RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

JOEL M. SCHUMM*

This survey of criminal cases decided between October 1, 2023, and September 30, 2024, focuses on Indiana Supreme Court opinions while also addressing some of the scores of published opinions of the Indiana Court of Appeals that provide significant direction in criminal cases from beginning (such as speedy trial requests and appointment of counsel) to end (sentencing and post-conviction relief).[1]

I. SPEEDY TRIAL

Defendants pursuing a speedy trial may ground their claim in either Indiana Criminal Rule 4 or the federal and state constitutions.[2] As summarized below, the Supreme Court decided a significant case regarding court congestion while the Court of Appeals grappled with a variety of Rule 4 claims.

A. Court Congestion

Criminal Rule 4(B) requires a trial within 70 days for incarcerated defendants who make a request.[3] One exception is court congestion.[4]

In *Grimes v. State*, a divided Indiana Supreme Court provided guidance about what parties and trial courts must do when continuing cases based on court congestion.[5] In *Grimes*, the defendant objected to the post-congestion trial date and filed a motion for discharge.[6] His motion included certified copies of the court's docket that showed no other jury trials were scheduled for the day of his original trial.[7] He also argued that no potential jurors had been summoned for the original date.[8] The supporting evidence was obtained nine days after the

* Carl M. Gray Professor of Law, Indiana University Robert H. McKinney School of Law. B.A. 1992, Ohio Wesleyan University; M.A. 1994, University of Cincinnati; J.D. 1998, Indiana University Robert H. McKinney School of Law.

1. Some juvenile delinquency appeals are also included because they address issues that apply with equal force to adult criminal defendants. *See, e.g.*, A.W. v. State, 229 N.E.3d 1060 (Ind. 2024) (double jeopardy); W.H. v. State, 231 N.E.3d 900 (Ind. Ct. App. 2024) (sufficiency of evidence).

2. Constitutional speedy trial claims usually involve the Sixth Amendment and sometimes its Indiana constitutional analog of Article 1, Section 13. *See, e.g.,* Watson v. State, 155 N.E.3d 608, 614 n.2 (Ind. 2020).

3. IND. R. CRIM. P. 4(B).

4. *Id.*

5. 235 N.E.3d 1224, 1228 (Ind. 2024).

6. *Id.* at 1229.

7. *Id.*

8. *Id.*

continuance order.[9] The trial court denied the motion to discharge without explanation.[10]

The majority opinion authored by Justice Slaughter sets forth a straightforward, burden-shifting test. First, trial courts are given deference as to an initial finding of congestion.[11] "But if the defendant presents a prima facie case that the court's congestion finding is inaccurate," the burden shifts to the trial court to explain why its calendar required continuing the trial.[12] If the court fails to meet its burden, the defendant is entitled to have the State's charge against him dismissed.[13]

By submitting docket entries showing no other scheduling conflicts with priority over his criminal trial, Grimes met his initial burden.[14] The trial court was then required to explain the postponement but "failed to meet even this low bar" because "it gave no explanation when it denied the defendant's motion for discharge."[15] The case was remanded with instructions to discharge Grimes.[16]

Justice Goff, joined by Justice Massa, dissented. In their view, Grimes failed to carry his burden of showing that the trial court's congestion finding was inaccurate "at the time it continued the trial."[17] Emphasizing the presumed validity of a trial court's finding, they faulted Grimes for offering "a copy of the court's docket dated **nine days** after the court rescheduled trial" and "merely alleging, without testimony or affidavit from court staff, that 'no jurors were summoned for duty' the week of the original trial date."[18]

Nonetheless, the dissent concluded by acknowledging that future reversals should be rare as a trial court can "meet its low burden by offering a simple factual basis to support its congestion finding—e.g., noting the case and cause number requiring priority treatment—and thus avoid cases like this."[19]

B. Inadequate Trial Court Records

The inadequacy of trial court records also contributed to a reversal in *Hoback v. State*.[20] There, the defendant bore the burden under Criminal Rule 4(C) to show that he was not brought to trial within one year and that any delay

9. *Id.*

10. The current version of CR 4(B) refers to the dismissal of charges rather than to discharge of the defendant, but the Court observed that its opinion applied with "equal force" to both versions of the rule. *Id.* at 1230.

11. *Id.* at 1228.

12. *Id.*

13. *Id.*

14. *Id.* at 1231.

15. *Id.* at 1228.

16. *Id.* at 1235.

17. *Id.* (Goff, J., dissenting).

18. *Id.*

19. *Id.* at 1237.

20. 225 N.E.3d 208 (Ind. Ct. App. 2023).

was not caused by him, congestion of the court's calendar, or an emergency.[21] The Court of Appeals reiterated that delay cannot be charged to a defendant for "absent or missing" docket entries.[22]

The majority found the trial court's record for delay past one year "woefully inadequate"; docket entries, such as "[a]dditional dates requested" or that the trial was "cancelled" for the reason "[o]ther," did not specify which party sought the delay.[23] Moreover, the entry canceling the jury trial did not reset the trial date, which would have triggered an obligation to object on Rule 4(C) grounds if the new date was beyond the time limit.[24] Put another way, "Hoback did not waive his discharge claim by failing to object to the order setting a status conference outside the one-year time period."[25]

Judge Felix dissented. First, he would have found the claim waived based on a lack of cogent argument on some points and defense counsel's otherwise "significant noncompliance with Appellate Rule 46," which "substantially impede[d]" review of the claim.[26] Moreover, he believed the defendant "acquiesced in, if not requested, the delay."[27] Unlike an earlier reversal in which the Chronological Case Summary (CCS) did not "provide any insight as to why the case was reset," one entry was "signed by both counsel and at least three docket entries from the court explain[ed], albeit not in great detail, why the trial was cancelled and a status conference reset."[28]

One can hope for better clarity going forward. Beginning January 1, 2024, Criminal Rule 4.1 now requires: "When granting or ordering a continuance, the court must designate whether the delay is excluded from the Rule 4 time period due to the act of the defendant, court congestion, or emergency."[29]

C. Criminal Rule 4(A) & (C)

Criminal Rule 4 sets different deadlines and imposes different consequences for speedy trial violations depending on whether a defendant is in custody and whether a speedy trial is requested.

For example, as reiterated in *Ko v. State,* it is well-settled "that a defendant held in jail for more than six months is not entitled to discharge from prosecution or dismissal of charges under Criminal Rule 4(A); rather, the defendant is

21. *Id.* at 212.
22. *Id.* at 213.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 214–15.
27. *Id.* at 213–14.
28. *Id.* at 216.
29. IND. R. CRIM. P. 4.1(A)(4).

merely entitled to prompt release on his own recognizance."[30] Pursuing a writ is the proper procedure to secure a defendant's prompt release.[31]

But Ko waited until after his trial concluded to raise the issue, and the court of appeals found the "issue is moot as no effective relief can be granted."[32]

The defendant in *Crabb v. State*, however, brought a challenge under Rule 4(C), which "places an affirmative duty on the State to bring a defendant to trial within one year of being charged or arrested, but allows for extensions of that time for various reasons."[33] The State bears the burden of bringing a defendant to trial within a year; defendants have no obligation to remind the State of its duty or remind the trial court of that duty.[34]

Crabb involved a special judge, a request for a competency evaluation, and emails that included court staff, defense counsel, and the special judge.[35] The parties agreed that, as of October 25, 2022, the State had 118 days—or until February 20, 2023—to bring Crabb to trial.[36] The State argued from the "context" of a January 2023 email that defense counsel met with the special judge on January 23 and agreed to an October 2023 trial date.[37] But the State offered no evidence that the Rule 4(C) clock stopped running on January 23.[38] Moreover, the State took no action in the case between October 2022 and February 22, 2023, when a trial date was set.[39] Because the 4(C) time had expired, Crabb had no duty to object and was entitled to discharge.[40]

D. Speedy Trial Claim Waived

In a Criminal Rule 4(B) case, *Miller v. State*, the trial court entered a congestion order vacating Miller's trial three days before his scheduled trial date because of a trial in another case.[41] After his case was scheduled for a date beyond the seventy-day deadline, Miller moved for discharge.[42]

The Court of Appeals found his claim waived.[43] First, the court of appeals rejected Miller's claim that no objection was required because it was impossible

30. 243 N.E.3d 1153, 1158 (Ind. Ct. App.), *trans. denied*, 2024 Ind. LEXIS 721 (Ind. 2024).

31. *Id.* (citing S.L. v. Elkhart Superior Ct. No. 3, 969 N.E.2d 590, 591 (Ind. 2012) (granting "relief in part by ordering that Relator be promptly released on his own recognizance, though he still may be held to answer for the criminal charge against him")).

32. *Id.*

33. 242 N.E.3d 539, 542 (Ind. Ct. App. 2024).

34. *Id.*

35. *Id.* at 540–41.

36. *Id.* at 542.

37. *Id.* at 543.

38. *Id.*

39. *Id.*

40. *Id.*

41. 225 N.E.3d 790, 792 (Ind. Ct. App. 2023), *trans. denied*, 2024 Ind. LEXIS 383 (Ind. 2024).

42. *Id.*

43. *Id.* at 793.

to reschedule the trial within the Rule 4 deadline.[44] Rather, because the congestion order was entered a few days before Miller's speedy-trial deadline, he was required to object.[45] Second, Miller's pro se letters objecting "to any and all continuances" were immaterial because "once counsel is appointed, a defendant speaks through his counsel and the trial court is not required to respond to the defendant's pro-se requests or objections."[46]

E. Conflicting Local Rule Invalid

Finally, in *Ferman v. State*, the defendant alleged under Rule 4(C) that the trial court improperly charged two delays to him, resulting from neither party filing a request to "call a jury" as required by a Fayette County local court rule.[47] The Court of Appeals agreed that the local rule conflicted with Rule 4(C) because it places a duty on defendants to file a request to call a jury and, if a trial is continued, charges defendants with the delay.[48] Nevertheless, discharge was not required because, even considering the wrongfully attributed delays under the local rule, the State still had a week to bring him to trial when he requested discharge.[49]

II. APPOINTED COUNSEL REINSTATED IN HIGH-PROFILE CASE

In October 2022, Richard Allen was arrested and charged with murdering two teenage girls in Delphi, a case that had garnered national attention.[50] He was appointed two public defenders who worked diligently on the case for the next year.[51] But a year after their appointment, "the special judge lost faith in their ability to assist Allen with his defense effectively, so she ultimately disqualified them as counsel."[52] New trial public defenders were appointed, and appellate lawyers filed an original action with the Indiana Supreme Court to challenge the disqualification and replacement.[53]

The Indiana Supreme Court received responses from the special judge and Attorney General before scheduling the matter for oral argument.[54] Hours after

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44. *Id.*
45. *Id.*
46. *Id.*
47. 232 N.E.3d 133, 138 (Ind. Ct. App. 2024).
48. *Id.*
49. *Id.* at 139.
50. State *ex rel.* Allen v. Carroll Cir. Ct., 226 N.E.3d 206, 209 (Ind. 2024). *See, e.g.*, Christine Hauser & Derrick Bryson Taylor, *Indiana Man Is Charged in 2017 Killings of Two Girls*, N.Y. TIMES (Oct. 31, 2022), https://www.nytimes.com/2022/10/31/us/delphi-murders-indiana.html.
51. *Allen*, 226 N.E.3d at 208–09.
52. *Id.* at 209.
53. *Id.*
54. *Id.* at 208–09.

the oral argument, the court issued an order granting the writ and reinstating counsel.[55] Weeks later, the formal opinion followed.

The opinion began by acknowledging that original actions for writs of mandamus or prohibition are "an extraordinary remedy," for a "clear and obvious emergency," and not "substitutes for appeal."[56] But the court has "repeatedly reviewed through original actions . . . whether to disqualify counsel" and found it appropriate to do so in Allen's case considering the "extraordinary circumstances where denying a writ will result in substantial injustice" and the absence of an "adequate appellate remedy."[57]

Turning to the merits, the majority relied on the Sixth Amendment, noting the high stakes because the erroneous deprivation of the right to counsel "constitutes structural error, which, unlike other errors, entitles criminal defendants who are convicted to automatic reversal and a new trial."[58] Although "[c]ourts around the country are divided over whether the Sixth Amendment guarantees criminal defendants the *continuity* of court-appointed counsel, appellate courts have at least limited the authority of trial courts to remove court-appointed counsel.[59] Some courts have found that due process, rather than the Sixth Amendment, protects the right.[60]

Whatever the source, even the Attorney General acknowledged that the trial court's discretion to disqualify court-appointed counsel is significantly limited.[61] The majority adopted the following rule:

> [A] trial court cannot disqualify court-appointed counsel over the objection of both the defendant and appointed counsel unless (a) disqualification is a last resort; (b) disqualification is necessary to protect the defendant's constitutional rights, to ensure the proceedings are conducted fairly and within our profession's ethical standards, or to ensure the orderly and efficient administration of justice; and (c) those interests outweigh the prejudice to the defendant.[62]

Applying that rule, the Supreme Court found that disqualification was not a last resort. The special judge's concerns were "addressed through a combination of procedural rules and court orders, including the gag order and protective order she entered," and she retained "both statutory and inherent authority to compel compliance with [her] orders and the procedural rules through contempt

55. *Id.* at 211.
56. *Id.*
57. *Id.* at 212.
58. *Id.* at 213. The court also quoted Article 1, Section 13, but did not develop or apply a separate Indiana constitutional analysis. *Id.*
59. *Id.* at 214.
60. *Id.*
61. *Id.* at 215.
62. *Id.*

proceedings and sanctions that include fines and even jail."[63] Next, the special judge's concern that counsel could not effectively represent the defendant was outweighed by the decades of experience of both.[64] And finally, Allen faced substantial prejudice from substituting counsel more than a year after counsel had been working with investigators and experts and was ready for trial.[65] Moreover, Allen had "already been in jail for about a year and a half now, and substituting counsel require[d] a nine-month delay in the trial date with substitute counsel unsure whether they would even be ready by then."[66]

Justice Slaughter dissented, citing the familiar legal principles that "[o]riginal actions are for clear-cut cases that apply settled law, not for cases like today's that announce new legal rules. The latter is what appeals are for."[67]

III. JURY INSTRUCTIONS

In a pair of cases, the appellate courts applied long-standing principles in (a) ordering a retrial based on an instruction that used "and/or" and (b) affirming another case where no instruction on a topic was warranted.

A. Burden in Self-Defense "and/or" Defense of Dwelling

Whether pursuing self-defense or defense of dwelling,[68] the State must prove beyond a reasonable doubt "that the defendant's use of force was not justified."[69] The trial court in *Dunn v. State* determined that both self-defense and defense of dwelling were potentially at issue, but it instructed the jury that the State had to prove Dunn "did not act in self-defense **and/or** act in defense of her dwelling."[70]

The Indiana Supreme Court summarized criticisms of use of "and/or" language, which "is ambiguous and potentially imprecise."[71] The inclusion of "and/or" in the *Dunn* instructions

> opened the door to confusion, suggesting that the State bore the burden of proving only that Dunn did **not** act in **both** self-defense **and** defense

63. *Id.* at 216.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 219.
68. A person "is justified in using deadly force" and has no "duty to retreat" if "the person reasonably believes that that force is necessary to prevent serious bodily injury to the person" or "the commission of a forcible felony." IND. CODE § 35-41-3-2(c) (2024). A person is also "justified in using reasonable force, including deadly force," if "the person reasonably believes that the force is necessary to prevent or terminate the other person's unlawful entry of or attack on the person's dwelling, curtilage, or occupied motor vehicle." I.C. § 35-41-3-2(d).
69. Dunn v. State, 230 N.E.3d 910, 915 (Ind. 2024).
70. *Id.* at 916.
71. *Id.*

> of her dwelling. Or, to put it another way, the jury may have understood Final Instruction 7 as giving the State the burden of disproving either self-defense **or** defense of dwelling, rather than both.[72]

In ordering a new trial because the error was fundamental, the Supreme Court relied on several factors. The "and/or" language was used repeatedly in the instructions, which "nowhere told the jury that the State needed to disprove both defenses."[73] Moreover, in its closing argument, the State "reiterated—rather than clarified—the ambiguous burden of proof, infecting the most critical issues in the case."[74] Although defense counsel focused on defense of dwelling and opposed any instruction on self-defense, the trial court gave a self-defense instruction, which it should have crafted with particular care when given sua sponte and "contrary to the express strategy of the party whom the instructions were supposed to protect."[75] Finally, the Supreme Court found the defense presented a "strong case" for defense of dwelling.[76] Because it was "the jury's prerogative to evaluate the credibility of the witnesses, weigh the evidence, and resolve any conflicts," a new trial was warranted to allow the jury to perform its role "equipped with the correct legal standard."[77]

B. Jury Instruction on Parental Privilege Denied

The defense of parental privilege to discipline a child is grounded in the "legal authority" statute.[78] Relying on the Restatement of Torts, the Indiana Supreme Court has held as follows: "A parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his [or her] child as he [or she] reasonably believes to be necessary for its proper control, training, or education."[79]

In *Ndiaye v. State*, a parent who threatened to cut off the hand of his daughter for stealing was charged with intimidation.[80] The Court of Appeals affirmed the trial court's refusal to instruct the jury on the defense of parental privilege because "reasonable parenting cannot, as a matter of law, include threatening to commit serious bodily injury to a child with a deadly weapon."[81]

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72. *Id.*
73. *Id.* at 917.
74. *Id.*
75. *Id.* at 918.
76. *Id.* at 919.
77. *Id.*
78. I.C. § 35-41-3-1.
79. Willis v. State, 888 N.E.2d 177, 182 (Ind. 2008).
80. 234 N.E.3d 906 (Ind. Ct. App. 2024).
81. *Id.* at 911 (footnote omitted).

IV. Crime or Not a Crime?

Indiana's appellate courts decided several cases regarding challenges to the validity of a specific charge. This section begins with an Indiana Supreme Court opinion that reversed convictions based on insufficient evidence of intent before turning to several decisions by the Court of Appeals addressing sufficiency claims for a variety of charges.

A. Insufficient Evidence of Intent

In *Teising v. State*, a township trustee was convicted of twenty-one counts of theft for each paycheck she cashed while leading "a nomadic life while continuing to work remotely" during the COVID-19 pandemic.[82]

A theft conviction requires proof that a person "knowingly or intentionally exert[ed] unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use . . . ."[83] Under long-standing precedent, "[t]he taking of property of another under a good faith claim of title or right to possession, or under circumstances consistent with honest conduct, is not larceny [(i.e., theft)], although the party charged with the crime might have been mistaken in [their] belief."[84] That is because "[t]he intent to steal property and a [bona fide] claim of right to take it are incompatible."[85]

Article 6, Section 6 of the Indiana Constitution requires that all township officers "shall reside within their respective . . . townships," and "they forfeit their position if they don't."[86] Teising was aware of the requirement to reside within the township when she "sold her home, bought a travel trailer, and left for a nomadic life while continuing to work remotely."[87] In the State's view:

> [T]hat lifestyle produced a chain of legal consequences: by leaving the township indefinitely, she stopped residing in the township as a matter of law; then by not complying with the constitutional requirement to reside within the township, she forfeited her office; and then by forfeiting her office, her paychecks became ill-gotten gains.[88]

The Indiana Supreme Court disagreed. The "State didn't prove Teising knew she forfeited her office," and "without knowing she wasn't supposed to be

82. 226 N.E.3d 780, 781 (Ind. 2024),
83. I.C. § 35-43-4-2.
84. Roark v. State, 130 N.E.2d 326, 328 (Ind. 1955).
85. *Id.*
86. *Teising*, 226 N.E.3d at 784.
87. *Id.* at 781.
88. *Id.* at 785.

receiving the paychecks, Teising could not have had the necessary criminal intent.[89]

The court also disagreed that Teising had inappropriately relied on a mistake of law defense. Teising could not "defend based on her ignorance of the *criminal* law . . . that she didn't know it was a crime to take other people's things without their permission," but she could "defend on the basis that she misunderstood the *civil* law to mean the allegedly stolen property was rightfully hers, because that misunderstanding negates her criminal intent."[90]

Without any evidence of intent, the court vacated the theft convictions, concluding the "only available remedies were civil."[91]

B. Perjury Conviction Reversed

Perjury occurs when a person "makes a false, material statement under oath or affirmation, knowing the statement to be false or not believing it to be true . . . ."[92] The statute is limited to "a statement of fact and not a conclusion, opinion, or deduction from given facts."[93]

In *Basso v. State*, a state trooper was injured after his vehicle was struck by a drunk driver.[94] During a pretrial deposition, he testified that he believed the driver "deserve[d] jail time."[95] The driver later pleaded guilty, and Basso testified at sentencing that he favored "home detention" instead of jail time.[96] An investigation ensued, and Basso was later charged with perjury.[97] He filed a motion to dismiss the charge, which was denied and then raised on interlocutory appeal.[98]

The Court of Appeals held that a crime victim does not commit perjury simply by changing his opinion about the proper punishment for the defendant.[99] Perjury can ordinarily not be based on a statement of opinion, which "is not a statement of fact that can be proven false in a perjury prosecution."[100] Acknowledging the important role that victims play in criminal prosecutions, the court explained that it is not unusual for crime victims to change their

89. *Id.* at 786.
90. *Id.* at 785.
91. Id. at 787.
92. I.C. § 35-44.1-2-1(a)(1).
93. Basso v. State, 244 N.E.3d 439, 443 (Ind. Ct. App. 2024) (citing references omitted).
94. *Id.* at 441.
95. *Id.*
96. *Id.* at 442.
97. *Id.*
98. *Id.*
99. *Id.* at 444.
100. *Id.*

opinion about punishment as "time passes, heated feelings cool, and old wounds heal."[101]

C. Website Citations Cannot Meet the State's Evidentiary Burden

Level 3 felony aggravated battery requires proof of a substantial risk of death to another person.[102] In *W.H. v. State*, the State offered evidence that W.H. shot the victim in the lower leg and general testimony from a detective about his experience with gunshot wounds.[103] The victim "was standing on one foot and was thereafter taken by ambulance to the hospital for his injury."[104] Although the State presented photographs of the wound, it "did not present any testimony or medical records explaining the specific nature of the injury or the treatment thereof."[105] Its reliance on "general or hypothetical questions" posed to a detective about his experience with gunshot wounds was not enough.[106] Nor could the State "fill the evidentiary gaps" of its failure to present evidence in the trial court with information from medical websites and journals on appeal.[107] The adjudication was vacated for lack of sufficient evidence.[108]

D. Felony Reduced to Misdemeanor Cannot Support SVF Conviction

A person convicted of certain felony offenses who possesses a firearm commits unlawful possession of a firearm by a serious violent felon (SVF), a Level 4 felony.[109] In *Brackenridge v. State*, the defendant's 2010 conviction for class D felony criminal confinement was reduced to a misdemeanor in 2016.[110] When charged with SVF in 2023, he sought dismissal. The Court of Appeals reversed the denial of his motion to dismiss because the SVF statute applies to felony convictions.[111] In addition to the plain statutory language, dismissal was warranted by the rule of lenity and by the purpose of Alternative Misdemeanor Sentencing (AMS) to reward good behavior.[112]

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101. *Id.* The appellate court also rejected the State's argument that Basso committed perjury by misrepresenting that his changed opinion was not based on a civil case he had filed against the driver. Rather, the "confusingly worded" question that Basso was asked was not what the State contends he was asked. *Id.*

102. I.C. § 35-42-2-1.5.

103. 231 N.E.3d 900, 904 (Ind. Ct. App. 2024).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 905. The opinion cites *Dolkey v. State*, which explained it "is axiomatic that appellate review of the factfinder's assessment is limited to those matters contained in the record which were presented to and considered by the factfinder." *Dolkey,* 750 N.E.2d 460, 462 (Ind. Ct. App. 2001).

108. *W.H.*, 231 N.E.3d at 905.

109. I.C. § 35-47-4-5.

110. 236 N.E.3d 684 (Ind. Ct. App. 2024).

111. *Id.* at 685.

112. *Id.* at 688–89.

E. HVSO Enhancement Supported by Either Felonies or Misdemeanors

A person is a habitual vehicular substance offender (HVSO) if "the person has accumulated three (3) or more prior unrelated vehicular substance offense convictions at any time."[113] A "vehicular substance offense" is "any misdemeanor or felony in which operation of a vehicle while intoxicated . . . is a material element" and includes "an offense under IC 9-30-5" (OWI offenses).[114]

In *Coonce v. State*, the defendant challenged his HVSO enhancement because it was based on both felonies and misdemeanors.[115] He pointed to Indiana Code section 9-30-15.5-2(b)(3), which mentions "(3) prior unrelated vehicular substance offense felonies." Considering other parts of the statute and the principle that courts should "avoid interpretations that depend on selective reading of individual words that lead to irrational and disharmonizing results," the court of appeals concluded that the "use of the word 'felonies' in the introductory clause of subsection (b)(3) is an anomaly and an error."[116] The prior offenses could be either misdemeanors or felonies.

Beyond grammar, the court reasoned that its interpretation was consistent with the purpose of the statute—"to provide enhanced sentencing for offenders who demonstrate a pattern of recidivism. It is the repetition, not the seriousness, of the offenses that establishes the habit. This is especially true in the context of HVSOs, because typically, OWI is a Class A or Class C misdemeanor offense."[117]

F. Identity Deception Conviction Upheld Under 2021 Statute

Under an earlier version of the identity deception statute, Indiana courts have reversed convictions when the defendant did not use identifying information of a real person, such as using a fictious name.[118] Although the defendant in *Kendall v. State*, relied on those cases, the court of appeals upheld his conviction under the statute, which was amended in 2021.[119]

Kendall told police his name was "Tyler Cliver," and his date of birth was "August 3, 1988."[120] Although the date of birth was correct, the name was not.[121] Under the amended statute, identity deception occurs when "a person who, with intent to harm or defraud another person, knowingly or intentionally obtains,

113. I.C. § 9-30-15.5-2(c).
114. I.C. § 9-30-15.5-1 (2016).
115. 240 N.E.3d 721 (Ind. Ct. App. 2024).
116. *Id.* at 725.
117. *Id.*
118. *See* Brown v. State, 868 N.E.2d 464 (Ind. 2007); Duncan v. State, 23 N.E.3d 805 (Ind. Ct. App. 2014).
119. 225 N.E.3d 794 (Ind. Ct. App. 2023).
120. *Id.* at 796.
121. *Id.*

possesses, transfers, or uses identifying information *to profess to be another person*."[122] The legislature also amended the definition of "identifying information" to include "information, *genuine or fabricated*, that identifies or *purports to identify* a person, including: (1) a name, address, date of birth . . . ."[123] Although the key terms are not defined in the statute, the court of appeals provided dictionary definitions of genuine, fabricate, and purport.[124]

Based on these amended statutes, the appellate court affirmed the conviction because it could not "say that the current version of the statute requires that the identifying information must coincide with any real person or an existing human being."[125]

V. INSANITY AND COMPETENCY

Although frequently raised together, insanity and incompetency are different; insanity looks to the mental state at the time of an offense, while competency considers the time of trial or other court proceedings.[126] The appellate courts addressed the insanity and competency statute in two different contexts—its inapplicability of insanity to contempt proceedings and the waiver of a competency challenge by defense counsel's words or actions.

A. Insanity Statute Does Not Apply in Contempt Proceedings

In *Finnegan v. State*, the defendant was found in indirect contempt of court because of his vulgar letters to the trial court.[127] His counsel's request for a mental health evaluation under the insanity statute was denied.[128] The court of appeals reversed, concluding that alleged indirect contempt defendants are "entitled to the same statutory protections afforded other criminal defendants," but the Indiana Supreme Court granted transfer.[129] It affirmed, "the trial court on the narrow ground that the insanity defense statutes, as codified in Indiana Code chapter 35-36-2, *et seq*., do not apply to indirect contempt proceedings."[130] Although "an alleged contemnor is always free to argue his mental state to excuse, explain, or mitigate his contemptuous behavior, the statutes simply do not compel a judge to treat him precisely like a criminal defendant."[131]

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122. *Id.* at 802 (quoting I.C. § 35-43-5-3.5(a)).

123. *Id.* (quoting I.C. § 35-43-5-1(i)).

124. The opinion includes definitions from American Heritage and from BLACK'S LAW DICTIONARY. In evaluating a vagueness claim in *Brown*, 868 N.E.2d at 467, "which hinges upon how ordinary people understand statutory language," the Indiana Supreme Court remarked that it preferred "to consult standard dictionaries, not a specialized legal dictionary as cited by the State."

125. *Kendall*, 225 N.E.3d at 803.

126. *Compare* I.C. § 35-36-2-1 (insanity) *with* I.C. § 35-36-3-1 (competency).

127. 240 N.E.3d 1265, 1268 (Ind. 2024).

128. *Id.* at 1268–69.

129. *Id.* at 1269.

130. *Id.* at 1270.

131. *Id.*

The majority carefully parsed statutory language to support its narrow holding. For example, criminal insanity statutes use the phrase "criminal case" to describe a defendant or trial,[132] but "the phrase 'criminal case' does not appear in the indirect contempt procedure statutes."[133] More broadly, the "General Assembly also distinguished the procedures governing indirect contempt by placing it under Title 34, which governs civil procedures, while Title 35 governs criminal proceedings."[134]

Nevertheless, the final words of the opinion signaled a looming and stronger argument for the future: whether the inability to raise insanity claims in contempt proceedings offends "due process must wait for a case where it is raised."[135]

Justice Goff dissented in part, signaling his support for greater protections when the issue next arises.[136] In his "view, indirect criminal contempt is a crime, and a defendant faced with such a charge is entitled to the same protections enjoyed by other criminal defendants, including the right to opinion testimony."[137]

B. Lack of Competency Hearing Was Invited Error

A trial court is required to hold a hearing on the issue of a defendant's competency "[i]f at any time before the final submission of any criminal case to the court or the jury trying the case *the court* has reasonable grounds for believing that the defendant lacks the ability to understand the proceedings and assist in the preparation of a defense."[138] In *Brunette v. State*, trial counsel representing a defendant charged with murder filed a motion to determine the defendant's competency to stand trial.[139] The trial court appointed two psychiatrists, who came to opposing conclusions about competency.[140] The court appointed a third psychiatrist, who concluded that the defendant was competent to stand trial.[141]

When the trial court asked whether defense counsel wanted "to have a full competency hearing," counsel declined "given the reports" and instead "stipulate[d] to competency."[142] The court of appeals concluded that any error in the trial court's failure to hold a competency hearing was invited error; nevertheless, "the better practice—and what the statute requires—is for the trial

132. I.C. §§ 35-36-2-1–2-2.
133. *Finnegan*, 240 N.E.3d at 1270–71.
134. *Id.* at 1271.
135. *Id.* at 1272.
136. *Id.* at 1272–79.
137. *Id.* at 1273.
138. I.C. § 35-36-3-1(a) (emphasis added).
139. 227 N.E.3d 982 (Ind. Ct. App. 2024).
140. *Id.* at 984.
141. *Id.*
142. *Id.*

court itself to determine whether there are reasonable grounds to question a defendant's competency . . . ."[143]

VI. Substantive Double Jeopardy Returns

In 2020, the Indiana Supreme Court overruled two decades of "constitutional tests in resolving claims of substantive double jeopardy" in *Richardson v. State*,[144] replacing it with "an analytical framework that applies the statutory rules of double jeopardy" in a three-part test in *Wadle v. State*.[145] Although the case was discussed in the constitutional law survey that year, the criminal law survey noted that "[t]he baton (or hot potato?) has been passed and will be part of the criminal law survey going forward."[146]

Although frequently raised in the years since, substantive double jeopardy challenges were usually resolved in unanimous, often unpublished, opinions from the Court of Appeals.[147] The Attorney General concedes error in many cases.[148] But two cases highlight challenges with the *Wadle* framework.

In *A.W. v. State*, the Supreme Court noted that courts "have since wrestled with applying the *Wadle* framework, and at times have misapplied its instructions by resurrecting a version of the 'actual evidence' test from *Richardson*—first in dicta, which then became part of a published decision."[149] The supreme court disapproved any opinion that relied on the actual evidence test and reiterated the *Wadle* test for resolving substantive double jeopardy claims, "albeit with a small but crucial adjustment at Step 2, where courts will now construe ambiguities from charging instruments in favor of defendants."[150]

As the Supreme Court explained, "if the prosecutor forgets to include—or perhaps even strategically omits—operative facts establishing that one offense is factually included in another, the defendant does not have **any** means to demonstrate the double jeopardy violation."[151] That approach would "undermine the fundamental objectives of *Wadle* in fashioning a neutral, coherent framework for analyzing substantive double jeopardy claims."[152]

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143. *Id.* at 986.

144. 717 N.E.3d 32 (Ind. 1999).

145. 151 N.E.3d 227, 235 (Ind. 2020).

146. Joel M. Schumm & Riley L. Parr, *Recent Developments in Indiana Criminal Law and Procedure*, 54 Ind. L. Rev. 851, 867 (2022).

147. *See, e.g.*, Boner v. State, 243 N.E.3d 354, 367 (Ind. Ct. App. 2024); Atkinson v. State, 2024 Ind. App. Unpub. LEXIS 1147 (Ind. Ct. App. 2024); Walls v. State, 2023 Ind. App. Unpub. LEXIS 1532 (Ind. Ct. App. 2023).

148. Mills v. State, 2024 Ind. App. Unpub. LEXIS 1699 (Ind. Ct. App. 2024) (concluding "the State now concedes that Mills's convictions constitute double jeopardy under *Wadle*, as clarified by *A.W.*"); Hutchison v. State, Ind. App. Unpub. LEXIS 427 (Ind. Ct. App. 2024) (noting "the State concedes that Hutchison's two convictions violate double jeopardy principles).

149. 229 N.E.3d 1060 (Ind. 2024).

150. *Id.*

151. *Id.* at 1070.

152. *Id.*

Finally, construing charging ambiguities against the State is consistent with principles of due process and the rule of lenity.[153] "In short, [A.W.] balances the scales by placing a defendant's rights 'beyond the reach' of unfair prosecutorial discretion, while securing the State's opportunity to later rebut a violation at Step 3" of *Wadle*.[154]

Applying the *Wadle* framework, the Supreme Court concluded that A.W.'s adjudications for possession of a machine gun and dangerous possession of a firearm violated double jeopardy.[155] First, neither statute permits multiple punishments.[156] Second, as charged, a child who possesses a machine gun necessarily possesses a dangerous firearm. And the extent to which there was factual ambiguity about whether the "means used" as presented in the charging instrument was the same weapon—a machine gun—to commit both offenses, the court construed the ambiguity in A.W.'s favor.[157] Third, considering the facts in the charging information and facts presented at trial, A.W. possessed the same weapon—a fully automatic Glock—for at least thirty seconds, which was "compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction."[158] The court, finding a double jeopardy violation, vacated A.W.'s adjudication for dangerous possession of a firearm.[159]

Justice Goff, the author of *Wadle*, concurred in the result. In his view, the majority's "well-intentioned" opinion "modifies the included-offense analysis in a manner that introduces ambiguity and inconsistency. It also undermines the stability of the law."[160] He pointed to "other devices in the 'legal toolbox,'" including (1) sentence revision under Appellate Rule 7(B); (2) an entitlement "to clear notice of the offenses charged" under Article 1, Section 13 of the Indiana Constitution; and (3) when "a charging instrument leaves it unclear whether two alleged offenses arise from the same facts, a defendant may move for a 'more definite statement' of the charges under Trial Rule 12(E)."[161] Finally, "a defendant may prefer ambiguity over whether a charged offense includes other offenses or not, hoping to leave the door open to conviction on a lesser, included offense."[162]

153. *Id.*
154. *Id.* at 1070–71 (footnote omitted).
155. *Id.* at 1072–73.
156. *Id.* at 1072.
157. *Id.*
158. *Id.*
159. *Id.* at 1073.
160. *Id.*
161. *Id.* at 1076.
162. *Id.*

B. More "Fine Tuning" Needed?

In *McGraw v. State*, Judge Bradford concluded that dual convictions for Level 5 felony and Level 6 felony domestic battery did not violate Indiana's prohibitions against double jeopardy under *Wadle*.[163] Judge Tavitas dissented, finding a violation under *Wadle*'s step three.[164]

Judge Crone wrote a concurring opinion lamenting "our supreme court's abandonment of the 'actual evidence' test from *Richardson* [] in favor of the *Wadle* test," which he believes did not provide clarity but "instead sowed confusion."[165] He concluded with the hope that the recent "fine tuning" of *Wadle* in *A.W.* continues in future cases.[166]

But *A.W.* may be all the fine-tuning in store for a while; the supreme court unanimously denied transfer in *McGraw*.[167]

VII. SENTENCING

Although most survey periods include notable opinions addressing sentence revisions under Appellate Rule 7(B), last year's survey noted that few published opinions from the Court of Appeals during the survey period addressed such claims, and the Indiana Supreme Court did not issue opinions in any 7(B) cases.[168] As summarized below, this year's survey includes a notable 3–2 opinion reversing a court of appeals' opinion that had reduced a lengthy sentence for several misdemeanor opinions. It also includes other 7(B) cases before turning to a variety of other sentencing claims, including the right to be present at sentencing, limits on fines and fees for cash bonds, and the alternative misdemeanor sentencing statute.

A. Consecutive Sentences for Multiple Misdemeanors

Both appellate courts addressed the imposition of lengthy sentences imposed for multiple misdemeanor convictions.

First, in *Lane v. State*, a 3–2 majority of the Indiana Supreme Court upheld an aggregate sentence of more than eight years for ten misdemeanor convictions of invasion of privacy based on the defendant "sending letters from prison to his former partner, while serving time after a domestic battery and in violation of a no-contact order."[169]

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163. 243 N.E.3d 394, 403 (Ind. Ct. App.), *trans. denied*, 2024 Ind. App. Unpub. LEXIS 711 (Ind. 2024).

164. *Id.* at 405.

165. *Id.* at 404.

166. *Id.*

167. 245 N.E.3d 1024 (Ind. 2024).

168. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 57 IND. L. REV. 891, 905 (2024).

169. 232 N.E.3d 119, 120 (Ind. 2024).

The majority opinion addressed important broad principles, but its ultimate holding was narrow. First, resolving a split in opinions from the court of appeals, the majority adopted the view of *Connor v. State*[170] that "the two prongs of Appellate Rule 7(B)—the nature of the offense and the character of the offender—are 'separate inquiries to ultimately be balanced in determining whether a sentence is inappropriate.'"[171] Reviewing courts "must consider" both factors, and revision may be warranted "where only one of the prongs weighs heavily in favor" of the defendant.[172] *Lane* rejected the approach of *Davis v. State*, which required the defendant to prove both "conditions" for relief.[173]

Moreover, the majority acknowledged that a lengthy aggregate sentence for misdemeanors is uncommon. The 1970 constitutional amendment that created the review-and-revise power was inspired by its "efficacious" use by the English Court of Criminal Appeals.[174] The English court recognized limiting principles, including (1) related and similar misdemeanor offenses committed close in time generally warrant concurrent sentences, and (2) separate misdemeanor offenses should not be punished "far in excess" of the most serious individual offense.[175] However, the majority declined "to adopt hard-and-fast directives under Indiana Appellate Rule 7(B) for sentences on multiple offenses."[176]

Rather, focusing on the 2014 criminal code reform, the majority concluded that "the essence of today's criminal justice system in Indiana is to distinguish dangerous, violent offenders from the rest and to provide for sentences that reflect all the pertinent circumstances."[177] Lane "committed repeated, similar offenses" that "reflected his longstanding pattern of domestic abuse, and he failed to stop committing crimes against the same victim despite imprisonment."[178]

The majority's affirmance is narrow and reiterates that trial courts should "use the full range of rehabilitation options when sentencing defendants for misdemeanors and low-level felonies."[179] In rare cases like *Lane*, "a lengthy sentence of incarceration for such offenses is necessary to protect victims and the community from an offender with a history of violence."[180]

Justice Molter, joined by Justice Massa, dissented. Largely agreeing with the helpful "guideposts for misdemeanor sentencing" in the majority opinion, the dissenting justices nevertheless concluded that the sentence was "an extreme

170. 58 N.E.3d 215, 218 (Ind. Ct. App. 2016).
171. *Lane*, 232 N.E.3d at 126.
172. *Id.*
173. 173 N.E.3d 700, 706 (Ind. Ct. App. 2021).
174. *Lane*, 232 N.E.3d at 129.
175. *Id.* at 129–30 (quoting D.A. Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193, 202–03 (1968)).
176. *Id.* at 130.
177. *Id.*
178. *Id.*
179. *Id.* at 120.
180. *Id.* at 121.

outlier" considering the nature of the offense—sending "nonthreatening letters"—especially when compared to shorter sentences imposed for violent or "more egregious conduct."[181] They would have revised the sentence to no more than the "two-and-a-half-year maximum sentence for battery resulting in moderate bodily injury."[182]

Months later, in *Crum v. State,* the Court of Appeals summarized and applied *Lane* in a case involving a twelve-year sentence (with four years suspended) for twenty-four counts of Class A misdemeanor neglect of a vertebrate animal.[183] The opinion reiterated that *Lane* had emphasized the importance of distinguishing between offenders the community is "mad at" and those the community is "afraid of" when considering sentencing options, and it "deferred to the trial court's assessment that Lane was too dangerous to receive anything but a lengthy executed sentence."[184]

Each count in *Crum* related to one of the defendant's two dozen malnourished dogs. Unlike the defendant in *Lane*, "Crum did not perpetuate his offenses against the same victim, let alone repeatedly over a span of one and one-half years."[185] Moreover, even the trial court found that Crum's offenses "occurred under circumstances that are not likely to occur again," which led the court of appeals to characterize Crum as "a low-level offender the community is 'mad at,' not 'afraid of.'"[186] Finally, if Crum had instead been charged with multiple Level 6 felony offenses for mistreating his dogs, Indiana Code section 35-50-1-2(d)(1) would have limited the total of his consecutive terms of imprisonment to four years because his convictions were part of the same episode of criminal conduct.[187]

Concluding that Crum's twelve-year sentence was an outlier warranting revision under Appellate Rule 7(B), the Court of Appeals reduced his sentence to four years with one year suspended to probation.[188]

B. Sentenced Reduced for Sixteen-year-old Defendant

In the past decade, the Indiana Supreme Court has "reduced the life or de facto life sentences of at least five juveniles convicted of murder given their young ages and the emerging scientific research on adolescent brain development, notwithstanding the horrific nature of the crimes."[189] In *Banks v.*

181. *Id.* at 131 (Molter, J., dissenting).
182. *Id.*
183. 239 N.E.3d 858 (Ind. Ct. App. 2024).
184. *Id.* at 862 (quoting *Lane*, 232 N.E.3d at 123).
185. *Id.* at 863.
186. *Id.*
187. *Id.*
188. As explained in a footnote, "suspending one year of Crum's four-year sentence to probation resembles approximately the composition of Crum's sentence imposed by the trial court. In this respect, we defer to the judgment of the trial court." *Crum*, 239 N.E.3d at 863 n.6.
189. Banks v. State, 228 N.E.3d 528, 529 (Ind. Ct. App. 2024).

State, the court of appeals reduced a 220-year sentence for a sixteen-year-old convicted of a quadruple murder to 135 years.[190]

Acknowledging that 135 years is still a "de facto life sentence," the majority cited to Indiana Code section 35-38-1-17(n), which was added in 2023 to allow defendants convicted of a murder committed when they were less than eighteen years old to modify their sentence after serving twenty years.[191] The reduced sentence "gives him a more realistic chance, with good behavior, at some life outside prison in his later years should he seek to modify his sentence" under the statute.[192]

C. Increasing Sentences on Appeal

Indiana Appellate Rule 7(B) decisional law focuses almost exclusively on the potential downward revision of a sentence on appeal. A decade and a half ago, in *McCullough v. State*, the Indiana Supreme Court held that, when a defendant requests independent review of a sentence, appellate courts have the option either to affirm, reduce, or increase the sentence imposed.[193] Although individual judges have written dissents arguing for an increased sentence,[194] just one opinion by the court of appeals has increased a sentence, and that increase was swiftly vacated by the Indiana Supreme Court.[195]

Last year's survey noted the Supreme Court's denial of transfer by a 3–2 vote in *Thomas v. State*, where the State argued that "[f]urther guidance from this Court is necessary to explain when and under what circumstances upward sentence revisions are justified under Rule 7(B)."[196] Although the Supreme Court did not offer further guidance during this survey period, at least one judge on the court of appeals concurred in a refusal to reduce a sentence but lamented it was "very unfortunate that the State did not ask for a harsher sentence."[197] Considering the "egregious nature of the offenses and what is known of the extremely poor character of the offender," Judge Bailey "would have readily

190. *Id.* at 539.

191. *Id.* 530, 538–39.

192. *Id.* at 530.

193. 900 N.E.2d 745 (Ind. 2009).

194. *See, e.g.*, Holt v. State, 62 N.E.3d 462, 467 (Ind. Ct. App. 2016) (Bradford, J., dissenting) ("Consequently, due to the age of the victims and nature of his offenses, I see no basis for leniency. I would therefore invoke this court's authority to revise Holt's sentence upward to eight years for each conviction.").

195. Akard v. State, 937 N.E.2d 811 (Ind. 2010).

196. State's Petition to Transfer at 6, Thomas v. State, 2023 Ind. App. Unpub. LEXIS 430 (22A-CR-2086) (Ind. Ct. App. 2023).

197. Searing v. State, No. 24A-CR-721, Ind. App. Unpub. LEXIS 1175 (Ind. Ct. App. 2024) (mem.) (Bailey, J., concurring).

voted to affirm a maximum sentence."[198] However, in the absence of a request from the State for an upward revision, he concluded, "We will not do so."[199]

D. Right to be Present at Sentencing

Outside the Rule 7(B) realm of sentence revision, the Indiana Supreme Court issued a short, per curiam opinion about the importance of the right to be present at sentencing in *Williams v. State*.[200] While the defendant was in the hospital awaiting a leg amputation, the trial court, court reporter, prosecutor, and defense counsel traveled to the hospital on the day of his sentencing.[201] When asked by the trial court if the defendant "wants to stay in the hospital room and he does not want us to enter?," counsel responded affirmatively, explaining that "he wants to have sentencing somewhere else, but he's not in a position to do that."[202] The trial court proceeded to sentencing without the defendant, who then appealed.[203]

The Indiana Supreme Court reversed, holding that it was improper to hold the sentencing at the hospital when the defendant "did not waive his right to be physically present at sentencing."[204] The statement that he "want[ed] to have sentencing somewhere else" showed "he would have participated in the proceeding but for his hospitalization. In this context, Williams's purported waiver was equivocal at best and was not unambiguously knowing and intelligent."[205]

The court reasoned that, although Indiana Code section 35-38-1-4(a) requires that "[t]he defendant must be personally present at the time sentence is pronounced," there was "no apparent justification to hold court in a hospital."[206] Use of that venue also "potentially implicates a defendant's right to a public sentencing hearing, and may impede rights of the press and public."[207]

E. Retention of Cash Bonds for Fines and Fees

By statute, when a trial court "requires the defendant to deposit cash or cash and another form of security" equal to the bail amount, the court may require both the defendant and the person posting bail to sign an agreement authorizing the court to retain the cash "to pay publicly paid costs of representation and fines, costs, fees, and restitution that the court may order the defendant to pay if

198. *Id.*
199. *Id.* (citing Akard v. State, 937 N.E.2d 811 (Ind. 2010)).
200. 219 N.E.3d 729 (Ind. 2023).
201. *Id.*
202. *Id.*
203. *Id.* at 731.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* (internal citations omitted).

the defendant is convicted."[208] In *Spells v. State*, the Indiana Supreme Court held that the statute allows trial courts to retain all or part of the cash bail to cover the cost of a defendant's public defender.[209] "Cash bail may not, however, be retained to pay fines or most fees and costs *unless an indigency determination is made following a hearing*."[210] Under a different statute,[211] "the record of an indigency determination must disclose evidence of the defendant's assets, income, and necessary expenses, insofar as they bear on ability to pay."[212] Because the indigency determination in *Spells* was incomplete, the case was remanded for further proceedings.[213]

F. Mistaken Understanding of AMS Statute Requires Resentencing

Finally, the Court of Appeals decided a case involving eligibility for Alternative Misdemeanor Sentencing (AMS). The defendant in *Henderson v. State* requested AMS after his guilty plea to Level 6 felony resisting law enforcement in Marion County.[214] The State argued he was ineligible for AMS because, within the prior three years, he had committed a felony for which judgment would be entered as a misdemeanor.[215] Although Henderson anticipated AMS in a Hendricks County case, he had not yet received it.[216] The trial court entered the conviction as a felony while agreeing the issue should be left open for appeal.[217]

Indiana Code section 35-50-2-7(c)(1) proscribes AMS for a second felony within three years if "the person has committed a prior unrelated felony for which judgment *was entered* as a conviction of a Class A misdemeanor."[218] The trial court misconstrued the law in refusing to consider AMS because "[t]he

208. IND. CODE § 35-33-8-3.2(a)(1) (2024).
209. 225 N.E.3d 767, 780 (Ind. 2024).
210. *Id.* (emphasis added).
211. *Id.* at 778. As explained in *Spells*:

> In 2020, the General Assembly enacted a new statute governing indigency determinations in a criminal case. When making such a determination, a trial court "shall" consider a defendant's "assets," "income," and "necessary expenses." Pub. L. No. 140-2020, § 2, 2020 Ind. Acts 1284, 1285 (codified at I.C. § 35-33-7-6.5(a)). The court "may consider" a defendant's eligibility for SNAP, TANF, or "another need based public assistance program" as sufficient evidence of indigency. I.C. § 35-33-7-6.5(b). The court may make an "initial indigency determination" pending receipt of evidence. I.C. § 35-33-7-6.5(c). And, lastly, the court may "prorate" fines, fees, and costs to what a defendant "can reasonably afford." I.C. § 35-33-7-6.5(d).

Id.
212. *Id.* at 780.
213. *Id.*
214. 240 N.E.3d 718, 719 (Ind. Ct. App. 2024).
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.* at 720.

statute employs past tense, as opposed to prospective, terminology.[219] At the time of Henderson's sentencing, he had not received an AMS benefit within the preceding three years."[220]

Because the court of appeals could not "say with confidence that the trial court would [have] reject[ed] AMS in Henderson's case regardless of his eligibility," reversal and remand for resentencing was warranted.[221]

VIII. Post-Conviction Relief for Sentencing Appeals with Plea Waiver

As summarized in last year's survey, defendants have a constitutional right to appeal their sentences,[222] but they may waive that right so long as their waiver is knowing and voluntary under the 2008 *Creech v. State* opinion from the Indiana Supreme Court.[223] In the decade and a half since, many prosecutors have included such waivers in plea agreements, which have generally been upheld on appeal unless the language was ambiguous or the trial court gave conflicting advisements during the plea colloquy.[224]

That changed in 2023 in *Davis v. State*, where Justice Molter wrote for a three-justice majority that, even if a trial court made conflicting statements before accepting a guilty plea that may have misled a defendant, the "remedy is to vacate his conviction through postconviction proceedings, not to nullify his appeal waiver through a direct appeal."[225] Moreover, "the remedy of setting aside the conviction would result in Davis invalidating the entire plea agreement rather than allowing him to retain its benefits while escaping its burdens."[226]

Justice Goff, joined by Chief Justice Rush, dissented, concluding that the appeal waiver was unenforceable "because Davis was affirmatively advised by the trial court, before entry of his guilty plea, that he would retain the right to appeal."[227] Because appeal waivers can be severed from the rest of a plea agreement, the defendant "should be allowed his appeal, rather than having to make an 'all or nothing' challenge to his plea."[228]

Supported by Amicus, Davis sought rehearing, which was granted. The Supreme Court added the following footnote at its conclusion:

> To be sure, there remain circumstances where defendants may pursue a direct appeal of sentencing issues notwithstanding an appeal waiver.

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219. *Id.*
220. *Id.*
221. *Id.*
222. Ind. Const. art. 7, §§ 4, 6.
223. Creech v. State, 887 N.E.2d 73, 74 (Ind. 2008).
224. *See generally* Schumm & Parr, *supra* note 146, at 870.
225. 207 N.E.3d 1183, 1184 (Ind. 2023).
226. *Id.* at 1188.
227. *Id.* at 1190 (Goff, J., dissenting).
228. *Id.*

> For example, some sentencing appeal issues are nonwaivable. *See Crider v. State*, 984 N.E.2d 618, 619 (Ind. 2013) ("In this case we conclude that the waiver of the right to appeal contained in a plea agreement is unenforceable where the sentence imposed is contrary to law and the Defendant did not bargain for the sentence."). Other issues may also fall outside the scope of the waiver. *See Archer v. State*, 81 N.E.3d 212, 214, 216 (Ind. 2017) (holding that the defendant's appeal waiver did not cover her right to appeal the restitution amount). This appeal does not implicate those issues because Davis's transfer petition seeks to nullify the appeal waiver as not knowing and voluntary rather than to raise a nonwaivable sentencing issue or an issue outside the scope of his appeal waiver.[229]

In the year since, the Court of Appeals has dismissed several appeals in memorandum decisions, relying on *Davis*.[230] One exception was in a case where the plea agreement merely provided that the defendant "waive[d his] right to appeal."[231] The court of appeals held the purported "waiver was ambiguous and unenforceable," a conclusion not contested by the State on appeal.[232]

IX. LIFE WITHOUT PAROLE DIRECT APPEALS

Although the life without parole (LWOP) sanction is noteworthy, the issues raised on appeal often are not. The Indiana Constitution gives the Indiana Supreme Court exclusive jurisdiction over all death penalty cases,[233] and most LWOP cases go directly to the Indiana Supreme Court by court rule.[234] As suggested in recent surveys, the fairly routine nature of LWOP direct appeals may lead some to wonder if the cases are better suited for resolution in the court of appeals.[235]

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229. *Id.* at 1236.

230. *See, e.g.,* Harris v. State, No. 23A-CR-2491, 2024 WL 3825168 (Ind. Ct. App. Aug. 15, 2024) (mem.); Roberts v. State, No. 23A-CR-1787, 2024 WL 1155021 (Ind. Ct. App. Mar. 18, 2024) (mem.). These were memorandum decisions of the court of appeals. Other cases were likely dismissed by order in response to a motion to dismiss filed by the State. Unfortunately, there is no easy or reliable way to track those cases, although this author is aware of one such case litigated by the Appellate Clinic. Order, Anderson v. State, No. 24A-CR-1358, (Ind. Ct. App. Dec. 9, 2024) (dismissing an appeal with prejudice while one dissenting judge "would hold Appellee's Motion to Dismiss Appeal in abeyance for the writing panel").

231. Morales v. State, No. 24A-CR-503, WL 3594827 (Ind. Ct. App. July 31, 2024) (mem.).

232. *Id.* at 1 n.1.

233. IND. CONST. art. 7, § 4.

234. IND. R. APP. P. 4(A)(1). Life without parole is usually imposed through the same statutory procedure used in capital cases. *See* I.C. § 35-50-2-9. A seldom-used statute that was repealed in 2014 allowed imposition of LWOP for a third, especially serious felony. *See* I.C. § 35-50-2-8.5 (2013), *repealed by* P.L.158-2013, SEC.662, eff. July 1, 2014.

235. *See, e.g.,* Schumm, *supra* note 168, at 911–14.

Routing those appeals to the court of appeals would simply require an amendment to the Appellate Rules—not the Indiana Constitution. Notably, in July 2024, the Indiana Supreme Court posted for comment a proposed amendment to Appellate Rule 4(A)(1) to remove LWOP appeals from its mandatory jurisdiction.[236] As of the writing of this article, however, the proposal has not been adopted.

The relatively unremarkable nature of the three direct appeals of LWOP cases during this survey period arguably offers support for the amendment.

A. Intellectual Disability

A person with an intellectual disability cannot face a death or LWOP sentence in Indiana.[237] Such an individual is defined by statute as one "who, before becoming twenty-two (22) years of age, manifests: (1) significantly subaverage intellectual functioning; and (2) substantial impairment of adaptive behavior; that is documented in a court-ordered evaluative report."[238] The defendant must prove both these elements by a preponderance of the evidence, and appellate courts review the trial court's finding of whether the defendant is intellectually disabled for clear error.[239]

In *Russell v. State*, the Supreme Court found the case was "a close call" because the defense introduced "expert opinion that Russell is intellectually disabled, the State concedes Russell's intellectual function is diminished, and Russell is near the line for substantial impairment of his adaptive behavior."[240] But the standard of review led it to affirm the trial court's "finding that Russell did not satisfy his burden to prove intellectual disability because that finding is supported by evidence in the record, and it is not clearly erroneous."[241]

Justice Goff dissented. In his view, "the trial court rejected uncontradicted expert testimony" and "did not engage with the evidence tending to show Russell's deficits and ignored the impact of prison structure on his test scores."[242] Because the "order under review would not pass muster in a death-penalty case," Justice Goff concluded, "[n]or should it pass muster here."[243]

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236. *Proposed amendment to Indiana Rules of Appellate Procedure (July 2024)*, IND. JUD. BRANCH, https://www.in.gov/courts/files/rules-proposed-2024-july-ar4.pdf [https://perma.cc/3SG3-6JM9] (last visited Mar. 30, 2025).

237. As a preliminary matter, the Supreme Court rejected the State's argument that appellate jurisdiction should instead rest with the court of appeals because of references to a modification instead of resentencing: "In the joint motion, throughout the proceedings, and in the Order on Resentencing, the parties and the lower court repeatedly confirmed their understanding that the relief the parties agreed to in exchange for Russell dismissing his PCR petition was a resentencing." Russell v. State, 234 N.E.3d 829, 842–43 (Ind. 2024).

238. I.C. § 35-36-9-2.

239. *Id.*

240. 234 N.E.3d at 844.

241. *Id.* at 845.

242. *Id.* at 865–66 (Goff, J., dissenting).

243. *Id.* at 866.

B. Routine Claims Rejected

In *Hancz-Barron v. State*, the Supreme Court rejected routine trial and sentencing claims.[244] It found "circumstantial and direct evidence from which a reasonable jury could have found beyond a reasonable doubt that Hancz-Barron was the person responsible for murdering [the victim] and her three children."[245] The trial court did not abuse its discretion in permitting the State to recall a witness—and even if it had, the error was harmless and did not warrant reversal.[246] Third, the Supreme Court rejected claims that the "jury erred in determining that the aggravating circumstances outweighed the mitigating circumstances, his sentence is inappropriate under Appellate Rule 7(B), and his sentence is unconstitutional."[247]

Another case, *Cramer v. State*,[248] like most of its predecessors, was affirmed unanimously in a straightforward opinion. Challenges to the appropriateness of a sentence are frequently raised but seldom successful; revisions are reserved for "exceptional" cases.[249]

> It is up to the defendant to persuade the appellate court that his or her sentence has met the inappropriateness standard of review. The trial court's sentence is afforded considerable deference and will stand unless compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character).[250]

That standard was not met in *Cramer*, where the nature of the offense involved "extreme brutality," and even the defendant's modest criminal history—five juvenile adjudications, three of which are felonies if committed by an adult—weighed against relief under Rule 7(B).[251]

X. RECUSAL REQUIRED IN PCR CASES

Finally, the Indiana Supreme Court addressed the importance of recusal in *Seabolt v. State*.[252] The interlocutory appeal of four post-conviction relief cases all involved allegations of systemic police and prosecutorial misconduct in Elkhart County. The judge, a former Elkhart County deputy prosecutor, had

244. 235 N.E.3d 1237, 1245 (Ind. 2024).
245. *Id.* at 1245.
246. *Id.* at 1247.
247. *Id.*
248. 240 N.E.3d 693 (Ind. 2024).
249. *Id.* at 698.
250. *Id.* (cleaned up).
251. *Id.* at 699–700.
252. 240 N.E.3d 1249 (Ind. 2024).

earlier recused in another case "for one of, or a combination of, two reasons": (1) the petitioner "would be calling many witnesses—law enforcement officers, deputy prosecutors, and an elected prosecutor—with whom the judge worked when she was a deputy prosecutor and some of whom remained the judge's social acquaintances," which raised concern that she could "remain impartial either when evaluating so many of her friends' and former colleagues' credibility or when evaluating [his] allegations of systemic police and prosecutorial misconduct that spanned the judge's own time as a deputy prosecutor in Elkhart County"; or (2) the "judge's characterization of his attorney's comments" about an "epidemic" of wrongful convictions grounded in "systemic" police and prosecutorial misconduct as "defamatory," which "suggested she had pre-judged his allegations of systemic misconduct before hearing any evidence."[253]

In the four cases on appeal in *Seabolt*, the petitioners were represented by the same lawyers who allege the same sort of "systemic" misconduct and "intend to call as witnesses former law enforcement officers and prosecutors who are the judge's former colleagues and/or current social acquaintances."[254]

The Supreme Court held the judge was "disqualified from presiding over these cases because her determination that recusal was mandatory in [the first] case would lead an objective observer to reasonably question her impartiality" in cases that raise the same concerns.[255]

253. *Id.* at 1252.
254. *Id.* at 1253.
255. *Id.*