was amended to provide a sentence of Life Imprisonment Without Parole as an alternative to capital punishment.¹⁶⁵
- The Court's Criminal Rule 24 provided defendants in capital cases with very thorough, high quality, and effective representation from two attorneys with experience in capital litigation, fifty percent of the cost of which is borne by the county budget.¹⁶⁶
- The Supreme Court rendered a series of decisions restricting the availability of the death sentence.¹⁶⁷

VI. THE PERVASIVE INFLUENCE OF ROGER O. DEBRULER

One reason prosecutors became more selective over time in seeking the death penalty was that the Court, beginning in the 1980s, subjected capital cases to rigorous review. The leader in demanding exacting compliance with the Constitution and the Death Penalty Act was Justice DeBruler. Although his views, expressed in his dissenting, concurring, and majority opinions in capital cases, did not always carry the day, the principles he explicated came to comprise much of the canon of Indiana death penalty jurisprudence.

Justice DeBruler came to the Court in 1968, four years before *Furman*, believing the death penalty violated the Indiana Bill of Rights specification that the Indiana "Penal Code shall be founded on the principles of reformation, and not vindictive justice."¹⁶⁸ His position failed on a 3-2 vote.¹⁶⁹ When the Indiana General Assembly adopted the new Indiana Death Penalty Act to conform to *Furman*'s dictates, Justice DeBruler mounted an even stronger attack on its constitutionality.¹⁷⁰ Focusing on the same Indiana Constitutional proscription on "vindictive justice," Justice DeBruler sought to prove vindictiveness to be a central motive of the new Act. In support of his argument, he marshaled the candid acknowledgment by several Supreme Court justices in *Gregg* that the death penalty did indeed serve a vindictive purpose.¹⁷¹ This time, his position drew no other votes.

Having failed in his effort to invalidate the Death Penalty Act, Justice

164. See *infra* Part VI.

165. See *infra* Part VII.

166. See *infra* Part VIII.

167. See *infra* Part IX.

168. IND. CONST. art I, § 18.

169. *Adams v. State*, 271 N.E.2d 425 (Ind. 1971), *rev'd on reh'g*, 284 N.E.2d 757 (Ind. 1972) (vacating death penalty in light of *Furman*).

170. *Judy v. State*, 416 N.E.2d 95, 112 (Ind. 1981) (DeBruler, J., dissenting).

171. *Id.* at 112 (quoting *Gregg v. Georgia*, 428 U.S. 153 (1976) (opinion of Stewart, J.)); *id.* at 113 (quoting *Gregg*, 428 U.S. 153 (opinion of White, J.) (citing with approval *Roberts v. Louisiana*, 428 U.S. 325 (1976) (White, J., dissenting))).

DeBruler adhered to *stare decisis* as to the constitutionality of the statute,¹⁷² and joined the majority in voting to affirm death sentences in many cases. He authored the majority opinion in eight of them.¹⁷³

Justice DeBruler wrote approximately five dozen majority, concurring, and dissenting opinions in capital cases decided under the Indiana Death Penalty Act.¹⁷⁴ Of the many things about which he wrote, language in a discussion of the search for and evaluation of mitigating circumstances stands out:

This part of the sentencing statute must be construed to encompass the constitutional mandate that the character and record of the individual offender be considered, and it must be emphasized and repeated that this part of the process does not involve a search for an excuse or justification for criminal conduct, but for knowledge of the person to the end that a judgment be made upon the question of whether the offender is the sort of person who should be put to death rather than put in jail.¹⁷⁵

Justice DeBruler wrote that the “most critical stage” in making the sentencing determination is the weighing of the aggravating circumstances proffered by the State in support of its death penalty request against the mitigating circumstances advanced by the defendant in justification of life.¹⁷⁶ The first step in this process is a clear and unequivocal finding by the trial court that one or more of the aggravating circumstances had been proven beyond a reasonable doubt.¹⁷⁷ Second, the trial court must give separate and independent consideration to any mitigating circumstances that might be present.¹⁷⁸

In *Wallace v. State*, Justice DeBruler confronted the fact that the trial court had not found any mitigating circumstances to exist at all.¹⁷⁹ He expressed what

172. See, e.g., *Fleenor v. State*, 514 N.E.2d 80, 90 (Ind. 1987).

173. A detailed spreadsheet containing citations for each of these and Justice DeBruler’s votes in other death penalty cases is on file with the author.

174. See, e.g., *Williams v. State*, 430 N.E.2d 759 (Ind. 1982) (DeBruler, J., concurring and dissenting).

175. *Id.* at 770.

176. *Spranger v. State*, 498 N.E.2d 931, 958 (Ind. 1986) (DeBruler, J., dissenting).

177. *Dillon v. State*, 454 N.E.2d 845, 856 (Ind. 1983) (DeBruler, J., dissenting); *Schiro v. State*, 451 N.E.2d 1047, 1068 (Ind. 1983) (DeBruler, J., dissenting).

In respect to aggravating circumstances, Justice DeBruler’s steadfast position that only aggravating circumstances listed in the death penalty statute could be considered—see *Minnick v. State*, 544 N.E.2d 471, 483 (Ind. 1989) (DeBruler, J., dissenting)—was effectively adopted in *Bellmore v. State*, 602 N.E.2d 111, 129 (Ind. 1992). *Bellmore* was a most remarkable case in which the Court held the trial court had erroneously relied on an aggravating factor not available for consideration under Indiana law—defendant’s tattoo depicting a knife with dripping blood. *Id.* at 127. Although re-sentencing to death was an option on remand, the trial court instead imposed a term of years.

178. *Spranger*, 498 N.E.2d at 958 (DeBruler, J., dissenting); *Lowery v. State*, 478 N.E.2d 1214, 1233 (Ind. 1985) (DeBruler, J., dissenting).

179. *Wallace v. State*, 486 N.E.2d 445, 465 (Ind. 1985) (DeBruler, J., dissenting).

he called “a nagging doubt . . . that the mitigating circumstances search required by the death statute is either being misunderstood, misapplied, or not reflected in sentencing court findings.”¹⁸⁰ He emphasized the importance of trial judges and lawyers understanding “that a finding of the existence of a mitigating circumstance does not preclude a positive death decision.”¹⁸¹

Once the aggravating and mitigating circumstances have been determined, the process moves to the “most critical” step: the weighing of mitigating circumstances and aggravating circumstances.”¹⁸² Justice DeBruler expected the trial court to

assign a value to all mitigating circumstances which exist, and then he must place the weighted mitigating circumstances, if any, on the mitigating side of the scale. Next, he must assign a value to the aggravating circumstance or circumstances, and then he must place the weighted aggravating circumstance or circumstances on the aggravating side of the scale. Only if the mitigating side of the scale is outweighed by the aggravating side of the scale can a death sentence be imposed.¹⁸³

In case after case, Justice DeBruler relentlessly insisted on a strict application of this weighing process. In some of his later opinions, he undertook to engage in an explicit weighing process himself, valuing each aggravating and mitigating circumstance and then weighing them.¹⁸⁴

My own time on the Court overlapped with Justice DeBruler’s but briefly. Yet during that time, I was privileged to participate in oral arguments on capital cases in which Justice DeBruler engaged Deputy Attorney General Arthur Thaddeus Perry, the two of them together identifying the issues and testing them with remarkable acumen and insight. These were intellectual inquiries of the highest order, seminars really, and from them Indiana developed a capital jurisprudence that made prosecutors far more selective over time in seeking the death penalty.

VII. LIFE IMPRISONMENT WITHOUT PAROLE

A second reason prosecutors became more selective over time in seeking the death penalty was the availability, beginning in 1993, of a sentence of Life Imprisonment Without Parole as an alternative to capital punishment.

When the backlog of death sentences that sat in the pipeline in 1993 were imposed, neither the Death Penalty Act in particular nor Indiana sentencing law in general allowed an option of life imprisonment without parole. The only alternative to a sentence of death was a sentence to a term of years. For a single murder standing alone, the maximum term was sixty years.¹⁸⁵ My very clear sense

180. *Id.*

181. *Id.*

182. *Spranger*, 498 N.E.2d at 958 (DeBruler, J., dissenting).

183. *Id.*

184. I emulated this practice in my own opinions in death penalty cases.

185. IND. CODE § 35-50-2-3 (1993). A (much) lengthier term could be available if there were

was there were a range of murders for which death was perhaps too much, but sixty years was clearly insufficient. When faced with this choice, prosecutors often sought death.

In 1993, the Indiana General Assembly amended the Death Penalty Act to permit a jury to recommend a sentence of life in prison without parole as an alternative in cases where the State seeks death.¹⁸⁶ However, the statute as amended did not permit the State to seek a sentence of life imprisonment without parole unless it was also seeking a death sentence in the alternative.¹⁸⁷ One year later, though, the Indiana General Assembly again amended the Death Penalty Act, this time authorizing the State to seek life imprisonment without parole, even when not charging the death penalty.¹⁸⁸

From this point forward, prosecutors were free to negotiate sentences of life imprisonment without parole as alternatives to seeking the death penalty. In my view, this change in the law was foremost among the four reasons Indiana saw such a precipitous decline in death penalty litigation during my tenure.

VIII. INDIANA CRIMINAL RULE 24

A third reason prosecutors became far more selective over time in seeking the death penalty was the operation of Indiana Criminal Rule 24, adopted by the Court in response to concerns expressed in Indiana and throughout this country over inadequate legal representation for defendants charged with capital crimes.¹⁸⁹

In this respect, the Court benefitted from the felicitous coincidence of having close at hand one of the nation's leading experts on criminal defense, Norman Lefstein, Professor of Law and Dean Emeritus at the Indiana University Robert H. McKinney School of Law.¹⁹⁰ With the assistance of Dean Lefstein and others with expertise in criminal justice administration, the Court promulgated Criminal Rule 24.¹⁹¹

multiple offenses committed in addition to the murder or the defendant qualified as a "habitual offender."

186. *Id.* § 30-50-2-9(e).

187. See Susan Burke & Donald S. Murphy, *Criminal Law and Procedure*, 27 IND. L. REV. 959, 964-65 (1994).

188. IND. CODE § 30-50-2-9(e) (2016).

189. See IND. CRIM. R. 24.

190. Dean Lefstein's professional activities have included serving as Chairman of the American Bar Association Section of Criminal Justice and as Reporter for the Second Edition of the *ABA Criminal Justice Standards Relating to the Prosecution Function and The Defense Function, Providing Defenses Services, and Pleas of Guilty*. Professor Lefstein assisted in drafting the ABA's *Ten Principles of a Public Defense Delivery System*, which are the most widely recognized set of standards for public defense systems. He also has served as Chairman of the ABA Committee on Criminal Justice Standards.

191. *Id.* The principal provisions of the Rule discussed in the text were adopted by the Court on January 22, 1993, which became effective on February 1, 1993. The Rule has been amended several times since 1993. See Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 IND. L. REV. 495 (1996).

Criminal Rule 24 requires qualified defense lawyers in all capital cases.¹⁹² Appointed counsel was paid at a rate of \$109 per hour at the time I left the court, subject to periodic adjustments for inflation.¹⁹³ Salaried counsel in county public defender agencies are paid at the same rate as the prosecuting attorneys in the capital case.¹⁹⁴

Criminal Rule 24 requires that, upon an adequate showing of reasonableness and necessity, lawyers in capital cases must be provided with adequate funds for investigative, expert, and other services necessary to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase, including reimbursement for reasonable and necessary incidental expenses.¹⁹⁵ Similar requirements obtain as to appellate counsel.¹⁹⁶

The cost of the system is divided equally between the state budget and the county budget.¹⁹⁷ Since the 1993 effective date of the Rule, more than \$12.1

192. IND. CRIM. R. 24(B). The presiding judge in a capital case must name two qualified attorneys to represent an individual in a trial proceeding where a death sentence is sought. *Id.* One of the lawyers is designated as lead counsel. IND. CRIM. R. 24(B)(1). To be eligible to serve as lead counsel, an attorney must be an experienced and active trial practitioner with at least five years of criminal litigation experience; have prior experience as lead or co-counsel in no fewer than five felony jury trials tried to completion; have prior experience as lead or co-counsel in at least one case in which the death penalty was sought; and have completed within two years prior to appointment at least twelve hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission. *Id.*

The other attorney is designated as co-counsel and must be an experienced and active trial practitioner with at least three years of criminal litigation experience; have prior experience as lead or co-counsel in no fewer than three felony jury trials; and have completed within two years prior to appointment the same twelve hours of training in the defense of capital cases as lead counsel. IND. CRIM. R. 24(B)(2).

As to workload and compensation, the Rule provides slightly different requirements, depending upon whether counsel is appointed or is a salaried lawyer employed by a county public defender agency. IND. CRIM. R. 24(B)(3). The workload of appointed counsel is limited to twenty open felony cases while the capital case is pending in the trial court. IND. CRIM. R. 24(B)(3)(c)(I). No new cases can be assigned to the lawyer within thirty days of the trial setting in the capital case and none of the lawyer's cases can be set for trial within fifteen days of the trial setting in the capital case. IND. CRIM. R. 24(B)(3)(c)(ii). The workload of all salaried counsel in county public defender agencies is already limited by a formula promulgated by the Indiana Public Defender Commission; Criminal Rule 24 specifies a capital case is treated as forty felonies under the formula. IND. CRIM. R. 24(B)(3)(d).

193. IND. CRIM. R. 24(C)(1). The current rate is \$117 per hour. *Indiana Compensation Rate for Capital Defense Counsel*, IN.GOV, http://www.in.gov/ipdc/public/dp_links/INDIANA%20COMPENSATION%20RATE%20FOR%20CAPITAL%20DEFENSE%20COUNSEL.pdf [https://perma.cc/8E3S-FPCB] (last visited May 17, 2016).

194. *Id.*

195. *Id.*

196. IND. CRIM. R. 24(K)(4).

197. IND. CODE § 33-40-6-5(a)(1).

million in state funds have been expended.¹⁹⁸

I believe that the requirements of Criminal Rule 24 provide particular integrity and fairness to Indiana's capital sentencing regime.¹⁹⁹ Whether that is so, the rule influenced prosecutors to become more selective more selective over time in seeking the death penalty for two reasons. First, because of the fifty-fifty cost sharing provision, a prosecutor's decision to pursue a death sentence added significant expense to the county budget. Second, because capital defendants are provided very thorough, high quality, and effective representation, the effort required to secure a death sentence in any particular case was increased.

IX. THE IMPACT OF SUBSEQUENT U.S. SUPREME COURT DECISIONS

After the Supreme Court upheld the constitutionality of "guided discretion" death penalty statutes in *Gregg*, its Eighth Amendment "evolving standards of decency" review of capital sentences continued. The impact of a number of these decisions (and counterpart developments in Indiana law) provided a fourth reason prosecutors became more selective over time in seeking the death penalty.

In two noteworthy areas, developments in Indiana law preceded Supreme Court pronouncements: prohibiting executing persons with mental retardation and persons under the age of 18 when their crimes were committed.

In 2002, the Supreme Court held the Constitution prohibits executing persons with mental retardation in *Atkins v. Virginia*.²⁰⁰ This followed by eight years the Indiana General Assembly's 1994 prohibition on the execution of persons with mental retardation.²⁰¹ In fact, the Supreme Court's opinion in *Atkins* specifically cited Indiana's 1994 statute in furtherance of its holding.²⁰²

Similarly, the Supreme Court's 2005 decision in *Roper v. Simmons*,²⁰³ holding it to be unconstitutional to impose the death penalty on offenders who were under the age of eighteen when their crimes were committed, post-dated the Indiana General Assembly's determination in 1987 that offenders under the age of eighteen when their crimes were committed would not be death-eligible in Indiana.²⁰⁴ The Supreme Court's opinion in *Simmons* references the Indiana

198. IND. PUB. DEF. COMM'N, ANNUAL REPORT 13 (2014-2015), available at <http://www.in.gov/judiciary/pdc/files/pdc-ann-rpt-14-15.pdf> [<https://perma.cc/PCG6-GWFD>].

199. Although acknowledging positive aspects of Criminal Rule 24's requirements, a comprehensive study published in February, 2007, was nevertheless highly critical of Indiana's death penalty system. AMERICAN BAR ASSOCIATION, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE INDIANA DEATH PENALTY ASSESSMENT REPORT (2007). This study was headed by Professor Joel M. Schumm.

200. 536 U.S. 304 (2002).

201. IND. CODE § 35-50-2-9; *id.* §§ 35-36-9-1 to -7

202. *Atkins*, 536 U.S. at 314.

203. 543 U.S. 551 (2005).

204. IND. CODE § 35-50-2-3(b). This enactment dates back to 1987 when international publicity surrounded a death sentence imposed upon a young Indiana woman named Paula Cooper who committed a grisly murder when she was fifteen-years-old. *Cooper v. State*, 540 N.E.2d 1216 (Ind. 1989).

statute.²⁰⁵

On the other hand, the Supreme Court's 2007 decision, *Panetti v. Quarterman*,²⁰⁶ proved challenging for Indiana. In a much earlier decision, *Ford v. Wainwright*,²⁰⁷ the Supreme Court had ruled it unconstitutional to execute "insane prisoners." By 2007, "insanity" in this context had become understood to mean "incompetence." Scott Panetti claimed he was mentally ill, his mental illness rendered him "incompetent," and, under *Ford*, his execution would be unconstitutional.²⁰⁸ The Supreme Court responded by holding that the lower courts had imposed too restrictive a standard in evaluating Panetti's claim that he could not be executed because he was incompetent.²⁰⁹ Though reversing, the Supreme Court said that it did "not attempt to set down a rule governing all competency determinations."²¹⁰

After *Panetti*, the Indiana Supreme Court was presented with several similar claims: individuals who contended they were mentally ill and that their mental illness rendered them constitutionally incompetent to be executed. Without a constitutional rule governing competency determinations, these cases were extremely difficult.²¹¹

Also impacting Indiana was *Ring v. Arizona*,²¹² decided by the Supreme Court in 2002. The question in *Ring* was whether the requirements of *Apprendi v. New Jersey*²¹³ that a jury determination was required of facts that had the effect of increasing punishments applied to aggravating circumstances in the death penalty context. This was important in Indiana because the Death Penalty Act gave a trial court judge the authority to impose a sentence of death even where a jury recommended against it. When faced with this issue prior to *Ring* being decided, the Court concluded *Apprendi* did not apply in the death penalty context.²¹⁴ *Ring*

205. *Simmons*, 543 U.S. at 579.

206. 551 U.S. 930 (2007).

207. 477 U.S. 399 (1986).

208. *Panetti*, 551 U.S. at 935.

209. *Id.* at 956-57.

210. *Id.* at 960-61.

211. See *Overstreet v. State*, 877 N.E.2d 144, 172 (Ind. 2007); *id.* at 178 (Boehm, J., concurring); *Timberlake v. State*, 859 N.E.2d 1209, 1209 (Ind. 2007). Following my departure from the Court, Michael Dean Overstreet renewed his contention that he was incompetent to be executed. The Supreme Court granted his successive petition for post-conviction relief. *Overstreet v. State*, 993 N.E.2d 179, 181 (Ind. 2013). Post-conviction relief was granted by the trial court and the State did not appeal the trial court's determination. Press Release, Ind. Attorney Gen., State Will Not Appeal Ruling in Competency to Be Executed Case (Dec. 9, 2014), available at http://www.in.gov/archive/calendar/EventList.aspx?fromdate=1/1/2014&todate=12/31/2014&display=Month&type=public&eventidn=198115&view=EventDetails&information_id=208656 [<https://perma.cc/35S8-W5GJ>].

212. 536 U.S. 584 (2002).

213. 530 U.S. 466 (2000); see *supra* text following note 8.

214. *Saylor v. State*, 765 N.E.2d 535 (Ind. 2002). I dissented in *Saylor*, believing *Apprendi* rendered the statute unconstitutional.

concluded the opposite with the result that several Indiana death sentences were set aside.²¹⁵ However, at almost the same time *Ring* was being decided, the Indiana General Assembly amended the Death Penalty Act to the same effect.²¹⁶ *Ring* will be revisited in the conclusion to this Article.²¹⁷

With few exceptions, the only viable claim available to petitioners on PCR is that they were deprived of their constitutional rights because they were the victims of ineffective assistance of counsel (“IAC”). When I came to the Court in 1993, two 1984 Supreme Court cases were regularly cited by petitioners as authority for their IAC claims: *Strickland v. Washington*²¹⁸ and *United States v. Cronic*.²¹⁹ Now it is certainly true *Strickland* and *Cronic* set forth IAC standards. But neither are death penalty cases and in neither case did the petitioner actually receive relief.²²⁰ In fact, at the time I started voting on death penalty cases, the Supreme Court had never found an instance of IAC in a death penalty case!

That changed with *Williams v. Taylor*²²¹ in 2000 where the Supreme Court concluded Terry Williams had been denied his Sixth Amendment right to the effective assistance of counsel when his trial lawyers failed to investigate and present substantial mitigating evidence to the sentencing jury. And by the time I left the Court, the Supreme Court had reversed death sentences in three more cases on grounds of IAC: *Wiggins v. Smith*,²²² *Rompilla v. Beard*,²²³ and *Porter v. McCollum*.²²⁴ Like *Williams*, each involved a claim that the trial lawyers failed in their obligation to investigate and present mitigating evidence.

When I started on the Court, it was open to question as to just how seriously the Supreme Court took *Strickland* in the death penalty context; my last decade demonstrated *Strickland* will be enforced, at least in respect to the investigation and presentation of mitigating evidence in the sentencing phase.

The impact of *Atkins*, *Simmons*, *Panetti*, and *Ring*—and counterpart developments in Indiana law—along with enforcement of *Strickland* in the death penalty context also contributed to prosecutors becoming more selective over time in seeking the death penalty.

215. See *Saylor v. State*, 808 N.E.2d 646 (Ind. 2004); *Ben-Yisrayl v. State*, No. 45S00-0407-SD-00294 (Ind. Aug. 6, 2004) (Order Authorizing Filing Successive Petition for PCR; PCR granted and death penalty vacated by the trial court on September 10, 2004); *Minnick v. State*, No. 47S00-0407-SD-00333 (Ind. July 28, 2004) (Order Authorizing Filing Successive Pet. for PCR; PCR granted and death penalty vacated by the trial court on December 1, 2004).

216. IND. CODE § 35-502-9(e) (2016).

217. See *infra* text accompanying note 235.

218. 466 U.S. 668 (1984).

219. 466 U.S. 648 (1984).

220. See *Strickland*, 466 U.S. at 701; *Cronic*, 466 U.S. at 666-67.

221. 529 U.S. 362 (2000).

222. 539 U.S. 510 (2003).

223. 545 U.S. 374 (2005).

224. 558 U.S. 30 (2009).

X. CONCLUSION: THE THOMAS SCHIRO LITIGATION

Rather than conclude with a summary of the principal points made above, I end with a story in which this Article's three principal themes—the jury's role in sentencing, appellate review of criminal sentences, and capital sentences (as well as Justice DeBruler's influence)—coalesce: the dramatic Thomas N. Schiro death penalty litigation.

The *Schiro* case is the most extensively litigated death penalty case in Indiana Supreme Court history—and the death penalty case on which the Court was most closely divided. In appeals in each of 1983, 1985, and 1989, Schiro's case came before the Court and, although his death sentence was affirmed each time, never were there more than three justices in the majority. And, with changing membership on the Court, three different justices had, at different times, voted to vacate the death sentence.²²⁵ The case is also the only modern Indiana death penalty case on which the Supreme Court has written.²²⁶

What closely divided the justices who had reviewed Schiro's case were not the facts; his crime made all who studied it recoil in horror. Rather, several important aspects of the case raised concern, the most important of which was the jury had unanimously recommended Schiro *not* be put to death. In dissent in all three appeals, Justice DeBruler argued the jury's recommendation should be followed.²²⁷

On the last day of Justice DeBruler's near twenty-eight years on the Court, he handed down his final majority opinion in the case of *Schiro v. State*.²²⁸ This time, his analysis prevailed.²²⁹ He pointed out after Schiro's 1989 appeal, the Court adopted "a form of closer appellate scrutiny for cases . . . wherein the jury recommends against death" and Schiro specifically requested such scrutiny in his original appeal.²³⁰ Although "the jury fully appreciated the details of Schiro's crime," it "unanimously recommended that the death penalty not be imposed."²³¹

225. *Schiro v. State*, 533 N.E.2d 1201, 1208 (Ind.) (Justices DeBruler and Dickson voted to vacate the sentence), *cert. denied*, 493 U.S. 910 (1989) (Justice Stevens, Brennan, and Marshall all dissented); *Schiro v. State*, 479 N.E.2d 556, 562 (Ind. 1985) (DeBruler, J., dissenting), *cert. denied*, 475 U.S. 1036 (1986) (Marshall, J., dissenting); *Schiro v. State*, 451 N.E.2d 1047 (Ind.) (Justices DeBruler and Prentice voted to vacate the sentence), *cert. denied*, 464 U.S. 1003 (1983) (Justices Brennan and Marshall dissented).

226. *Schiro v. Farley*, 510 U.S. 222 (1994). The Supreme Court denied Schiro relief by a vote of 7-2. Justices Blackmun and Stevens each wrote dissents, both of which quoted from Justice DeBruler's dissents in earlier cases. *See id.* at 237 (Blackmun, J., dissenting) (quoting *Schiro*, 451 N.E.2d at 1065 (DeBruler, J., dissenting)); *id.* at 239, 242 (Stevens, J., dissenting) (quoting *Schiro*, 533 N.E.2d at 1209 (DeBruler, J., dissenting)).

227. *Schiro*, 533 N.E.2d at 1208 (DeBruler, J., dissenting); *Schiro*, 479 N.E.2d at 562 (DeBruler, J., dissenting); *Schiro*, 451 N.E.2d at 1064 (DeBruler, J., dissenting).

228. 669 N.E.2d 1357 (Ind. 1996). I joined Justice DeBruler's opinion, as did Justices Dickson and Selby. Chief Justice Shepard dissented.

229. *See generally id.*

230. *Id.* at 1358.

231. *Id.* at 1359-59.

Justice DeBruler wrote: "When the unanimous rejection by the jury of the predicate for imposition of the death penalty, with all such rejection imports, is placed in tandem with the evidence in mitigation, with all such evidence imports," he continued, "we conclude that it may not be said that the facts available in the record support the conclusion that the death penalty is appropriate." Thomas Schiro's death sentence was modified to a term of years.²³²

A careful reader of this Article might be puzzled about at least two aspects of the *Schiro* story.

First, the degree of appellate scrutiny exercised in this 1996 decision seems inconsistent with the sentiment expressed in the first part of this Article that until 2003, a sentence was not eligible for appellate review unless "manifestly unreasonable."²³³ Certainly this sentence was not manifestly unreasonable. The answer lies in the fact that from at least 1986, the Court did not apply the "manifestly unreasonable" sentencing review rules in capital cases. Rather, Justice Dickson wrote for the Court, "in our capital cases . . . , the [sentencing review] rules stand more as guideposts for our appellate review than as immovable pillars supporting a sentence decision."²³⁴ Appellate sentencing review in capital cases was the norm.

Second, what about *Apprendi* and *Ring*? After all, the Indiana Death Penalty Act requires proof of one or more aggravating circumstances before a death sentence can be imposed. Schiro's jury recommended against death but the trial court nevertheless imposed it, in apparent violation of *Apprendi* and *Ring*. Why didn't Schiro's sentence violate *Apprendi* and *Ring*?

The answer, of course, is that neither *Apprendi* nor *Ring* had been decided in 1996 when Justice DeBruler wrote *Schiro*. Had Thomas Schiro still been on death row when *Ring* was decided, he would undoubtedly been entitled to relief.²³⁵ Had the Court not ruled as it did when it did, he would undoubtedly have been put to death.²³⁶

232. *Id.*

233. *See supra* text accompanying notes 87-90.

234. *Spranger v. State*, 498 N.E.2d 931, 947 n.2 (Ind. 1986).

235. William Minnick, who had been sentenced to death notwithstanding a jury recommendation against death, won relief in federal court after *Schiro* but before *Ring* on grounds that treating him differently from Schiro violated the Equal Protection Clause. *Minnick v. Anderson*, 151 F. Supp. 2d 1015 (N.D. Ind. 2000).

236. The Court was reviewing a successive PCR; all of Schiro's other state and federal remedies had been exhausted.