

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

HON. GARY L. MILLER*
JOEL M. SCHUMM**

This Article will focus on some of the major recent developments and cases in the area of criminal law and procedure that have been addressed by the 1996 Indiana General Assembly and Indiana appellate courts since the 1995 survey.

I. 1996 LEGISLATIVE ACTS

The 1996 Indiana General Assembly made several significant changes in the area of criminal law by amending the bail statute, creating a DNA database and modifying several other existing statutes.

A. *Bail and Bail Procedure*

The Indiana General Assembly addressed concerns that courts had no legal authority to consider the dangerousness of a defendant when setting bail. The concerns were addressed by making three changes to the bail statute.¹ First, the definition of “bail bond” was amended to include a “bond . . . for the purpose of ensuring . . . another person’s physical safety”² or “the safety of the community.”³ Second, the courts were given the discretion to consider whether a “defendant poses a risk of physical danger to another person or the community”⁴ and to consider factors “to assure the public’s physical safety”⁵ when admitting a defendant to bail and imposing release conditions. Considering these circumstances and “upon a showing of clear and convincing evidence” that the defendant poses a danger, the court may deny bail.⁶ Third, the legislature gave the court the authority to set the amount of bail in an amount not only to assure the defendant’s appearance in court⁷ but also to “assure the physical safety of another person or the community if the court finds by clear and convincing evidence that

* Presiding Judge, Marion Superior Court, Criminal Division; Judge, Marion Superior Court, Criminal Division Room Five; Adjunct Professor of Law, Indiana University School of Law—Indianapolis. J.D., 1980, Indiana University School of Law—Indianapolis.

** J.D. Candidate, 1998, Indiana University School of Law—Indianapolis; B.A., 1992, Ohio Wesleyan University; M.A., 1994, University of Cincinnati. He has served as a bailiff/clerk for Judge Miller since January 1995.

1. IND. CODE §§ 35-33-8-1 to -8 (1993 & Supp. 1996).

2. *Id.* § 35-33-8-1(2) (Supp. 1996).

3. *Id.* § 35-33-8-1(3).

4. *Id.* § 35-33-8-3.1(a).

5. *Id.*

6. *Id.* Although community safety is proper consideration in the setting of bail, it is not a proper consideration in the revocation of bail. *See Ray v. State*, 679 N.E.2d 1364 (Ind. Ct. App. 1997). Bail revocation is governed by section 35-33-8-5 of the Indiana Code, which is unaffected by the addition of the “community safety” exception to a different code section. IND. CODE § 35-33-8-5 (1993).

7. IND. CODE § 35-33-8-4(b) (Supp. 1996).

the defendant poses a risk to the physical safety of another person or the community.”⁸

These changes explicitly give courts the authority to consider a defendant's dangerousness but do little to change the practical effect of the prior statute which gave the court the authority to consider “any other factors, including any evidence of instability and a disdain for authority.”⁹ A court may now state on the record that the defendant's dangerousness, as perceived by the court, is the rationale for setting a high bail or no bail at all.¹⁰

B. Indiana's DNA Data Base

The use of DNA analysis and genetic markers for identification purposes has increased in the last decade. Even though Indiana has enacted a statute that allows DNA evidence in a criminal trial,¹¹ there continues to be a great debate, even among experts, about standards in the industry.¹²

One of the major accomplishments of the 1996 General Assembly was the setting of DNA standards through the creation of an Indiana DNA Data Base.¹³ This statute sets out new procedures to be used in establishing a database of DNA identification records for “convicted criminals, crime scene specimens, unidentified missing persons, and close biological relatives of missing persons”¹⁴ in order to “assist federal, state, and local criminal justice and law enforcement agencies in the putative identification, detection, or exclusion of individuals who are subjects of an investigation or prosecution of a sex offense, a violent crime, or another crime in which biological evidence is recovered from the crime scene.”¹⁵ Unless the submission of a blood sample would present a substantial and unreasonable risk to the person's health,¹⁶ all persons convicted of a felony offense against a person under article 35-42 of the Indiana Code, burglary under section 35-43-2-1 of the Indiana Code, or child solicitation under section 35-42-4-6 of the Indiana Code must provide a DNA sample to the Department of Corrections.¹⁷ This requirement applies to all such convicted persons after June 30, 1996, whether or not sentenced to a term of imprisonment, and to all persons convicted before July 1, 1996 if the person is held in jail or prison.¹⁸

8. *Id.*

9. *Id.* § 35-33-8-4(b)(9).

10. *But see* IND. CONST. art. I, § 17.

11. IND. CODE § 35-37-4-13(b) (1993).

12. *See* NATIONAL RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE (1992).

13. IND. CODE §§ 10-1-9-1 to -22 (Supp. 1996).

14. *Id.* § 10-1-9-8(a).

15. *Id.* § 10-1-9-8(c).

16. *Id.* § 10-1-9-10(b).

17. *Id.* § 10-1-9-10(a). Similar requirements have been found constitutional by at least two courts. *See* *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996); *Cooper v. Gammon*, 943 S.W.2d 699 (Mo. Ct. App. 1997), *trans. denied*.

18. IND. CODE § 10-1-9-10 (a)(1), (2) (Supp. 1996).

The statute authorizes the State Police Department Superintendent to issue guidelines applicable to the “procedures for DNA sample collection and shipment within Indiana for DNA identification testing.”¹⁹ The tests performed on DNA samples are to be used to analyze and type the genetic markers in or derived from DNA,²⁰ for research or administrative purposes,²¹ and for law enforcement identification purposes.²²

Access to the database is limited to federal, state, and local law enforcement agencies “through their servicing forensic DNA laboratories.”²³ There are provisions in the statute to expunge DNA profiles from the database,²⁴ and criminal penalties may be imposed upon a person who “knowingly or intentionally disseminates, receives, or otherwise uses or attempts to use information in the Indiana DNA data base or DNA samples used in DNA analyses, knowing that such dissemination, receipt, or use is for a purpose other than authorized by law.”²⁵ Criminal penalties may also be imposed for tampering or attempting to tamper with a DNA sample.²⁶

C. Public Defender Reimbursement

For the last several years, local funding agencies have had difficulties paying for the ever increasing costs of court-appointed counsel. In an effort to require the courts to try to recoup some of these costs, the Indiana General Assembly enacted a statute that requires judges to determine at the initial hearing whether the defendant can partially pay for legal representation. If “the person is able to pay part of the cost of representation by the assigned counsel, the court shall order the person to pay the following: (1) For a felony action, a fee of one hundred dollars (\$100); (2) For a misdemeanor action, a fee of fifty dollars (\$50).”²⁷ These funds are to be deposited in the county’s supplemental public defender services fund established under section 33-9-11.5-1 of the Indiana Code.²⁸ In addition, if the court finds that a person can pay part of the cost of representation by assigned counsel, the court is to order the defendant upon conviction to pay an amount not to exceed the cost of defense services rendered on behalf of the person.²⁹ These amounts are also to be deposited into the county’s supplemental public defender services fund.³⁰ Each person ordered to pay these costs is entitled to the same

19. *Id.* § 10-1-9-11.

20. *Id.* § 10-1-9-13(a)(1).

21. *Id.* § 10-1-9-13(a)(3).

22. *Id.* § 10-1-9-13(a)(2).

23. *Id.* § 10-1-9-21.

24. *Id.* § 10-1-9-20.

25. *Id.* § 10-1-9-16.

26. *Id.* § 10-1-9-15.

27. *Id.* § 35-33-7-6(c).

28. *Id.*

29. *Id.* § 33-19-2-3.

30. *Id.* § 33-9-11.5-1.

rights and protections as other judgment debtors,³¹ and the failure to pay such costs “is not grounds for revocation of probation.”³²

D. Sex Offenses

The legislature modified several sex offense statutes in 1996. The age of offenders continues to occupy the time of the legislature as the 1996 Indiana General Assembly repealed the section of the child molesting statute³³ which enhanced the offense of fondling a child under the age of fourteen to a Class B felony, and, at the same time, provided child molesting offenses “committed by a person at least twenty-one (21) years of age”³⁴ as an additional reason to enhance the grade of the offenses. The penalties for sexual misconduct with a minor were increased from a Class C felony to a Class B felony if intercourse or deviate sexual conduct with a fourteen to sixteen year old was performed by someone twenty-one or older³⁵ and from a class D felony to a class C felony if the fondling or touching of a fourteen- to sixteen-year-old and was performed by someone twenty-one or older. The legislature increased the penalty for knowingly or intentionally failing to register as a sex offender from a Class A misdemeanor to a Class D felony for first time offenders³⁶ and from a Class D felony to a Class C felony for persons who have a “prior unrelated offense under this section.”³⁷

Penalties for child exploitation and child solicitation were increased to provide for enhancements to the base offense to a Class C felony when committed by using a “computer network,”³⁸ which is defined as “the interconnection of communication lines with a computer through remote terminals or a complex consisting of two (2) or more interconnected computers.”³⁹

E. Stalking

The legislature substantially increased the penalties for stalking when it increased the base offenses under the statute from a Class B misdemeanor to a Class D felony,⁴⁰ increased the Class A misdemeanor to a Class C felony,⁴¹ and increased the Class D felony to a Class B felony.⁴² The statute added factors to the Class C felony section to include violations of protective orders issued under chapter 31-6-4 of the Indiana Code for delinquency and Children in Need of

31. *Id.* § 33-9-11.5-6.

32. *Id.* § 35-38-2-3.

33. Act of Mar. 18, 1994, No. 79, § 12, 1994 Ind. Acts 1081, 1097-98 (repealed 1996).

34. IND. CODE § 35-42-4-3 (Supp. 1996).

35. *See id.* § 35-42-4-9(a)(1).

36. *See id.* § 5-2-12-9.

37. *Id.*

38. *Id.* § 35-42-4-6.

39. *Id.* § 35-43-2-3(a).

40. *See id.* § 35-45-10-5(a).

41. *See id.* § 35-45-10-5(b).

42. *See id.* § 35-45-10-5(c).

Services (CHINS) proceedings,⁴³ procedures in juvenile court under chapter 31-6-7 of the Indiana Code,⁴⁴ and protective orders to prevent abuse under section 34-4-5.1 of the Indiana Code.⁴⁵ In addition, for the first time under Indiana law, the legislature has given the court discretion when someone is convicted under this section of a Class C felony to impose judgment and conviction as a Class D felony.⁴⁶ Previously, such discretion to reduce the class of offense has only been granted to allow for the reduction of Class D felonies to Class A misdemeanors in certain circumstances.⁴⁷ The 1996 legislation now allows entry of conviction of a Class D felony for non-support of a child under section 35-46-1-5 of the Indiana Code.⁴⁸ This author predicts that the legislature will continue to give the courts more discretion to reduce the class of charges in an attempt to lessen the impact of mandatory minimum sentences and to alleviate the overcrowded Department of Corrections.

F. The Death Penalty

The 1996 legislature made two modifications to Indiana's death penalty statute.⁴⁹ The first amendment added that "[t]he defendant burned, mutilated, or tortured the victim while the victim was alive"⁵⁰ as an aggravating factor for which the death penalty may be sought. The second gives the court the ability to receive information from the victim's family by authorizing the court to "receive evidence of the crime's impact on members of the victim's family"⁵¹ prior to making the final determination of the sentence and by requiring the presentence report to contain victim impact statements and adhere to other victim notification requirements.⁵²

G. Other Enhancements

The legislature has given courts the power to suspend for one year the driver's

43. *Id.* § 35-45-10-5(b)(2)(B).

44. *Id.* § 35-45-10-5(b)(2)(C).

45. *Id.* § 35-45-10-5(b)(2)(D).

46. *See id.* § 35-45-10-5(e).

47. *See id.* § 35-50-2-7(b).

48. *Id.* § 35-50-2-6.

49. *Id.* § 35-20-2-9(b)(11).

50. *Id.* § 35-50-2-9.

51. *Id.* § 35-50-2-9(e). If challenged, the Indiana Supreme Court will likely uphold the constitutionality of this provision. In *Bivins v. State*, 642 N.E.2d 928, 955 (Ind. 1994), the court found that the admission of victim impact evidence was unconstitutional because it was not sufficiently related to "specific aggravating circumstances designated by our legislature as appropriate for the death sentence." In so doing, the court tacitly acknowledged that the legislature has the authority to determine what is an aggravating factor and what is not. Therefore, under *Bivins*, it seems likely that the court will defer to the legislature's will on this point.

52. *See* IND. CODE § 35-38-1-8.5 (Supp. 1996).

license of any person who commit criminal mischief which "involves graffiti."⁵³ Graffiti is defined as "any unauthorized inscription, work, figure, or design that is marked, etched, scratched, drawn, or painted on a component of any building, structure, or other facility."⁵⁴ The court may lift the suspension if the graffiti is removed or restitution is made, and the owner of the defaced or damaged property is satisfied with the removal or restitution.⁵⁵

The legislature added to the list of offenses for which any portion of a sentence in excess of the "minimum sentence" may be suspended by adding to the offense operating a vehicle while intoxicated under Indiana Code section 9-30-5 if the offender has accumulated at least two prior unrelated convictions under chapter 9-30-5 of the Indiana Code. Whether the reference to "an offense under I.C. 9-30-5"⁵⁶ makes the suspension limitation inapplicable to the .10% blood alcohol driving statute under section 9-30-5-5 of the Indiana Code remains unclear. If the .10% blood alcohol offense is not intended to be subject to the suspension limitation, is it not then true that a prior conviction for a .10% blood alcohol offense would not seemingly be considered a "prior unrelated conviction" on which the suspension limitation can be based? The language of this statute needs to be addressed and redrafted by the next session of the legislature if, in fact, that is what the legislature intends.

In *Freeman v. State*,⁵⁷ the Indiana Supreme Court determined that it was improper for the State to obtain a conviction under the general habitual substance offender statute for an operating while intoxicated offense that was enhanced to a Class D felony from a Class A misdemeanor.⁵⁸ The 1996 legislature sought to change this ruling by amending the habitual substance offender's definition of "substance offense" to include "an offense under IC 9-30-5 and an offense under IC 9-11-2."⁵⁹ This statute seeks to expressly make habitual substance offender enhancements available for alcohol and substance abuse driving offenses and attempts to abrogate the *Freeman* ruling. It is doubtful, however, that such a statutory change by the legislature can withstand a future constitutional double jeopardy challenge as described in *Freeman*.

The guilty but mentally ill statute⁶⁰ was amended to require the court to obtain an evaluation of the defendant by a psychiatrist, psychologist, or community mental health center *before* imposition of a guilty but mentally ill sentence regardless of whether the conviction is by trial or a plea of guilty.⁶¹

The chapter of the Indiana Code dealing with Children and Handguns⁶² was

53. *Id.* § 35-43-1-2(c).

54. *Id.* § 35-41-1-12.3.

55. *See id.* § 35-43-1-2(d).

56. *Id.* § 35-50-2-10(a)(2), (b).

57. 658 N.E.2d 68 (Ind. 1995).

58. *Id.* at 71.

59. IND. CODE § 35-50-2-10(a)(2).

60. *Id.* § 35-36-2-5.

61. *See id.* § 35-36-2-5(b).

62. *Id.* §§ 35-47-10-1 to -10.

amended to make the chapter applicable to “firearms” rather than “handguns.”⁶³ The sentencing statute was also amended to reflect that the term of imprisonment under “IC 35-47-10-6 [dangerous control of a firearm] or IC 35-47-10-7 [dangerous control of a child] may not be suspended if the commission of the offense was knowing or intentional.” This change makes the entire term of imprisonment and not just the “minimum sentence” under section 35-50-2-1(c) of the Indiana Code nonsuspendible for knowingly or intentionally committing these offenses.

The ten-year sentence enhancement for use of an assault weapon has been eliminated and in its place, the legislature substituted a five-year sentence enhancement for use of a firearm in the commission of an article 35-42 of the Indiana Code felony that resulted in death or serious bodily injury,⁶⁴ kidnapping,⁶⁵ or criminal confinement as a Class B felony.⁶⁶ This additional penalty is not suspendible.⁶⁷ The provisions of the statute that require the state to seek this enhancement by filing a separate page of the information requesting it and for the enhanced penalty to be imposed in the court’s discretion if the court finds after a sentencing hearing that the defendant used a “firearm in the commission of the offense” were retained.⁶⁸

II. CASE DEVELOPMENTS IN 1995-96

A. Search and Seizure

1. *The “Plain Feel” Doctrine.*—During the past year, there were several cases involving the “plain feel” doctrine. In *Parker v. State*,⁶⁹ an informant tipped an Indianapolis police officer that Parker was carrying cocaine and would be at a liquor store selling it. The informant had been paid by the police for several years and had provided information to the police that had led to the arrest of several other drug dealers. En route to find Parker, the police saw the informant who personally verified the information given minutes earlier to the police over the phone. The police went to the liquor store and found Parker. The police stopped Parker and his companion and conducted a patdown search. During the patdown, a police officer felt an object in Parker’s shorts that the police officer immediately determined to be cocaine. The officer reached into Parker’s pocket and pulled out a clear bag containing cocaine.

On an interlocutory appeal, the court evaluated the defendant’s assertion that the investigatory stop did not meet the requirements of *Terry v. Ohio*⁷⁰ by relying

63. *Id.* §§ 35-47-10-5 to -6.

64. *Id.* § 35-50-2-11(b)(1).

65. *Id.* § 35-50-2-11(b)(2).

66. *Id.* § 35-50-2-11(b)(3).

67. *Id.* § 35-50-2-2(f).

68. *Id.* § 35-50-2-11(d).

69. 662 N.E.2d 994 (Ind. Ct. App. 1996), *trans. denied*.

70. 392 U.S. 1 (1968).

on *Alabama v. White*.⁷¹ In *White*, the Court held that a tip of a confidential informant may constitute reasonable suspicion justifying an investigatory stop. This is a less demanding standard than probable cause both in the quantity and reliability of information necessary to make such a determination.⁷² The Court also found that such a determination must be based on a "totality of the circumstances."⁷³ In *Parker*, "the officers relied on the tip of a known informant who provided the information over the phone and in person, gave specific verifiable details, accurately predicted Parker's future actions, and had provided information in the past that led to other narcotics convictions. . . . [T]he tip provided sufficient indicia of reliability to justify the police's investigatory stop of Parker."⁷⁴ The court distinguished *Johnson v. State*,⁷⁵ in which the Indiana Supreme Court reversed a similar case when it recognized that the "informant's tip contained facts that any member of the general public could provide, and because there was no evidence that a single conviction ever resulted from one of the informant's tips."⁷⁶ Because the indicia of reliability that the court found lacking in *Johnson* were present in *Parker*, the court found that the stop was legal.⁷⁷

The court then examined the issue of the patdown search and the challenge by the defendant that the seizure of the cocaine went beyond the scope of a *Terry* frisk. The court examined *Minnesota v. Dickerson*,⁷⁸ which stands for the general principle that "police officers may seize contraband other than weapons during a patdown search as long as their search stays within the bounds of *Terry*."⁷⁹ The *Dickerson* Court explained:

If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context.⁸⁰

In *Parker*, the police officer conducted a legitimate patdown search for weapons and immediately discovered contraband through his sense of touch.⁸¹ The search did not exceed that permissible by *Terry* or *Dickerson*.⁸²

71. 496 U.S. 325 (1990).

72. *Id.* at 330.

73. *Id.*

74. *Parker*, 662 N.E.2d at 997.

75. 659 N.E.2d 116 (Ind. 1995).

76. *Parker*, 662 N.E.2d at 997 (citing *Johnson*, 659 N.E.2d at 118-19).

77. *Id.* at 998.

78. 508 U.S. 366 (1993).

79. *Parker*, 662 N.E.2d at 998 (citing *Dickerson*, 508 U.S. at 373-74).

80. *Id.*

81. *Id.* at 999.

82. *Id.*

The court distinguished its holding in *Parker* from that of *C.D.T. v. State*,⁸³ which stands “for the proposition that once the police determine a suspect is not armed, no further search is permissible under *Terry*.”⁸⁴ The court found that the difference between the two cases was that, in *C.D.T.*, the officer had already determined that the suspect did not have a weapon at the time he came across the contraband, and, thus, by continuing the search he exceeded the scope of *Terry*.⁸⁵ In *Parker*, however, the officer was still in the process of conducting a patdown for weapons at the time he discovered the contraband.⁸⁶ In addition, the court relied on *Bratcher v. State*,⁸⁷ where the police stopped a vehicle suspected in a domestic dispute and then conducted a patdown of the driver for weapons. The officer felt a “soft item” in Bratcher’s pocket which was removed and found to be a bag containing marijuana.⁸⁸ The seizure of the drugs was upheld as being within the scope of *Terry*, because the officer “determined contemporaneously with his patdown search for weapons that the item in Bratcher’s pocket was marijuana, rather than during a further search after he concluded Bratcher did not possess a weapon.”⁸⁹

Judge Sullivan, in his well-considered dissent, would have reversed the trial court based on two factors. First, the *Dickerson* “plain feel” test would not have applied to powder cocaine, as discovered in *Parker*, because the “officer could not have determined it to be cocaine until he removed the plastic bag from Parker’s pocket and saw that it contained cocaine powder, as opposed to crack cocaine” which was the case in *Dickerson*.⁹⁰ Second, the officer’s discovery of the cocaine was not inadvertent as required, in his view, by the “plain view” doctrine.⁹¹ When Parker was stopped by the police, one officer immediately stated that he was conducting a narcotics investigation. “The informant had advised police that Parker would be carrying cocaine and would be selling the cocaine at the liquor store. It was clear, therefore, that the purpose in making the patdown was to

83. 653 N.E.2d 1041, 1047 (Ind. Ct. App. 1995).

84. *Parker*, 662 N.E.2d at 999.

85. *Id.* And the court is clearly correct in its distinction: a *Terry* frisk is only justified to protect an officer. Once the officer has ascertained that the person he has detained does not have weapons, the frisk must end. If he continues his patdown past that which is needed to ensure that the detainee is unarmed, he is violating the Fourth Amendment.

86. *Id.*

87. 661 N.E.2d 828 (Ind. Ct. App. 1996).

88. *Id.* at 830.

89. *Id.* at 832.

90. *Parker*, 662 N.E.2d at 1000 (Sullivan, J., dissenting).

91. *Id.* The Fourth Amendment does *not* require that the discovery be inadvertent. See *Horton v. California*, 496 U.S. 128, 130 (1990). Moreover, the case, *Wood v. State*, 592 N.E.2d 740 (Ind. Ct. App. 1992), which Judge Sullivan cites does not stand for the proposition that the discovery must be inadvertent. It merely holds open the possibility that article I, § 11 of the Indiana Constitution may have an inadvertence requirement. *Id.* at 742. Judge Shields disagreed. See *id.* at 745 (Shields, J., concurring).

ascertain the presence of cocaine."⁹² Judge Sullivan therefore concluded that the majority opinions in *Bratcher* and *Parker* were wrong and should be reversed.⁹³

In *Walker v. State*,⁹⁴ police officers were dispatched to a bar to investigate a fight involving weapons and were told that Walker was involved. A police officer conducted a patdown of Walker and "sensed an article in Walker's right hip pocket which he believed to be a bag of marijuana."⁹⁵ Walker argued that the search and seizure violated the scope of the Fourth Amendment as permitted by *Terry*.⁹⁶ The officer testified that:

when he sensed the item he knew it was not a weapon and based upon his experience, he thought the item was a bag a marijuana. He indicated that he squeezed the items with his fingers but did not manipulate it in any way. More importantly, when asked the period of time between his realization that the item was not a weapon but marijuana, Officer Ogle responded "instantaneously."⁹⁷

The court of appeals recognized that the seizure was immediate and "occasioned no further invasion of privacy beyond that already authorized by the officer's search for weapons and, thus, its warrantless seizure was justified under *Terry*."⁹⁸

In a unanimous decision in *Shinault v. State*,⁹⁹ a different panel of the court of appeals addressed similar claims. In the early evening a police officer saw Shinault standing face to face with another person who appeared to be "involved in a transaction." When the two saw the police car, they immediately parted and walked briskly in opposite directions. A police officer followed Shinault and saw him put his hands into his jacket. The officer told Shinault to remove his hands, whereupon the officer observed a "bulge" in the jacket. When Shinault approached the officer, the officer detected a strong odor of marijuana. The officer conducted a patdown of Shinault and found a bag containing more than fifty grams of marijuana and arrested him.¹⁰⁰ Shinault filed a motion to suppress that the trial court denied.¹⁰¹

The court quickly resolved the stop and frisk claim of the defendant by

92. *Id.* The officer's subjective motive is generally irrelevant in Fourth Amendment cases. See *Whren v. United States*, 116 S. Ct. 1769, 1774 (1996). "Not only have we never held, outside the context of inventory search or administrative inspection . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; *but we have repeatedly held and asserted the contrary.*" (emphasis added). See also *State v. Hollins*, 672 N.E.2d 427 (Ind. Ct. App. 1996), *trans. denied* (following *Whren*).

93. See *Parker*, 662 N.E.2d at 1001 (Sullivan, J., dissenting).

94. 661 N.E.2d 869 (Ind. Ct. App. 1996).

95. *Id.* at 870.

96. *Id.*

97. *Id.* at 871.

98. *Id.*

99. 668 N.E.2d 274 (Ind. Ct. App. 1996).

100. *Id.* at 276.

101. *Id.*

recognizing that “[u]nder the totality of the circumstances, [the officer] was justified in stopping Shinault to determine if he was engaged in criminal activity.”¹⁰² Because the trial court found that the officer had a “reasonable fear of danger” from Shinault, the officer was “justified in conducting a limited patdown search for his own safety”¹⁰³ The issue then became whether the “plain feel” doctrine applied. The court of appeals analyzed the facts in light of *Dickerson, Walker, and Parker* and found that

[the officer’s] discovery of marijuana was contemporaneous with his patdown search for weapons. He testified that he observed a cylindrical shaped bulge in Shinault’s pocket; that he did not know what it was; that he suspected it could be a “bag of pot,” but also realized it could be “a hundred different things”; that it felt like plastic, but because of its shape, he thought it could be a weapon. When questioned by the court, [the officer] said that he was not sure that the object was not a weapon until he pulled it out of Shinault’s pocket.¹⁰⁴

The court held that because the officer was unable to immediately eliminate the possibility that the tightly rolled plastic bag of marijuana was not some sort of dangerous weapon at the time of the seizure, the seizure was permissible under *Terry*.¹⁰⁵

2. *Probable Cause and Informant’s Tips*.—In *Johnson v. State*,¹⁰⁶ the Indiana Supreme Court granted transfer to review the propriety of a stop based on a confidential informant’s tip. The police began an investigation of Johnson, and the investigating officer put out a “Be on the Lookout” for Johnson based on a confidential informant’s tip.¹⁰⁷ Johnson had not committed any traffic violations or infractions in the presence of the police when they stopped him in the area where the informant said he would be. After he was stopped, Johnson immediately got out of his car and approached the police. The police

first asked appellant for identification and then told him that they had probable cause to believe he was transporting narcotics. Appellant asked if they were going to look down his pants. The officers said that they were but did not have to do it there, handcuffed appellant, placed him in the police car, and transported him to a safer area approximately three blocks away where they conducted a “pat-down” search of his person and required appellant to open his pants. The officers found a small amount of marijuana in the waistband of appellant’s trousers.¹⁰⁸

The majority examined the argument of the defendant in light of the principle

102. *Id.* at 277.

103. *Id.*

104. *Id.* (citations omitted).

105. *Id.*

106. 659 N.E.2d 116 (Ind. 1995).

107. *Id.* at 117.

108. *Id.*

established in *Terry*, that “(i)n order to justify this stop, the police must have had a reasonable suspicion that criminal activity was occurring, or was about to occur.”¹⁰⁹ Here, the court found that the informant’s tip provided no specifics by which the tip could be confirmed, said nothing that was not known by members of the general public, and none of the informant’s tips have ever resulted in a conviction.¹¹⁰ The court found that

there was evidence of neither a request for immediate police aid nor a credible informant warning of a specific impending crime. . . . [T]he tip in this case was completely lacking in indicia of reliability and the record offers no evidence that the confidential informant was reliable; the tip was, therefore, inadequate to support an investigatory stop.¹¹¹

The supreme court remanded the cause to the trial court with an order to suppress the result of the illegal search.¹¹²

Justice Sullivan’s dissent, with which Chief Justice Shepard concurred, eloquently stated that:

[t]he theory employed by the Court of Appeals in affirming the trial court’s denial of Johnson’s motion to suppress was that even if probable cause did not exist at the time the police stopped Johnson, there was reasonable suspicion under *Terry v. Ohio* to make the stop; then, during their encounter with Johnson, the officers corroborated aspects of the informants tip and probable cause arose to search Johnson and his car.¹¹³

The tip, along with the police officers analysis of Johnson’s behavior, established the “reasonable suspicion” necessary to stop the car.¹¹⁴ Additionally, Johnson’s question, “Are you going to look in my pants?” corroborated the informant’s tip and established probable cause necessary to justify the search.¹¹⁵ The minority would, therefore, have affirmed the trial court.¹¹⁶

3. *The Scope of a Consent to Search.*—In *Foreman v. State*,¹¹⁷ the defendant leased a room in a bingo center from Ogletree, the operator and manager. An investigator went to the center to see if it was operating under a proper permit and observed several hundred people playing bingo. Ogletree gave the investigator written consent to search the center. During the search, police officers encountered a locked door that they removed from its hinges. Inside the room, the officers found video gaming devices with stools in front of them whereupon Ogletree told the police that the machines were not his and that he leased the room

109. *Id.* at 118.

110. *Id.* at 119.

111. *Id.*

112. *Id.* at 120.

113. *Id.* (Sullivan, J., dissenting).

114. *Id.* at 122.

115. *Id.*

116. *Id.*

117. 662 N.E.2d 929 (Ind. 1996).

to Foreman. He also told them that the room was left open during bingo games to allow access to the patrons of the bingo center. Foreman was charged with two counts of professional gambling.¹¹⁸ He filed a motion to suppress claiming that Ogletree's written consent was invalid as to the room leased by Foreman.¹¹⁹

The supreme court found that, although consent to search may be given by a third person who has common control over the premises searched, "[t]o establish common authority, the State must show that the third party had joint access or control over the premises."¹²⁰ Here, the court of appeals did not rule on the issue of whether Ogletree had common authority but instead found that "where a third party does not actually have common control over the premises, if the police at the time of the entry reasonably believed that the third party had common control over the premises, the warrantless entry may be valid."¹²¹ The supreme court rejected the notion that the police could have had a reasonable belief that Ogletree had common control over the locked room because the police took the door off its hinges.¹²² Moreover, there was no evidence that Ogletree gave consent to search to room.¹²³ The supreme court stated,

We acknowledge that Ogletree had signed a written consent permitting a search of the Richmond Plaza Bingo Hall, without any explicit exclusion of the locked room. However, we cannot reconcile that fact with the inconsistent behavior of the police in removing the door off its hinges when Ogletree was standing right there and could have easily provided a key to unlock the door.¹²⁴

The court then examined the State's claim that the defendant did not have a reasonable expectation of privacy in the room searched. The court found that the room was not open to the public because one of the employees had closed and locked the door cutting off access to the general public, and that because the police had to remove the door from its hinges, the officers did not enter the room as regular customers.¹²⁵ Thus, because measures were taken to maintain privacy with respect to the room, Foreman had a subjective expectation of privacy when the door was closed and locked.¹²⁶ Finally, the court found that society would recognize such an expectation of privacy as reasonable where the general public no longer had access and the door was closed and locked.¹²⁷ Therefore, because Foreman "had a reasonable expectation of privacy in the leased room, there was no valid consent to search the premises, and no other valid exception to the

118. *See id.* at 930.

119. *See id.*

120. *Id.* at 932.

121. *Id.* (citing *Illinois v. Rodriguez*, 497 U.S. 177, 179 (1990)).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 933.

126. *Id.* at 934.

127. *Id.*

warrant requirement was claimed, the warrantless search of the leased premises was unconstitutional and the trial court's motion to suppress was appropriate."¹²⁸

B. Speedy Trial

In *Clark v. State*,¹²⁹ the Indiana Supreme Court attempted to resolve some of the long-standing confusion surrounding the congested court calendar exception to Criminal Rule 4.¹³⁰ Prior to *Clark*, two panels of the Indiana Court of Appeals had issued conflicting opinions on the subject. In *Bridwell v. State*,¹³¹ one panel held that trial court congestion need not be documented and would be accepted on appeal absent a claim of subterfuge.¹³² In *Raber v. State*,¹³³ another panel required that a trial court document the nature of its congestion.¹³⁴ In *Clark*, the supreme court announced a new rule which was more in line with *Bridwell*.

Clark orally requested a "fast and speedy trial" at his initial hearing.¹³⁵ The trial court set his case for jury trial on the seventieth day thereafter, in accordance with Criminal Rule 4(B). On Clark's trial date, however, the court issued an order continuing the case for over four months "due to congestion of Court's calendar."¹³⁶ Several weeks later, Clark moved for a discharge asserting that the seventy day time limit of Criminal Rule 4(B) had been exceeded.¹³⁷ At a hearing on that motion, the defense presented testimony that no jury trial was held in that court on the original trial date, nor were jurors even summoned to appear on that date.¹³⁸ There were seventeen criminal jury trials and two eviction hearings scheduled for that day. In denying the defendant's Motion for Discharge, the court noted its routine practice of setting several cases for trial on a given date and then assigning one case as the "number one" case to be on the "ready docket" on the Friday before the trial date. The remaining cases are "continued because of congestion."¹³⁹ Even though the "number one" case would sometimes be disposed of prior to trial, the court believed that congestion actually existed because "the

128. *Id.*

129. 659 N.E.2d 548 (Ind. 1995).

130. A criminal defendant who moves for an early trial "shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar." IND. R. CRIM. P. 4(B)(1).

131. 640 N.E.2d 437 (Ind. Ct. App. 1994).

132. *Id.* at 439.

133. 622 N.E.2d 541 (Ind. Ct. App. 1993).

134. *Id.* at 547.

135. *Clark v. State*, 659 N.E.2d 548, 550 (Ind. 1995).

136. *Id.*

137. *See id.*

138. *Id.*

139. *Id.*

congestion would be effective as [of] the Friday noon before the trial setting.”¹⁴⁰

On appeal, Clark asserted that no court congestion existed on the original trial date.¹⁴¹ The trial court had not entered its congestion order until the day of trial.¹⁴² Moreover, if court congestion truly existed, “the continuance would have been made at an earlier date, when the ‘number one’ case and ‘ready docket’ were determined.”¹⁴³ The State argued in response that:

sixteen other criminal jury trials were scheduled for [the original trial date]; that at least fourteen of these were older than the defendant’s case; and that no testimony was presented as to whether or not a bench trial may have been conducted . . . or whether a last-minute plea agreement or continuance had occurred on the “ready docket.”¹⁴⁴

Holding that an incarcerated defendant’s request for a speedy trial “requires particularized priority treatment,” the supreme court remanded the case with instructions to discharge the defendant.¹⁴⁵ The court held that Criminal Rule 4(B) cases “must be assigned a meaningful trial date within the time prescribed by the rule, if necessary superseding trial dates previously designated for civil cases and even criminal cases in which Criminal Rule 4 deadlines are not imminent.”¹⁴⁶ The court also held that on rare occasion, however, “complex trials that have long been scheduled or that pose significant extenuating circumstances to litigants and witnesses” may justify an exception this rule.¹⁴⁷

Procedurally, a defendant must file a Motion for Discharge and demonstrate that “at the time the trial court made its decision to postpone trial, the finding of congestion was factually or legally inaccurate.”¹⁴⁸ In the absence of trial court findings explaining the congestion, such proof will be *prima facie* adequate for discharge.¹⁴⁹ On appeal, the trial court’s findings will be accorded “reasonable deference,” and reversal will only occur if the trial court was “clearly erroneous.”¹⁵⁰

The supreme court also reconsidered *Bridwell*¹⁵¹ in light of its holding in *Clark*. Unlike Clark, Bridwell was released on bond during the pendency of his case.¹⁵² Thus, Criminal Rule 4(C) required that he be tried within 365 days of his arrest or indictment, instead of the seventy days prescribed by Criminal Rule 4(B)

140. *Id.*

141. *Id.* at 551.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 552.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Bridwell v. State*, 659 N.E.2d 552 (Ind. 1995).

152. *Id.* at 553.

for an in-custody defendant who moves for a speedy trial.¹⁵³ On appeal, Bridwell argued that his trial did not commence within 365 days of his arrest and that 209 days of the delay was attributable to court congestion which was not supported by a sufficient docket record.¹⁵⁴

The trial court used a pre-printed form which stated that the case was being continued due to congestion and reset for the court's earliest available trial setting.¹⁵⁵ Although Bridwell filed two motions for discharge prior to trial, he did not present any evidence to show that the findings of court congestion were "clearly erroneous" as required by *Clark*.¹⁵⁶ Because the requisite showing was not made, the supreme court upheld Bridwell's convictions.

The supreme court also considered Criminal Rule 4 in a slightly different context in *Jackson v. State*.¹⁵⁷ Jackson was incarcerated throughout the pendency of his case and moved pro se for a speedy trial on January 18.¹⁵⁸ The seventy-day time period of Criminal Rule 4(B) would therefore have expired on March 29. On March 21, Jackson requested a trial date consistent with his speedy trial request.¹⁵⁹ The trial court offered a trial date within those parameters, but the prosecutor informed the court that "the State would not be ready for trial" on the offered day.¹⁶⁰ Over the objection of the defendant, the court then set a trial date of May 16, which was well beyond the seventy day time period.¹⁶¹

On appeal, the State reasserted the trial court's reasoning for denying the defendant's Motion for Discharge, that the defendant's speedy trial motion was "apparently not served on the State of Indiana."¹⁶² The supreme court noted, however, that the prosecutor had merely stated that his file did not contain the written motion, but that Jackson's motion did contain a certificate of service.¹⁶³ Moreover, Jackson had brought his speedy trial demand to the attention of the judge who conducted his initial hearing. "His failure to mount a more aggressive campaign for a speedy trial hardly vitiates his right to that speedy trial."¹⁶⁴

The supreme court also rejected the State's argument that Jackson's case was continued due to a congested court calendar.¹⁶⁵ This contention was based on the trial judge's identification of several dates outside of the seventy-day period in

153. IND. R. CRIM. P. 4(B), 4(C).

154. *Bridwell*, 659 N.E.2d at 553.

155. Although the supreme court's opinion does not discuss the date of these congestion orders, the trial court's policy was to file the orders on the day prior to trial—not the day of trial as in *Clark*.

156. *Id.*

157. 663 N.E.2d 766 (Ind. 1996).

158. *Id.* at 768

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 769.

163. *Id.*

164. *Id.*

165. *Id.* at 770.

which the court was not available to conduct a trial.¹⁶⁶ However, the trial court had made itself available for the day before the seventy-day period expired.¹⁶⁷ The trial was continued beyond that date solely due to the prosecutor's unreadiness.¹⁶⁸ Because Jackson requested a speedy trial and did not receive it within the mandated seventy-day period—and the delay was not attributable to his actions or to a congested court calendar—the supreme court ordered the defendant discharged.¹⁶⁹

Although the supreme court made some strides toward clearing the uncertainty surrounding Criminal Rule 4 through the preceding three cases, some confusion still exists. The lesson of *Jackson*, however, is quite simple. When offered a trial date within the seventy-day period of Criminal Rule 4(B), the prosecution cannot refuse the date in exchange for a date beyond the seventy-day period. The trial court could, however, note its congestion on the record and continue the case beyond the seventy-day parameter. Moreover, the prosecution could have avoided this situation by agreeing to the release of the defendant or by dismissing the case and refile it at a later time.

The lesson of *Clark* and *Bridwell*, however, is not so clear. How is a trial judge who has ten or more jury trials set on a given day supposed to decide which case goes to trial? What if more than one of these cases has a speedy trial demand and several of the defendants are incarcerated? This author takes the position that those defendants who have been incarcerated the longest should go to trial first. Allowing all incarcerated defendants to go to trial first, however, means that in some instances a defendant released on bond may not go to trial for well over a year. If a trial court enters justification of why a given case is not going to trial,¹⁷⁰ the supreme court's holding in *Clark* will result in the trial court's finding of congestion being upheld unless the finding is clearly erroneous.¹⁷¹

On a very different speedy trial issue, the Indiana Court of Appeals considered whether Criminal Rule 4 applies to a retrial for an habitual offender adjudication in *Poore v. State*.¹⁷² Poore was adjudicated to be an habitual offender.¹⁷³ The habitual offender adjudication was subsequently vacated through a post-conviction relief petition.¹⁷⁴ Poore was retried on the habitual offender count based on his

166. *Id.*

167. *Id.* at 769.

168. *Id.*

169. *See id.* at 770

170. An example of an appropriate congestion order might be as follows: "Due to the trial of *State v. John Smith* (case no. 97009876), a defendant who demanded a speedy trial on January 6, 1997, and has been continuously incarcerated for 94 days thereafter, the court continues this case until May 12, 1997, which is the next earliest available trial setting. Pursuant to *State v. Clark*, the court finds that the Criminal Rule 4 deadlines of Mr. Smith's case are more imminent than those of this case."

171. *Clark v. State*, 659 N.E.2d 548, 552 (Ind. 1995).

172. 660 N.E.2d 591 (Ind. Ct. App. 1996).

173. *See* IND. CODE § 35-50-2-8 (Supp. 1996).

174. *Poore*, 660 N.E.2d at 594.

other prior felony convictions, and a jury again found him to be an habitual offender.¹⁷⁵ On appeal, he asserted that he was denied his right to speedy trial because the retrial took place more than seventy days after he requested a speedy trial.¹⁷⁶

A two-member majority held that Criminal Rule 4 does not apply to a habitual offender retrial because such a determination occurs as part of sentencing, and speedy trial requirements are not applicable to sentencing.¹⁷⁷ The court provided several reasons for its “refusal to elevate an habitual offender determination to the status of a trial for purposes of Crim.R. 4(B).”¹⁷⁸ First, Criminal Rule 4(B) applies to defendants held in jail on an “indictment or information,” and defendants such as Poore are generally being held because of an underlying felony.¹⁷⁹ Second, “the purposes behind the speedy trial rule are inapplicable to an habitual offender determination,” as that rule is “intended to protect against the possibility of lost evidence or fading memories.”¹⁸⁰ Finally, the majority was not persuaded by the fact that habitual offender proceedings are consistently referred to as “trials,” because “calling a rooster an eagle does not make the rooster an eagle.”¹⁸¹ Even though it contains some trial-like aspects, the habitual offender determination is part of the defendant’s sentencing—thus making the time periods of Criminal Rule 4 inapplicable.

Judge Sullivan, in his dissent, noted the trial-like aspects of a habitual offender determination. The proceeding “involves factual determinations which are within the prerogative of the trier of fact,” and it “must be proven by the state beyond a reasonable doubt.”¹⁸² Moreover, an habitual determination is not purely a sentencing matter because it must be resolved by trial or retrial.¹⁸³

Although Judge Sullivan’s dissent is factually correct and logical, this author finds the majority’s opinion more persuasive. A defendant convicted of a felony has already been afforded the protections of Criminal Rule 4 once. Moreover, the factual determinations are very limited, as a habitual offender phase generally lasts no longer than one hour and largely consists of the jury reviewing documents. Finally, this author has never, during a six-year tenure on the bench, presided over a trial in which a jury found that the habitual offender enhancement was not proven.

175. *Id.*

176. *Id.*

177. *Id.* (citing *Alford v. State*, 294 N.E.2d 168, 170 (Ind. Ct. App. 1973), *overruled on other grounds by* *Holland v. State*, 352 N.E.2d 752 (Ind. 1976)).

178. *Id.*

179. *Id.* at 594-95.

180. *Id.* at 595 (citing *Alford*, 294 N.E.2d at 171).

181. *Id.* (quoting *Indiana Republican State Com. v. Saymaker*, 614 N.E.2d 981, 983 (Ind. Ct. App. 1993)).

182. *Id.* at 597.

183. *Id.* at 598.

C. Jury Selection

In a pair of cases, *Williams v. State*¹⁸⁴ and *Currin v. State*,¹⁸⁵ the Indiana Supreme Court addressed the propriety of a trial judge's sua sponte order requiring each side to present a race-neutral justification before exercising a peremptory challenge. In *Williams*, the supreme court upheld the defendant's murder conviction and death sentence, but established a new rule for future cases.¹⁸⁶ In *Williams*, the trial court required each attorney to give a race, ethnic, religious, sex-neutral reason for the use of each peremptory challenge.¹⁸⁷ Even though the prosecution did not object to the defendant's use of some peremptory challenges, the trial court found defense counsel's explanation inadequate on five occasions and refused to excuse the jurors.¹⁸⁸ On appeal, *Williams* argued that denial of the use of peremptory challenges was reversible error.¹⁸⁹

In considering *Williams*' claim, the court noted three separate legal principles: *Batson* principles, peremptory challenge principles, and trial management principles.¹⁹⁰ In *Batson v. Kentucky*¹⁹¹ and its progeny, the U.S. Supreme Court forbade the practice of using peremptory challenges to exclude members of a certain race from a jury. According to the Court, the Equal Protection Clause protects both defendants and prospective jurors from the racially discriminatory use of peremptory challenges.¹⁹² Under *Batson*, after a party raises an objection, the burden is on the opposing party to demonstrate that its adversary is striking the juror solely because of race or gender.¹⁹³ If a prima facie showing is made, the burden shifts to the party seeking to exercise the challenge to provide a neutral explanation for its use.¹⁹⁴ Thus, *Batson* principles and peremptory challenge principles require a court to wait for an objection before it can require a race-neutral justification for the use of a peremptory challenge.¹⁹⁵

Other jurisdictions, however, have expanded the scope of *Batson* and embraced the notion that a trial judge may sua sponte raise a *Batson* objection.¹⁹⁶ In *Williams*, the court found that the trial court's actions did not constitute

184. 669 N.E.2d 1372 (Ind. 1996).

185. 669 N.E.2d 976 (Ind. 1996).

186. *Williams*, 669 N.E.2d at 1372.

187. *Id.* at 1376.

188. *Id.* at 1380.

189. *Id.* at 1376.

190. *Id.*

191. 476 U.S. 79 (1986).

192. *Williams*, 669 N.E.2d at 1377.

193. *Id.* at 1378 (discussing *Pfister v. State*, 650 N.E.2d 1198 (Ind. Ct. App. 1995)).

194. *Id.*

195. *Purkett v. Elem*, 514 U.S. 765 (1995) (per curiam) is the Court's latest pronouncement on this issue.

196. *Williams*, 669 N.E.2d at 1379 (collecting cases). Although *Batson* does not express an opinion about whether a trial judge can sua sponte raise an objection. The Supreme Court is unlikely to ever forbid state trial judges from intervening when discrimination is "abundantly clear."

reversible error, as “it was within the discretion trial courts enjoy to manage and control the proceedings to intervene to protect this right, especially where, as here, the prosecution was subjected to the same rules”¹⁹⁷

The court then turned to the issue of whether the race-neutral justifications offered by the defense in *Williams* showed discriminatory intent or should have been believed. On appeal, a trial court’s fact finding on such matters is accorded “great deference” by the appellate court.¹⁹⁸ After review of the reasons given for excusing four of the jurors, the court was unable to conclude that defense counsel had given the “sufficiently clear and reasonable specific explanation[s]” required to overcome the great deference afforded to the trial court’s findings.¹⁹⁹

The court, in exercise of its supervisory responsibilities, adopted a procedure to be followed for all cases tried after *Williams* was certified. Concluding that the interests of the state and a criminal defendant are weightier than the interest of a potential juror, the court held that “absent extraordinary circumstances a trial court should not require each side to present a race-neutral justification for each of its peremptory challenges.”²⁰⁰ Trial courts should wait for an objection, and sua sponte intervention “is only authorized when a prima face case is abundantly clear with respect to a particular juror.”²⁰¹

In *Currin*, the supreme court reversed a robbery conviction because the trial court rejected a sufficiently race-neutral reason for the exercise of a peremptory challenge.²⁰² In that case, an African-American defendant sought to peremptorily strike the only African-American juror on the venire.²⁰³ His proffered race neutral explanation was “that the juror had previously served on a criminal jury, had voted for conviction, and had been frustrated by that jury’s inability to reach a verdict.”²⁰⁴ The court found that this explanation was “sufficiently clear and reasonably specific,” and that the trial court committed reversible error in failing to grant the peremptory strike based on this justification.²⁰⁵

D. Sentencing

During the past year, the Indiana appellate courts considered sentencing in three different and significant contexts: mandatory sentences; enhanced sentences; and probation. In *Person v. State*,²⁰⁶ the Indiana Court of Appeals considered, as an issue of first impression, whether requiring a mandatory executed sentence for

197. *Id.*

198. *Id.* at 1380 (citing *Hernandez v. New York*, 500 U.S. 352, 360 (1991)).

199. *Id.* at 1381.

200. *Id.* at 1382.

201. *Id.*

202. *Currin v. State*, 669 N.E.2d 976 (Ind. 1996).

203. *Id.* at 977.

204. *Id.* at 979.

205. *Id.*

206. 661 N.E.2d 587 (Ind. Ct. App. 1996), *trans. denied*.

a conviction for dangerous possession of a handgun²⁰⁷ violated the privileges and immunities clause of the Indiana Constitution.²⁰⁸ Person, then seventeen years old, was the sole back seat passenger of a car that was pulled over by the police. After ordering Person to exit the vehicle, the officer found a handgun sticking out of the rear seat.²⁰⁹ The trial court found Person guilty of dangerous possession of a handgun and sentenced him to sixty days with fifty-five of those days suspended.²¹⁰ The five-day executed sentence was in accordance with a statutory mandatory minimum sentence for the offense.²¹¹

On appeal, Person challenged the constitutionality of his sentence on several grounds. First, he argued the statutes under which he was convicted and sentenced violated article I, sections 16²¹² and 18²¹³ of the Indiana Constitution,²¹⁴ which protect against disproportionate penalties and vindictive justice, respectively. Second, he argued that his sentence violated the privileges and immunities clause of the Indiana Constitution. In finding no constitutional violations, the court noted that “penal sanctions are primarily legislative considerations and judicial review . . . is very deferential.”²¹⁵ Because the juvenile justice system is focused upon the care, treatment and rehabilitation of the wayward child, a mandatory five-day jail sentence may be a powerful and constitutional tool toward that end.²¹⁶

On the issue of privileges and immunities, the court considered the dangerous possession of a handgun by a child statute alongside the statute prohibiting adults from carrying a handgun without a license.²¹⁷ Person noted that the crime of

207.

A child who knowingly, intentionally, or recklessly: (1) possesses a firearm for any purpose other than a purpose described in section 1 of this chapter; or (2) provides a firearm to another child with or without remuneration; commits dangerous possession of a firearm, a Class A misdemeanor.

IND. CODE § 35-47-10-5 (Supp. 1996).

208. “[T]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.” IND. CONST. art. I, § 23.

209. *Person*, 661 N.E.2d at 590.

210. *Id.* at 589.

211. “In addition to any criminal penalty imposed for an offense under this chapter, the court shall order incarceration for five (5) consecutive days in an appropriate facility” IND. CODE § 35-47-10-8 (Supp. 1996).

212. “All penalties shall be proportioned to the nature of the offense.” IND. CONST. art. I, § 16.

213. “The penal code shall be founded on the principles of reformation, and not of vindictive justice.” *Id.* § 18.

214. *Person*, 661 N.E.2d at 590.

215. *Id.* at 593.

216. *Id.*

217. *Id.* at 592-93. “Except as provided in section 2 of this chapter, a person shall not carry a handgun in any vehicle or on or about his person, except in his dwelling, on his property or fixed

carrying a handgun without a license can be committed by either an adult or a child, while dangerous possession of a handgun can only be committed by a child, yet the penalty for the latter is more severe than for the former.²¹⁸ He asserted that this was a violation of the privileges and immunities clause because juveniles are subjected to a more severe penalty than are adults.²¹⁹ The court noted at the outset, however, that a juvenile will not necessarily be treated more harshly than an adult, because the five days is merely a minimum.²²⁰

A claimed violation of privileges and immunities is evaluated under a two-prong test. The test was set forth in *Collins v. Day*²²¹ as follows:

First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. Finally, in determining whether a statute complies with or violates Section 23, courts must exercise substantial deference to legislative discretion.²²²

As noted above, there is a strong presumption of validity, and one challenging a statute carries a very heavy burden. As to the other considerations, the court noted that "legislative classification becomes a judicial question only where the lines drawn are arbitrary or manifestly unreasonable."²²³ The court held that "the special classification of children is reasonably related to the subject-matter of the legislation" and reasonably related to its purpose, which is to deter children from possessing handguns.²²⁴ Finally, the second prong is satisfied because "the statutory scheme applies equally to all persons who are under age 18"²²⁵

In *Walker v. State*,²²⁶ the Indiana Supreme Court considered whether the crime of dealing in cocaine as a Class A felony²²⁷ requires proof that a defendant had actual knowledge that the sale was occurring within 1000 feet of a school.²²⁸ Walker was convicted of dealing in cocaine as a class A felony based on evidence

place of business, without a license issued under this chapter being in his possession." IND. CODE § 35-47-2-1 (1993).

218. *Person*, 661 N.E.2d at 591. An individual convicted of Carrying a Handgun without a License, a Class A misdemeanor can be sentenced to up to 365 days in jail. There is, however, no statutory minimum sentence.

219. *Id.*

220. *Id.*

221. 644 N.E.2d 72 (Ind. 1994).

222. *Id.* at 80.

223. *Person*, 661 N.E.2d at 593 (quoting *Collins*, 644 N.E.2d at 80).

224. *Id.*

225. *Id.*

226. 668 N.E.2d 243 (Ind. 1996).

227. IND. CODE § 35-48-4-1 (Supp. 1996).

228. *Walker*, 668 N.E.2d at 243.

that he had sold \$20 worth of crack cocaine within 1000 feet of a school.²²⁹

The statute provides: "(a) A person who: (1) Knowingly or intentionally . . . (C) Delivers . . . cocaine . . . commits dealing in cocaine, a Class B felony."²³⁰ The offense is elevated to a Class A felony, however, if the person "[d]elivered . . . the drug in or on school property or within one thousand (1,000) feet of school property or on a school bus."²³¹ Walker argued that permitting enhancement to a Class A felony without requiring proof of knowledge that the transaction occurred within 1000 feet of a school violates the due process requirement that a conviction rest on proof of each element of a charged crime.²³²

The court framed the issue as "whether the legislature meant to impose liability without fault or, on the other hand, really meant to require fault, though it failed to spell it out clearly."²³³ The court reaffirmed its approval of the seven factors found in the *LaFave and Scott* hornbook which are to be weighed in deciding the issue.²³⁴ Chief Justice Shepard, writing for a three-member majority, held that the weight of the factors failed to support contention that the Indiana General Assembly intended to require separate proof of knowledge of his proximity to a school.²³⁵ Moreover, the majority quoted Judge Staton's pragmatic words that "a dealer's lack of knowledge of his proximity to the schools does not make the illegal drug any less harmful to the youth in whose hands it may eventually come to rest."²³⁶

In dissent, Justice DeBruler began with the proposition that "the statutory language is the primary guide in determining the Legislature's intent."²³⁷ The statutory language cited above raises the question of whether the "knowingly and intentionally" language modifies only the term "delivers" or all elements of the offense, including the elevating element of delivery within 1000 feet of a school.²³⁸ Justice DeBruler also quoted a separate statute which provides "unless the statute defining the offense provides otherwise, if a kind of culpability is required for the commission of the offense, it is required with respect to every material element of the prohibited conduct."²³⁹ Finally, he noted that "the rule of lenity requires that criminal statutes be strictly construed against the State."²⁴⁰ Because the State made

229. *Id.*

230. IND. CODE § 35-48-4-1.

231. *Id.*

232. *Walker*, 668 N.E.2d at 244. *See also In re Winship*, 397 U.S. 358 (1970).

233. *Walker*, 668 N.E.2d at 244 (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 3.8, at 342-44 (1986)).

234. *Id.*

235. *Id.*

236. *Id.* at 244-45 (DeBruler, J., dissenting) (citing *Williford v. State*, 571 N.E.2d 310, 313 (Ind. Ct. App. 1991)).

237. *Id.* at 245 (citing *State ex rel. Roberts v. Graham*, 110 N.E.2d 855 (Ind. 1953)).

238. *Id.*

239. *Id.* (citing IND. CODE § 35-41-2-2(d) (1993)).

240. *Walker*, 668 N.E.2d at 246 (DeBruler, J., dissenting) (citing *Bond v. State*, 515 N.E.2d 856, 857 (Ind. 1987)).

no showing at trial that Walker knew his distance from the school, Justice DeBruler would have remanded the case for sentencing as a Class B felony.²⁴¹

In *Johnson v. State*,²⁴² the Indiana Court of Appeals considered the setting of probation conditions for an anti-abortion protester convicted of the misdemeanor offenses of obstructing pedestrian traffic and criminal trespass. Johnson was part of a group of individuals who blocked access to a Merrillville Planned Parenthood Clinic to prevent employees and patients from entering.²⁴³ She was convicted of misdemeanor charges and placed on probation.²⁴⁴ On appeal, she argued that the probation term requiring her to attend a reproductive health lecture sponsored by Planned Parenthood violated her First Amendment religious rights under the Establishment and Free Exercise Clauses.²⁴⁵

The court noted that probation is a “matter of grace and . . . not a right,” thus a trial court is given “broad discretion in establishing conditions of probation.”²⁴⁶ To that end, “conditions of probation which intrude upon constitutionally protected rights are not necessarily invalid.”²⁴⁷

In evaluating Johnson’s Establishment Clause claim, the court considered the three-prong *Lemon* test.²⁴⁸ Because Planned Parenthood was a purely secular organization which did not inquire into the religious faith of its clients, the court found that it did not favor one religion over another or favor the non-existence of religion.²⁴⁹ Similarly, the court dispensed with Johnson’s Free Exercise claim by noting that the defendant was not singled out for special hostility based on her religious beliefs, but rather the trial court action was motivated by non-religious deterrence.²⁵⁰ Finally, in upholding the propriety and constitutionality of the lecture requirement, the court noted that the requirement was not meant to alter Johnson’s religious beliefs or stance on the abortion issue, but was rather designed to apprise her of the variety of services—above and beyond abortion—offered by Planned Parenthood.²⁵¹

E. Death Penalty

241. *Id.* at 247.

242. 659 N.E.2d 194 (Ind. Ct. App. 1995).

243. *Id.* at 196.

244. *Id.* at 197.

245. U.S. CONST. amend. I.

246. *Id.* at 198 (citing *Million v. State*, 646 N.E.2d 998, 1002 (Ind. Ct. App. 1995)).

247. *Id.* at 199 (citing *Patton v. State*, 580 N.E.2d 693, 698 (Ind. Ct. App. 1991)).

248. *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)). State action does not violate the Clause if it 1) has a secular purpose, 2) does not have as its primary or principle effect the advancement or inhibition of religion, and 3) does not foster excessive entanglement with religion. *Id.*

249. *Johnson*, 659 N.E.2d at 199.

250. *Id.* at 200.

251. *Id.*

In *Schiro v. State*,²⁵² the Indiana Supreme Court considered whether, through a petition for post-conviction relief, a defendant sentenced to death was entitled to the review of his sentence under a judicial approach to death penalty appeals adopted after his direct appeal. In 1981, Schiro was charged with intentional murder and felony murder, i.e. killing while raping or attempting to rape his victim, in Vanderburgh County.²⁵³ He was granted a change of venue to Brown County, where a jury convicted him on the felony murder charge but not on the charge of intentional murder.²⁵⁴ The State had sought the death penalty by alleging that Schiro had intentionally killed his victim,²⁵⁵ but the jury returned a recommendation that the death penalty not be imposed.²⁵⁶ However, at a sentencing hearing two weeks later the trial judge sentenced Schiro to death.²⁵⁷

On direct appeal, the Indiana Supreme Court had considered Schiro's contention that a stricter standard of review should be used when the trial court imposed the death penalty over the unanimous recommendation of a jury against it.²⁵⁸ The supreme court held that it would not apply a different standard and that the death sentence was appropriate in this case.²⁵⁹ In addition to Schiro's direct appeal, the Indiana Supreme Court had considered his case on two other occasions—denying his petitions for post-conviction relief both times.²⁶⁰

After the denial of his second petition for post-conviction relief, the supreme court decided two cases which changed the standard of review for death penalty cases. In *Martinez Chavez v. State*,²⁶¹ the supreme court required that a trial judge make an express response to a jury recommendation against death.²⁶² In *Roark v. State*,²⁶³ the court modified *Martinez Chavez* somewhat by retaining that approach only as an appellate requirement. Thus, during appellate review of a death sentence imposed by a judge over the recommendation of a jury, the court considers two separate issues: "1) whether the trial court sentencing statement demonstrates due consideration of the jury recommendation; and 2) whether this Court, upon independent reconsideration of a jury recommendation against death, nevertheless concludes that the death penalty is appropriate."²⁶⁴ Because Schiro had been denied review of his death sentence under the *Chavez/Roark* approach at the time of his direct appeal in 1983, the supreme court held that he was entitled

252. 669 N.E.2d 1357 (Ind. 1996).

253. *Id.* at 1358.

254. *Id.*

255. See IND. CODE § 35-50-2-9(b)(1) (Supp. 1996).

256. *Schiro*, 669 N.E.2d at 1358.

257. *Id.*

258. *Schiro v. State*, 451 N.E.2d 1047 (Ind. 1983).

259. *Id.* at 1058.

260. *Schiro*, 669 N.E.2d at 1358.

261. 534 N.E.2d 731 (Ind.), *modified*, 539 N.E.2d 4 (Ind. 1989).

262. *Id.*

263. 644 N.E.2d 556, 565 (Ind. 1994).

264. *Id.* (quoting *Roark v. State*, 644 N.E.2d 556 (1994)).

to review by that standard through his petition for post-conviction relief.²⁶⁵

In conducting that review thirteen years after his direct appeal, the supreme court considered two factors in particular. First, Schiro had been charged with both intentional murder and felony murder, but the jury found him guilty of felony murder only.²⁶⁶ Secondly, after the penalty phase, the jury deliberated only sixty-one minutes before unanimously recommending that the death penalty not be imposed.²⁶⁷ Based on these two factors, Justice DeBruler wrote "this record strongly supports the conclusion that after the prosecution exercised two separate, full, and fair opportunities to support its claim for the death penalty based upon the existence of the intent to kill, the jury unanimously found the claim unsubstantiated."²⁶⁸ The court also noted that the trial judge's decision was based in part on his "inferences of evil intent and malingering on the part of Schiro from his out of the presence of the jury observations of Schiro during the course of the trial."²⁶⁹ Finally, the court acknowledged that several days of mitigation evidence had been presented.²⁷⁰ This included evidence of Schiro's admission of involvement in the crime, his chronic substance abuse problem, his scarred childhood, his mental illness, his kindness when not on alcohol or drugs, and his youth.²⁷¹

After considering all of these factors, the supreme court held that "it may not be said that the facts available in the record support the conclusion that the death penalty is appropriate."²⁷² The court remanded the cause with instructions to grant the petition for post-conviction relief, set aside the death penalty, and impose a term of sixty years imprisonment.²⁷³

Chief Justice Shepard was the sole dissenter and began by noting "Thomas N. Schiro has been permitted to litigate against the penalty of death imposed on him for killing Laura Luebenhusen for the last fifteen years . . . [t]his determined litigation has finally paid off, as four judges of this Court have decided that Schiro should not die for his crime after all."²⁷⁴ He noted that the trial judge had found that Schiro intentionally killed his victim, and that the trial judge's finding was upheld by the supreme court on direct appeal.²⁷⁵ Moreover, the trial judge found no mitigating factors, but instead found aggravating ones.²⁷⁶ The aggravating factors included Schiro's extensive criminal history and admission that he had committed at least eighteen other rapes, as well as his display of contempt for

265. *Schiro*, 669 N.E.2d at 1358.

266. *Id.*

267. *Id.* at 1359.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 1360 (Shepard, C.J., dissenting).

275. *See id.* at 1361. *See also* *Schiro v. State*, 451 N.E.2d 1047, 1058 (Ind. 1983).

276. *See Schiro*, 669 N.E.2d at 1362 (Shepard, C.J., dissenting).

people and the law throughout his life.²⁷⁷

Chief Justice Shepard quoted the U.S. Supreme Court's endorsement of sentencing by a judge and not jury: "It would appear that judicial sentencing should lead, if anything to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced at sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."²⁷⁸ Based on his belief that the trial judge discharged his responsibility in sentencing Schiro and that the supreme court fulfilled its constitutional mandate in giving his sentence a thorough and individualized review, Chief Justice Shepard voted to uphold the death sentence.²⁷⁹

F. The Reasonable Doubt Instruction

In *Winegeart v. State*,²⁸⁰ the Indiana Supreme Court considered and upheld the constitutionality of a reasonable doubt instruction. Two of the justices concurred in the result, but did not agree with the conclusions of the majority regarding the instructions. However, the court recommended the use of a new reasonable doubt instruction.²⁸¹

The court first examined the constitutional challenge to the following instruction:

A reasonable doubt is such doubt as you may have in your mind when having fairly considered all of the evidence, you do not feel satisfied to a moral certainty of the guilt of the defendant. A reasonable doubt is a fair actual and logical doubt that arises in the mind as an impartial consideration of all the evidence and the circumstances in the case. It is not every doubt, however, it is a reasonable one. You are not warranted in considering as reasonable those doubts that may be merely speculative or products of the imagination, and you may not act upon mere whim, guess or surmise or upon the mere possibility of guilt. A reasonable doubt arises, or exists in the mind, naturally, as a result of the evidence or lack of evidence. There is nothing in this that is mysterious or fanciful. It does not contemplate absolute or mathematical certainty. Despite every precaution that may be taken to prevent it, there may be in all matters depending upon human testimony for proof, a mere possibility of error.

If, after considering all of the evidence, you have reached such a firm belief in the guilt of the defendant that you would feel safe to act upon that belief, without hesitation, in a matter of the highest concern and importance to you, than you have reached that degree of certainty which excludes reasonable doubt and authorizes conviction.

This rule on reasonable doubt applies to each of you individually, and

277. *Id.* at 1362-63.

278. *Id.* at 1363 (quoting *Proffitt v. Florida* 428 U.S. 242 (1976)).

279. *Id.*

280. 665 N.E.2d 893 (Ind. 1996).

281. *Id.*

it is your personal duty to refuse to convict as long as you have a reasonable doubt as to the defendant's guilt as charged. Likewise, it is your personal duty to vote for conviction as long as you are convinced beyond a reasonable doubt of the defendant's guilt as charged.²⁸²

Although the defendant did not make a timely objection to this instruction, the court examined the instruction to determine whether the giving of the instruction constituted fundamental error and thus denied the defendant a right to a fair trial.²⁸³ The court considered the due process protection "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"²⁸⁴ The court acknowledged that "[w]hile the federal constitution requires that juries be instructed 'on the necessity that the defendant's guilt be proven beyond a reasonable doubt,' it does not require the use of 'any particular form of words.'"²⁸⁵

The court then examined the reasonable doubt instructions approved by the U.S. Supreme Court in *Victor v. Nebraska*,²⁸⁶ which included the moral certainty language similar to that used in *Winegeart*. The court recognized the U.S. Supreme Court's language which said that "reasonable doubt occurs when, 'after consideration of all of the evidence,' the juror does not have 'an abiding conviction, to a moral certainty of the guilt of the accused.'"²⁸⁷ The supreme court then said that "in the context of the entire instruction, which explicitly directed the jurors to base their conclusion on the evidence of the case and not to engage in speculation or conjecture, the inclusion of the moral certainty language did not render the instructions unconstitutional."²⁸⁸

The Indiana Supreme Court compared the challenged language in *Winegeart* to that approved in *Victor* and found that the instruction in *Winegeart* contained

both significant differences from, and substantial similarities to, the instructions approved in *Victor*. The *Winegeart* instructions reference to "moral certainty" lacks the "abiding conviction" language noted in *Victor*. On the other hand, the "actual and substantial doubt" wording in the Nebraska instruction in *Victor* is similar to the "fair, actual, and logical doubt" phrase used in *Winegeart*'s trial. Moreover, the *Winegeart* jury was directed to base its decision on all the evidence; to disregard whim, guess, surmise, or mere possibility of guilt; and to consider the "hesitate to act" benchmark—all significant factors that the *Victor* court found significant.²⁸⁹

282. *Id.* at 895.

283. *Id.* at 895-96.

284. *Id.*

285. *Id.*

286. 511 U.S. 1 (1994).

287. *Winegeart*, 665 N.E.2d at 897 (citing *Victor*, 511 U.S. at 18).

288. *Id.*

289. *Id.* at 897 (citations omitted).

The Indiana Court of Appeals had rejected Winegeart's challenge to the "fair" and "actual" language used to define reasonable doubt but "found constitutional error because the prominently placed, first substantive sentence of the definition in the instruction equated reasonable doubt with moral certainty"²⁹⁰ In reversing the trial court, the appellate court followed the reasoning in *Cage v. Louisiana*²⁹¹ in finding that the use of the phrase "moral certainty" *may have* allowed the jury to define guilt based upon a degree of proof below that required by the Due Process Clause.²⁹² The Indiana Supreme Court acknowledged that the U.S. Supreme Court had changed the standard since *Cage* and that the appropriate inquiry "is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it."²⁹³ The Indiana Supreme Court accepted the reasoning in *Victor* and stated that

there is not a reasonable likelihood that the jurors who determined the defendant's guilt applied the instruction in a way that violated the Due Process Clause. Thus the giving of this instruction would not have constituted error even if a timely and proper objection would have been made at trial. When there is no error, *ipso facto*, there is no fundamental error.²⁹⁴

The court then described its displeasure with the continued use of this instruction and stated,

The instruction uses 300 words in eleven sentences to explain reasonable doubt. This is not atypical for the reasonable-doubt instructions, which often appear to be a conglomeration of phrases providing supplemental or alternative explanation of reasonable doubt . . . most reasonable doubt instructions commonly in use in our courts today have not been crafted for the purpose of most effectively explaining the concept of reasonable doubt to jurors but rather are used primarily because the language therein is considered adequate to avoid appellate reversal.

As courts utilize such longer, more intricate explanations of reasonable doubt, juries are likely to draw an overall impression which may transcend the literal meaning of the substance of the words.²⁹⁵

The court went on to examine other jurisdictions to see how they handled the instruction²⁹⁶ and examined research to determine whether juror understanding of

290. *Id.*

291. 498 U.S. 39 (1990) (per curiam).

292. *Winegeart*, 665 N.E.2d at 897.

293. *Id.* (citing *Victor*, 511 U.S. at 6).

294. *Id.* at 898

295. *Id.*

296. *Id.* at 898-99 (citing *United States v. Headspeth*, 852 F.2d 753, 755 (4th Cir. 1988); *Kansas v. Larkin*, 498 P.2d. 37, 39 (Kan. 1972)).

the concept of reasonable doubt was enhanced after hearing instructions.²⁹⁷ The court acknowledged that research suggests that jurors have less difficulty understanding instructions that “have been rewritten in light of psycholinguistic principles.”²⁹⁸ The court agreed that “the phrase reasonable doubt may suffice without further explication and that many attempts to provide effective additional explanation have fallen short. However, we are not convinced that the task is impossible”²⁹⁹

The court looked at the Indiana Pattern Jury Instruction 1.15 which states,

A reasonable doubt is a fair, actual and logical doubt that arises in your mind after an impartial consideration of all of the evidence and circumstances in the case. It should be a doubt based on reason and common sense and not a doubt based upon imagination or speculation.

To prove the defendant’s guilt of the elements of the crime charged beyond a reasonable doubt, the evidence must be such that it would convince you of the truth of it, to such a degree of certainty that you would feel safe to act upon such conviction, without hesitation in a matter of the highest concern and importance to you.³⁰⁰

The court expressed concern over the “hesitate to act” language believing that, although it would survive a constitutional challenge, “use of this analogy is neither required nor particularly desirable in explaining the concept of reasonable doubt.”³⁰¹

The court examined the Federal Judicial Center’s instruction which focuses on the “positive concept” of proof beyond a reasonable doubt.³⁰² That instruction states,

[T]he government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government’s proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law

297. *Id.* at 899 (citing Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 L. & SOC’Y REV. 153, 180 (1982); Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 J.L. REFORM 401, 414-16 (1990)).

298. *Id.* at 900.

299. *Id.*

300. *Id.* at 901 (quoting INDIANA PATTERN JURY INSTRUCTION NO. 1.15 (2d ed. 1991)).

301. *Id.* at 902.

302. *Id.*

does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you [should] find [him/her] guilty. If on the other hand, you think there is a real possibility that [he/she] is not guilty, you [should] give [him/her] the benefit of the doubt and find [him/her] not guilty.³⁰³

The Indiana Supreme Court then authorized and recommended the future use of this instruction, but acknowledged that because two of the members of the court preferred the Indiana Pattern Instruction, its use in future cases was not mandated.³⁰⁴ Justice DeBruler joined by Chief Justice Shepard wrote a concurring opinion in which they stated that they “[did] not believe that ‘firmly convinced’ equate[d] to ‘beyond a reasonable doubt.’ Both objectively and subjectively, ‘firmly convinced’ seem[ed] more similar to ‘clear and convincing’ than to ‘beyond a reasonable doubt,’” and therefore they [found] that the Indiana Pattern Jury Instruction is “more than adequate.”³⁰⁵

303. *Id.* (quoting FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTION NO. 21 (1987)).

304. *Id.*

305. *Id.* at 905.

