

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

JOEL M. SCHUMM*

Indiana's appellate courts tackled a variety of significant issues during the survey period October 1, 2005, to September 30, 2006. As in recent years, sentencing issues dominated the dockets of both courts, although issues on topics ranging from guilty pleas, confrontation rights, ineffective assistance of counsel, and indigency also got some play.¹ This Article seeks not only to summarize the significant opinions of the past year but also to offer some perspective on their likely future impact.

I. LEGISLATIVE DEVELOPMENTS

Following a national trend, the General Assembly toughened laws against sex offenders during the 2006 short session. For example, sexually violent predators who commit offenses after June 30, 2006, must be placed on lifetime parole after being released from prison.² The parolee must wear a GPS-monitoring device during this parole.³ Other legislation now prohibits sexually violent predators from volunteering on school property, at a public park, or at a youth program center in addition to prohibiting them from residing within 1000 feet of a school, public park, youth program, or within a mile of the victim's residence.⁴

Indiana distanced itself from most of the rest of the nation, however, in the area of self-defense. Although Indiana law did not previously require residents confronted with threats of bodily harm to retreat before using a gun or other deadly weapon, the self-defense statute was amended to make it clear that there is no such duty to retreat.⁵ As the author of the bill put it, the new law eliminates "any duty to retreat that a court might decide is necessary. We're only one of three states to have put it in statute to make sure that doesn't change."⁶ Although the amendment was to the self-defense statute, the arguments surrounding the legislation were framed in no small part by interest groups on both sides of the gun-control debate. The National Rifle Association pushed what it calls "Stand Your Ground" bills like this one in several other states.⁷ The Brady Campaign

* Clinical Associate Professor of Law, Indiana University School of Law—Indianapolis. B.A., 1992, Ohio Wesleyan University. M.A., 1994, University of Cincinnati. J.D., 1998, Indiana University School of Law—Indianapolis.

1. The appellate courts also addressed important issues of search and seizure, many of which are summarized in the survey of Indiana constitutional law. Jon Laramore & Jane A. Dall, *Indiana Constitutional Developments: Incrementalism and School Tuition*, 40 IND. L. REV. 749, 765-74 (2007).

2. IND. CODE § 35-50-6-1(e) (Supp. 2006).

3. *Id.* § 11-13-3-4(i).

4. *Id.* § 11-13-3-4(g).

5. IND. CODE § 35-41-3-2(a) (Supp. 2006).

6. Bill Ruthhart, *Lethal Force in Self-Defense is Legal, Indiana Law Says*, INDIANAPOLIS STAR, Mar. 22, 2006, at A1.

7. *Id.*

to Prevent Gun Violence, on the other hand, called such initiatives “shoot first” bills, which could encourage people to use deadly force instead of relying on trained police officers.⁸

II. SENTENCING: WHICH PUBLIC DEFENDER MUST BRING THE CLAIM

A variety of sentencing issues were addressed during the survey period. Although the appellate courts resolved important issues regarding when a sentence must be appealed, which sentences may be appealed after a guilty plea, and many of the effects of *Blakely v. Washington* on sentences, many questions remain for the courts and legislature to address in the coming months and years. This section discusses which public defender, under Indiana’s system that allocates some responsibilities to counties (direct appeals) and others to the State Public Defender (post-conviction), must bring sentencing challenges.

In 2004, the Indiana Supreme Court made clear in *Collins v. State*,⁹ that a sentence imposed pursuant to an open plea, i.e., one that gives the trial court some discretion, can—and must—be challenged on direct appeal, if it is challenged at all.

Little more than a year later, the Indiana Supreme Court acknowledged in *Kling v. State*¹⁰ that “*Collins* ha[d] given rise to questions concerning the relative roles and responsibilities of county appellate public defenders and the State Public Defender in handling belated appeals of sentences imposed following open pleas.”¹¹ Specifically, in the wake of *Collins* the State Public Defender pursued a policy of seeking to withdraw from all “open plea” post-conviction cases in which a direct appeal of the sentence had not been pursued.¹² The State Public Defender would simultaneously request the appointment of appellate counsel at county expense to investigate and pursue a belated direct appeal of the sentence.¹³ Trial courts appear to have responded differently to these requests. Many would grant the motion,¹⁴ while at least one judge would issue an order directing post-conviction counsel to confer with county appellate counsel to determine whether it was in the defendant’s best interest to delay pursuit of the post-conviction petition to allow for a belated appeal of the sentence.¹⁵

Although the State Public Defender’s role is limited to providing representation in post-conviction relief cases,¹⁶ her argument to the supreme court went even further, asserting that she had “no role or responsibility in respect to a person sentenced under an open plea” until the possible sentencing

8. *Id.*

9. 817 N.E.2d 230 (Ind. 2004).

10. 837 N.E.2d 502 (Ind. 2005).

11. *Id.* at 503.

12. *Id.* at 504-05.

13. *Id.* at 505.

14. *Id.*

15. *Id.* (discussing an order from Judge Jane Magnus-Stinson of Marion County).

16. *Id.* at 506 (citing IND. CODE § 33-40-1-2(a) (2004)).

claim was investigated and pursued by a county appellate public defender.¹⁷ This one-size-fits-all view involved no consultation with clients regarding the best course of action.

Recognizing the ethical obligation of attorneys to provide clients with sufficient information to allow their meaningful participation in decisions affecting the objectives of representation,¹⁸ the supreme court rejected the State Public Defender's view and provided clear instructions for how to address future "open plea" post-conviction cases. Specifically, deputy state public defenders must consult with clients regarding *both* potential post-conviction issues and potential sentencing issues that could be pursued by belated appeal.¹⁹ "[T]his process should involve some assessment of the relative chances for success in each proceeding, including some consideration [of] whether the client would likely be able to meet the burden of proving [a] lack of fault and diligence under P-C.R. 2."²⁰ The court continued by making clear that the State Public Defender must represent those defendants who, after consultation, decide to pursue a P-C.R. 2 belated appeal in the filing of the petition, any hearing on the petition, and an appeal if the petition is denied.²¹ If the petition is granted at the trial or appellate level, a county public defender then assumes the responsibility to perfect the belated appeal.²²

As a final point, the supreme court addressed in some detail whether a defendant who presses forward with a P-C.R. 1 petition with potential P-C.R. 2 sentencing claims "waiting in the wings" will be able to demonstrate diligence for seeking a belated appeal after the P-C.R. 1 petition is resolved.²³

The factual determination of diligence is one for the trial court or appropriate appellate court to make in the context of a particular case when P-C.R. 2 relief is sought. However, as a general matter, electing to proceed first on a P-C.R. 1 claim does not preclude a finding of diligence in a later P-C.R. 2 claim. Nor does the time spent by the State Public Defender investigating a claim count against the defendant when courts consider the issue of diligence under P-C.R. 2. Finally, with respect to P-C.R. 2 petitions filed by persons sentenced in "open pleas," we think it appropriate for courts to keep in mind that *Collins* resolved a conflict in earlier Court of Appeals' opinions regarding whether such a defendant could include a sentencing challenge in a P-C.R. 1 petition and some delay may be attributable to the prior uncertainty in the law rather than the defendant's lack of diligence.²⁴

17. *Id.* at 507.

18. *Id.* (citing IND. PROF. CONDUCT R. 1.4 cmt. 5).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 508.

23. *Id.*

24. *Id.* (internal citation omitted).

Although the court declined to adopt any sort of bright-line rule, its explanation suggests a fairly liberal approach to allowing belated appeals.

Several recent decisions have also toiled with the propriety of allowing a defendant a belated direct appeal if the notice of appeal was not filed within thirty days of sentencing.²⁵ These cases are governed by Section 1 of P-C.R. 2, which allows a belated appeal when “(a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.”²⁶

Cruite v. State,²⁷ presents the fairly typical case in which a defendant pleaded guilty, was not advised of his right to appeal his sentence, and later filed a petition for post-conviction relief, which was dismissed to allow for a direct appeal of the sentence at the request of the State Public Defender shortly after *Collins*.²⁸ Even though the defendant had waited nearly six years after his sentencing to file his petition for post-conviction relief, the court of appeals focused on the absence of advisements about the right to appeal and the period of delay *after* the petition for post-conviction relief was filed in holding that the trial court should have granted the request for a belated appeal.²⁹

In *Jackson v. State*,³⁰ the court of appeals reiterated the importance of trial courts holding hearings on motions for belated appeals. In addition to the rather broad language of P-C.R. 2, courts should consider factors such as “the defendant’s level of awareness of his procedural remedy, age, education, and familiarity with the legal system, as well as whether he was informed of his appellate rights and whether he committed an act or omission that contributed to the delay” in deciding whether a belated appeal should be permitted.³¹ Because the court could not “make the necessary factual determinations” in the absence of a hearing, the case was remanded to the trial court with instructions to hold a hearing on the petition.³² Judge Barnes dissented in *Jackson*, observing that “petitions for permission to file belated appeals must be closely scrutinized so as not to allow wholesale exceptions to the State’s interest in the finality of criminal proceedings” and noting that “Jackson did not contest the length of his sentence for a period of three years.”³³

The right to pursue a belated appeal has not been allowed in cases involving especially long periods of delay. For example, in *Beatty v. State*,³⁴ the court of appeals reversed a trial court’s authorization of a belated appeal for a 1982

25. See *infra* notes 27-49 and accompanying text.

26. IND. PROF. CONDUCT R. 2.

27. 853 N.E.2d 487 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 598 (Ind. 2006).

28. *Id.* at 489.

29. *Id.* at 490-91.

30. 853 N.E.2d 138, 140 (Ind. Ct. App. 2006).

31. *Id.*

32. *Id.* at 141.

33. *Id.* at 141-42 (Barnes, J., dissenting).

34. 854 N.E.2d 406 (Ind. Ct. App. 2006).

conviction for voluntary manslaughter.³⁵ The sentence was completed in 1986, and Beatty did not learn until 1996 that a direct appeal of that conviction had never been pursued as he had requested.³⁶ Even if the court were to excuse this decade-long delay, Beatty offered no explanation for the six-year lapse between 1996 and 2002, when he sought leave to pursue a belated appeal.³⁷ This six-year lapse led the court to conclude that Beatty had not established he was without fault or was diligent as required by P-C.R. 2.³⁸

It is not entirely clear what documents need to be included with a petition under P-C.R. 2. In *Baysinger v. State*,³⁹ the Attorney General faulted a defendant for including only “his own affidavit,” but the court of appeals noted that he had also included transcripts of his guilty plea and sentencing hearing as exhibits.⁴⁰ Reviewing the guilty plea transcript, the court of appeals observed that the trial court failed to inform Baysinger of his right to appeal his sentence but instead told him he was giving up “most” of his grounds for appeal.⁴¹ Baysinger’s affidavit further demonstrated that trial counsel had not told him of the right to appeal his sentence, which collectively led to the conclusion that the failure to file a timely notice of appeal was not due to Baysinger’s fault.⁴² Moreover, Baysinger made the requisite showing of diligence by filing his pro se petition with the trial court on March 1, 2005, after reading *Collins* just one month earlier.⁴³

Although Baysinger included several documents, it does not appear that all of these are required under P-C.R. 2. Specifically, many defendants may not have access to a transcript of their guilty plea or sentencing hearing. An affidavit that alleges the right to appeal was not explained by the trial court or trial counsel would seemingly be sufficient, absent some counter-evidence from the State to the contrary. In the alternative, defendants may feel compelled to request, wait for, and review transcripts before filing motions for belated appeals.

Finally, it is important to realize that the denial of a motion for belated appeal by the trial court or court of appeals is not necessarily the end of the matter. In *Townsend v. State*,⁴⁴ the court of appeals found that the trial court erred in granting a motion to file a belated notice of appeal.⁴⁵ Although the lapse of time was relatively brief—a pro se petition for belated appeal was filed and denied in May 2004 just five months after the December 2003 sentencing hearing and an amended petition was filed by counsel and granted in April 2005—the

35. *Id.* at 407.

36. *Id.* at 410.

37. *Id.*

38. *Id.*

39. 835 N.E.2d 223 (Ind. Ct. App. 2005), *trans. denied*, 860 N.E.2d 600 (Ind. 2006).

40. *Id.* at 225.

41. *Id.*

42. *Id.*

43. *Id.*

44. 843 N.E.2d 972 (Ind. Ct. App. 2006).

45. *Id.* at 973.

amended petition included no facts showing why Townsend was without fault or that he had been diligent in pursuing an appeal.⁴⁶ Townsend bore the burden of proving these things by a preponderance of the evidence, and the lack of any evidence demonstrated a failure to meet this burden.⁴⁷ Although the court of appeals simply dismissed the appeal,⁴⁸ the Indiana Supreme Court made clear in its order denying transfer that Townsend was not precluded “from filing another petition to file a belated notice of appeal that makes the demonstrations called for by [P-C.R. 2].”⁴⁹

III. SENTENCING: SORTING THROUGH THE *BLAKELY* AFTERMATH

Although Justice O’Connor initially referred to *Blakely v. Washington*,⁵⁰ as a No. 10 “earthquake,”⁵¹ its direct impact in Indiana has ultimately proven fairly muted. In *Smylie v. State*,⁵² the Indiana Supreme Court held that *Blakely* applies to Indiana’s sentencing scheme generally but does not impact the ability to impose consecutive sentences.⁵³ Moreover, Indiana courts have also repeatedly held that criminal history or the “fact of a prior conviction,” a common aggravating circumstance in many criminal cases, is exempted from the reach of *Blakely*.⁵⁴

The prior conviction exemption was stretched even further in *Ryle v. State*,⁵⁵ which held that juvenile adjudications fall within the exception.⁵⁶ Although the *Apprendi/Blakely* exception specifically mentions the right to a jury trial, the court noted that the underlying basis for allowing enhanced sentences is recidivism.⁵⁷ Juveniles in Indiana—and in most states—are not afforded the right to a jury trial in delinquency proceedings, but they are guaranteed several other procedural protections, including “the right to notice, the right to a speedy trial, the right to confront and cross-examine witnesses, the right to compulsory process to obtain witnesses and evidence, the right to counsel, the right against self-incrimination, and the right to require the State to prove all allegations beyond a reasonable doubt.”⁵⁸ Finally, the court found unacceptable the option of retrying juvenile cases in front of a jury or conducting jury trials “in which the jury would be asked to decide whether the earlier court found the juvenile guilty

46. *Id.* at 974-75.

47. *Id.*

48. *Id.* at 975.

49. *Townsend v. State*, 855 N.E.2d 1011 (Ind. 2006) (June 16, 2006 order denying transfer).

50. 542 U.S. 296 (2004).

51. *See* Lyle Denniston, *Justices Agree to Consider Sentencing*, N.Y. TIMES, Aug. 3, 2004, at A14.

52. 823 N.E.2d 679 (Ind.), *cert. denied*, 126 S. Ct. 545 (2005).

53. *Id.* at 686.

54. *See, e.g.*, *Morgan v. State*, 829 N.E.2d 12, 15 (Ind. 2005).

55. 842 N.E.2d 320 (Ind. 2005).

56. *Id.* at 321.

57. *Id.* at 322.

58. *Id.*

or not guilty.”⁵⁹

In *Young v. State*,⁶⁰ the supreme court applied *Blakely* to a case involving several robbery convictions in which the trial court had imposed slightly enhanced sentences of twelve years, to be served consecutively as to three of the eight counts.⁶¹ The court held it was improper to aggravate the sentences based on the purported admission of the defendant that he had gone on a “crime spree,” but imposed essentially the same sentence by “altering the sentences [itself] within the bounds of *Blakely* using [its] constitutional power to review and revise sentences.”⁶² Each count was reduced to the presumptive term but an additional count was ordered served consecutively instead of concurrently.⁶³

In *Neff v. State*,⁶⁴ the court offered some additional insight into the appropriate remedy when confronted with a sentencing error under *Blakely*. The State had requested remand to the trial court with instructions to allow the State an opportunity to prove the aggravators to a jury beyond a reasonable doubt.⁶⁵ Such a remand is not always required, however.

The court acknowledged its prior opinions “obviously do not reflect an adherence to a single determinative practice in concluding whether or not to remand a case with the option to prove additional aggravators. Rather, they indicate that the decision is the result of a complex calculus that must take account of numerous considerations.”⁶⁶ Remand is appropriate when an otherwise proper aggravator was deemed improper because the trial court did not follow the *Blakely* requirement of a jury, but the remand is not appropriate to prove new aggravators that had previously not been presented to the trial court.⁶⁷ When trial courts make judicial statements about certain facts, which are not proper aggravators, appellate reweighing of aggravators and mitigators is “more efficient” and appropriate.⁶⁸ Ultimately the court affirmed the court of appeals’ revision of Neff’s maximum sentence of eight years to six years because that court “carefully and methodically examined Neff’s criminal history, and weighed that history against the mitigating circumstances found by the trial court.”⁶⁹

Finally, it is important to put these cases in the appropriate context of Indiana

59. *Id.* at 323. Juvenile adjudicatory hearings result in a “true” or “not true” finding rather than a verdict of guilty or not guilty. Moreover, this language suggests a burdensome process, although many cases tried in the wake of *Blakely* in Indiana included a relatively simple second phase of the jury trial—similar to the habitual offender phase—in which the State sought to prove aggravators to the jury beyond a reasonable doubt.

60. 834 N.E.2d 1015 (Ind. 2005).

61. *Id.* at 1016.

62. *Id.* at 1017.

63. *Id.*

64. 849 N.E.2d 556 (Ind. 2006).

65. *Id.* at 559.

66. *Id.* at 560.

67. *Id.*

68. *Id.* at 562.

69. *Id.* at 563.

Appellate Rule 7(B). The supreme court continued its trend of developing principles that can be applied to future cases to ensure consistency in sentencing.⁷⁰ In *Hunter v. State*,⁷¹ the supreme court maintained its approach of avoiding *Blakely* challenges to enhanced sentences when it was possible to resolve the claim by a reduction to the presumptive term under the court's review and revise power under article VII, section 4 of the Indiana Constitution.⁷² More importantly, the court built on its body of sentencing jurisprudence beyond the principle that the maximum permissible sentence should be reserved for the worst offenses and worst offenders.⁷³ Specifically, in reviewing the maximum sentence for escape, the court noted that the nature of the escape offense involved not a premeditated plan or endangerment of life or property, but was simply a man who "walked away when he inadvertently found himself locked out of the jail," which is "surely the least noxious of escapes."⁷⁴ Moreover, the court found the defendant's record of misdemeanors and one felony—the burglary for which he was incarcerated—was "not a particularly significant aggravating circumstance" because "a prior conviction approaches an element of the offense of escape and therefore is of minimal weight."⁷⁵ Concluding that "neither the nature of the offense nor the character of the offender supports an enhanced sentence," the court reduced the sentence to the presumptive term of four years.⁷⁶

In the wake of *Blakely*, many defendants whose appeals had been previously decided, or who had pleaded guilty and never appealed their sentence, sought application of the requirement that aggravating circumstances other than prior convictions be proved to a jury beyond a reasonable doubt under *Apprendi* and *Blakely*. Each of these cases is grounded in a legitimate concern that many defendants will pursue belated appeals "on the basis of a rule that was not the law when they were convicted [and] could not have been anticipated when they were sentenced."⁷⁷ It is more tenuous, however, to suggest that retroactivity will have a "highly detrimental effect on the administration of justice" and "wreak 'havoc' on trial courts across the country."⁷⁸ Because many—if not most—defendants have a prior criminal history, *Blakely* will simply not be available to many of them. Moreover, defendants without a criminal history may not have received a term above the presumptive, which would not implicate *Blakely*. For those without a criminal history, *Blakely* would simply require, in cases in which a sentence above the presumptive term is sought, a relatively short

70. See generally Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 36 IND. L. REV. 1003, 1024-33 (2003).

71. 854 N.E.2d 342 (Ind. 2006).

72. *Id.* at 344.

73. *Id.* (citing *Buchanan v. State*, 767 N.E.2d 967, 973 (Ind. 2002)).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Boyle v. State*, 851 N.E.2d 996, 1006 (Ind. Ct. App. 2006).

78. *Baysinger v. State*, 854 N.E.2d 1211, 1214 (Ind. Ct. App.) (quoting *Boyle*, 851 N.E.2d at 1006), *trans. denied*, 860 N.E.2d 600 (Ind. 2006).

jury proceeding in which the State seeks to prove any aggravating circumstances beyond a reasonable doubt. Consecutive sentences are exempted from this requirement, which allows for the stacking of multiple presumptive terms.⁷⁹ Moreover, a trial court need not hold a new trial on these aggravators if the State agrees to a presumptive term.⁸⁰

It seems unlikely that the Indiana Supreme Court will affirm the court of appeals' view that "[u]nless and until the U.S. Supreme Court revises or clarifies its rules on retroactivity . . . we are bound to consider the merits of belated *Blakely* appeals where appropriate."⁸¹ In *Smylie*, the supreme court held that the *Blakely* rule would be applied "retroactively to all cases on direct review at the time *Blakely* was announced."⁸² This is quite different from applying the rule to crimes and sentencing hearings that pre-dated *Blakely* (or *Apprendi*) in which a defendant did not pursue a timely direct appeal. Indeed, some judges and at least one majority opinion of the court of appeals have concluded that *Blakely* claims cannot be raised in belated appeals in which a defendant was sentenced pre-*Blakely*.

In *Robbins v. State*,⁸³ the defendant was sentenced in 1999 and filed a belated notice of appeal in 2005. The court of appeals concluded that Robbins' "direct appeal was not pending at the time that *Blakely* was decided," as required to fall within the ambit of *Smylie*.⁸⁴ The court acknowledged that Robbins had "the option of pursuing a belated appeal at the time that the *Blakely* rule was announced" but that his case had become final for purposes of retroactivity when he failed to pursue a timely direct appeal.⁸⁵

Similarly, Judge Vaidik recently explained in a separate concurring opinion in *Baysinger* that her colleagues' approach of allowing defendants the benefit of *Blakely* as part of a belated appeal would transform the guarantee that new rules for the conduct of criminal prosecutions be available to cases "pending on direct review or not yet final"⁸⁶ from *Smylie* and *Griffith v. Kentucky*⁸⁷ into a guarantee "that leaves any case that was never timely subjected to direct review perpetually 'unfinal' for the purposes of retroactivity until such time as the defendant seeks a belated appeal."⁸⁸ The issue is squarely presented in *Gutermuth v. State*,⁸⁹ which should be decided by the Indiana Supreme Court in the coming months.

79. See, e.g., *Young v. State*, 834 N.E.2d 1015 (Ind. 2005).

80. *Smylie v. State*, 823 N.E.2d 679, 687 (Ind.), cert. denied, 126 S. Ct. 545 (2005).

81. *Boyle*, 851 N.E.2d at 1006.

82. *Smylie*, 823 N.E.2d at 690-91.

83. 839 N.E.2d 1196 (Ind. Ct. App. 2005).

84. *Id.* at 1199.

85. *Id.*; see also *Boyle*, 851 N.E.2d at 1008 (Friedlander, J., dissenting).

86. *Baysinger v. State*, 854 N.E.2d 1211, 1218 (Ind. Ct. App.) (Vaidik, J., concurring in result), trans. denied, 860 N.E.2d 600 (Ind. 2006).

87. 479 U.S. 314 (1987).

88. *Baysinger*, 854 N.E.2d at 1218 (Vaidik, J., concurring in result).

89. 848 N.E.2d 716 (Ind. Ct. App.), vacated on transfer, 860 N.E.2d 588 (Ind. 2006).

IV. CHALLENGING A SENTENCE AFTER A GUILTY PLEA

It is axiomatic that plea agreements are essential to the functioning of the criminal justice system, resolving the majority of cases in far less time and expense than a trial. The Indiana Supreme Court's opinion in *Childress v. State*⁹⁰ resolved some significant confusion regarding the ability of defendants to challenge a sentence imposed after they enter into a guilty plea.

There are many types of plea agreements but little confusion about the effects of those at the polar extremes. A plea agreement that calls for a "specific term of years" affords no discretion to the trial court, and the sentence imposed has always been unassailable on appeal.⁹¹ At the other extreme, an open plea to all charges—with or without a plea agreement—gives unlimited discretion to the trial court, and the resulting sentence has been appropriately challenged on appeal pursuant to the 1970 constitutional amendment that granted Indiana's appellate courts the power to review and revise sentences.⁹² In the vast middle, however, are plea agreements that set a cap on the sentence that may be imposed or establish a sentencing range. The trial court retains some discretion, albeit limited, in imposing sentence.

In a series of opinions beginning with *Gist v. State*,⁹³ the court of appeals took a restrictive view of a defendant's ability to challenge a sentence imposed pursuant to a plea agreement providing for a sentencing cap or sentencing range.⁹⁴ *Gist* held, under a plea to a ten-year cap, the defendant "necessarily agreed that a ten-year sentence was appropriate" and therefore unassailable under Appellate Rule 7(B).⁹⁵ Several similar decisions followed.⁹⁶

In *Childress*, the Indiana Supreme Court disapproved all of these opinions. The court largely adhered to its decision in *Tumulty v. State*,⁹⁷ which held that "a defendant is entitled to contest the merits of a trial court's sentencing discretion where the court has exercised sentencing discretion, as it did here."⁹⁸ Rejecting the line of court of appeals' opinions holding otherwise in the context of plea agreement providing for a sentencing cap or sentencing range, the *Childress* court concluded that "to say that a defendant has acquiesced in his or her sentence or has implicitly agreed that the sentence is appropriate undermines in our view the scope of authority set forth in Article VII, Section 4 of the Indiana Constitution."⁹⁹ Such sentences may therefore be appealed, just as any sentence imposed after a trial or open plea. In a concurring opinion, however, Justice

90. 848 N.E.2d 1073 (Ind. 2006).

91. *Id.* at 1079 n.4.

92. *Id.* at 1079 (citing IND. CONST. art. VII, § 4).

93. 804 N.E.2d 1204 (Ind. Ct. App. 2004).

94. *Id.* at 1206.

95. *Id.*

96. See *Childress*, 848 N.E.2d at 1077 n.2 (collecting cases).

97. 666 N.E.2d 394 (Ind. 1996).

98. *Id.* at 396.

99. *Childress*, 848 N.E.2d at 1080.

Dickson expressed the view that such plea agreements “should usually be understood as strong and persuasive evidence of sentence reasonableness and appropriateness,” and appellate revision will occur “only in the most rare, exceptional cases.”¹⁰⁰

In some respects, the Indiana Supreme Court’s opinion in *Childress* is unremarkable. The court did little more than adhere to *Tumulty* in holding that defendants who plead guilty may appeal the trial court’s exercise of discretion at sentencing. Disapproving nine recent cases from the court of appeals, which had held defendants may not challenge the appropriateness of such sentences, however, is quite remarkable.

Although the supreme court’s opinion in *Childress* did little more than apply longstanding precedent, it has been greeted with something short of enthusiastic support by some players in the criminal justice system, especially trial judges.¹⁰¹ One judge is quoted as calling the decision “offensive” because defendants “essentially know what they’re going to get.”¹⁰² Another judge wondered why there were “plea bargains” if cases are not truly resolved by the agreement but instead continue with a sentencing appeal.¹⁰³

It is too early to know what effect *Childress* may have on Indiana trial and appellate courts as well as the broader criminal justice system. Many trial judges were appointing appellate counsel when requested in cases with a range or capped plea agreement—even in the face of the court of appeals’ decisions that suggested such appeals were not proper or severely restricted to review only for an abuse of discretion in the finding of the aggravators and mitigators.¹⁰⁴ It is not clear, however, whether defendants were always being properly advised of their right to appeal by trial courts or defense counsel in all (or even most) of the hundreds of criminal cases resolved each week around the State. If there were no such advisements, the clarification brought by *Childress* could lead to a significant increase in the number of sentencing appeals brought to the court of appeals each year.

By bringing clarity to this issue, *Childress* could instead have the effect of reducing the number of sentencing appeals—IF (yes, this is a big if) prosecutors and defendants begin to enter into more set plea agreements, i.e., a plea that affords the trial court no discretion at sentencing. This is easier said than done, as a prosecutor’s view of the appropriate sentence (often influenced by consultation with the victim(s)) does not always match with the defense view. Rather than compromising and negotiating, plea agreements with caps, ranges, or open terms allow the parties to pass the buck on to the trial court. After *Childress*, however, it is now clear that the trial court does not necessarily have

100. *Id.* at 1081 (Dickson, J., concurring).

101. Dionne Waugh, *Court Decisions Ignite Plea Appeals*, FORT WAYNE JOURNAL GAZETTE, Nov. 19, 2006, at 1C.

102. *Id.* (quoting Allen County Judge John F. Surbeck).

103. *Id.*

104. See, e.g., *Reyes v. State*, 828 N.E.2d 420, 426 (Ind. Ct. App. 2005), *aff’d in part, vacated in part*, 848 N.E.2d 1081 (Ind. 2006).

the last word.

Although not addressed in *Childress*, the parties would seemingly be free to negotiate a plea agreement that includes an express term that the sentence imposed by the trial court is the appropriate one and cannot be appealed. Indeed, some prosecutors have already responded to *Childress* by including a provision in plea agreements stating that defendants are forfeiting their right to appeal the sentence.¹⁰⁵ Although defendants have a constitutional right to appeal their sentence, this right—like almost all others in the criminal realm—could seemingly be waived if the waiver is knowing, intelligent, and voluntary.¹⁰⁶ An express plea term, coupled with a short colloquy as part of the acceptance of the guilty plea, would accomplish this. Forfeiting the right to appeal a sentence, however, is unlikely to come without a cost to prosecutors. If a plea agreement is truly a “bargain,” defendants may well agree to such terms. Alternatively, if prosecutors require a plea to the lead or only charge, some defendants may decide not to sign the agreement and instead plead guilty without an agreement or go to trial. In either case, the right to appeal will be preserved. Therefore, an already overburdened trial court system could face even more docket pressure. Ideally, one can hope that *Childress* leads to more discussion between parties, more negotiation, and more set pleas, which bring the sort of predictability most likely to satisfy all concerned.

Whether *Childress* motivates prosecutors and defense lawyers to resolve more cases with set pleas will determine the impact on the caseload of the Indiana Court of Appeals.¹⁰⁷ Every sentence imposed after a guilty plea that affords the trial court any discretion may be appealed, and indigent defendants, especially those sentenced to prison, have little incentive not to pursue an appeal that costs them nothing and seemingly presents no risk.¹⁰⁸ Indeed, as *Childress* and its companion case highlight, defendants who receive any sentence above the minimum under the plea agreement sometimes choose to appeal.

An increase in appeals, however, need not crush the docket of the court of appeals. Sentencing appeals, when the trial court offers a thoughtful sentencing statement that carefully articulates and balances the relevant sentencing factors, are often resolved in relatively few pages by the court of appeals, which gives considerable deference to the thoughtful judgment of trial judges at sentencing. Nevertheless, allowing such appeals whenever discretion is exercised provides an important check on this discretion and is essential to furthering the important goals of consistency and fairness in sentencing.

Two recent cases highlight just how extensive appellate sentence review in Indiana has become. In *Hole v. State*,¹⁰⁹ the Indiana Supreme Court rejected a defendant’s challenge to his ten-year sentence for B felony battery that was

105. Waugh, *supra* note 101.

106. See, e.g., Leone v. State, 797 N.E.2d 743, 750 n.5 (Ind. 2003).

107. See generally Michael W. Hoskins, *Court of Appeals Eyes Expansion; New Staff, Judges Needed to Keep up With Caseload*, IND. LAW., Dec. 27, 2006, at 17.

108. The State may not appeal a sentence. IND. R. APP. P. 7(A).

109. 851 N.E.2d 302 (Ind. 2006).

imposed pursuant to a plea agreement for a “ten (10) year sentence. [P]lacement open to the court.”¹¹⁰ Because Hole received “the precise sentence for which he bargained,” his sentence could not be challenged under Appellate Rule 7(B).¹¹¹ The court noted that Hole did not challenge “the location of his sentence” (a community corrections program or the Department of Correction), but that “this discretionary placement”¹¹² would be subject to 7(B) review had it been raised.¹¹³

In *Davis v. State*,¹¹⁴ the court of appeals addressed a challenge to a six-year sentence (four years at the Department of Correction and two years at Community Corrections) for a defendant who had seriously injured two people while driving drunk. The court emphasized the significant efforts by Davis to “improve herself,” including her regular attendance at Alcoholics Anonymous meetings, working to provide for her children, her desire to pay restitution, and her acceptance of responsibility by pleading guilty and apologizing to the victims.¹¹⁵ Based on these weighty mitigating facts and only one valid aggravator to offset it, the court reduced the sentence to “four years with the time remaining on her sentence to be served through Community Corrections so that she may continue to work to provide for her children and to pay restitution to the victims.”¹¹⁶

Although cost is often difficult to measure in the criminal justice system—and arguably should not matter when fundamental rights are at stake—some of the criticism of *Childress* has focused on the apparent opening of the floodgates of appeals and the attendant costs. The transcripts are much shorter (and cheaper), and attorneys’ costs are lower in appeals of a sentence only.¹¹⁷ If one takes a broad view of cost, an appellate reduction of a sentence by even a few years in just ten percent of appealed cases would save the State hundreds of thousands of dollars as it costs more than \$21,500 annually to incarcerate a defendant in the Department of Correction.¹¹⁸ Assuming many of these defendants get jobs and pay taxes (as opposed to committing more crimes and ending up back in prison), the savings are even greater.

V. SENTENCING: SORTING THROUGH THE 2005 STATUTORY AMENDMENTS

As summarized in last year’s survey, in response to *Blakely* and *Smylie*, the General Assembly amended Indiana’s sentencing statutes to replace the

110. *Id.* at 303.

111. *Id.* at 304.

112. *Id.*

113. *Id.* at 304 n.4.

114. 851 N.E.2d 1264 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 594 (Ind. 2006).

115. *Id.* at 1268.

116. *Id.* at 1269.

117. Waugh, *supra* note 101 (citing a cost of approximately \$125 for a guilty plea transcript compared to \$1,000 for a day-long jury trial).

118. Indiana Department of Correction, Frequently Asked Questions, <http://www.in.gov/indcorrection/facts.htm> (last visited Feb. 12, 2007).

“presumptive” sentence with a range and “advisory” term.¹¹⁹ The legislation also added language that has since created considerable confusion: “A court may impose any sentence that is: (1) authorized by statute; and (2) permissible under the Constitution of the State of Indiana; regardless of the presence or absence of aggravating circumstances or mitigating circumstances.”¹²⁰ Another unchanged and longstanding provision requires the court to make a statement of its “reasons for selecting the sentence that it imposes if the court finds aggravating circumstances or mitigating circumstances.”¹²¹ Finally, the 2005 amendments included a significant revision of the list of aggravating circumstances.¹²²

*Anglemyer v. State*¹²³ was the first decision to wrestle with this seemingly contradictory language. It held that trial courts are “no longer required to justify any deviation from the presumptive sentence” and that any “error in the trial court’s identification or weighing of [aggravating or mitigating circumstances] is not an issue that now can be raised on appeal.”¹²⁴ Transfer was granted in June 2006, oral argument was held in September, and a decision is pending from the Indiana Supreme Court. While waiting for that decision, the court of appeals continued to address the effect of the 2005 amendments in a number of cases. One panel recently framed the issues posed as a

new set of questions as to the respective roles of trial and appellate courts in sentencing, the necessity of a trial court continuing to issue sentencing statements, and appellate review of a trial court’s finding of aggravators and mitigators under a scheme where the trial court does not have to find aggravators or mitigators to impose any sentence within the statutory range for an offense, including the maximum sentence. The continuing validity or relevance of well-established case law developed under the old “presumptive” sentencing scheme is unclear.¹²⁵

As highlighted by two August opinions, disagreement has resulted and is likely to continue until these issues are resolved by the supreme court.

In *Fuller v. State*,¹²⁶ the court gave a literal reading to the final clause in section 7.1(d).

Accordingly, a sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances. Rather, the

119. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 39 IND. L. REV. 893, 906 (2006). Also, for a detailed and thoughtful summary of the legislation, see Michael R. Limrick, *Senate Bill 96: How General Assembly Returned Problem of Uniform Sentencing to Indiana’s Appellate Courts*, RES GESTAE, Jan./Feb. 2006, at 18.

120. IND. CODE § 35-38-1-7.1(d) (Supp. 2005).

121. *Id.* § 35-38-1-3(3) (2004).

122. *Id.* § 35-38-1-7.1(a).

123. 845 N.E.2d 1087 (Ind. Ct. App.), *vacated*, 855 N.E.2d 1012 (Ind. 2006). This author represented Mr. Anglemyer in transfer proceedings before the Indiana Supreme Court.

124. *Id.* at 1090.

125. *Gibson v. State*, 856 N.E.2d 142, 146 (Ind. Ct. App. 2006).

126. 852 N.E.2d 22 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 594 (Ind. 2006).

court may impose any sentence within the sentencing range without regard to the presence or absence of such circumstances. “Because the new sentencing statute provides a range with an advisory sentence rather than a fixed or presumptive sentence, a lawful sentence would be one that falls within the sentencing range for the particular offense.”¹²⁷

Two days later, in *Davis v. State*,¹²⁸ a different panel took a different view of the same statutory amendment:

The only purpose of the amendment was to avoid problems with *Blakely v. Washington*, which held that aggravating factors other than criminal history that are not admitted by the defendant must be proven to a jury beyond a reasonable doubt, and *Smylie v. State*, which held that Indiana’s sentencing scheme violated the rule announced in *Blakely*. In our view, this amendment does not alter the fact that one sentence is advised by the General Assembly, and that advisory sentence should therefore be the starting point for a court’s consideration of the sentence that is appropriate for the crime committed.¹²⁹

These two decisions cannot be reconciled, and the divergent approaches may make a significant difference in the resolution of sentencing appeals. Under *Fuller* (as in *Anglemyer*), the trial court’s finding of aggravating and mitigating circumstances is seemingly unassailable on appeal, while the decades of precedent regarding the finding of aggravators and mitigators remains intact under *Davis*. Although both approaches still allow for a challenge of the appropriateness of the sentence under Appellate Rule 7(B), the *Davis* approach is considerably kinder to defendants by placing a premium on the new advisory sentence as the starting point for appellate review, if not trial court sentencing as well.

The Indiana Supreme Court will ultimately resolve whether sentencing statements are required and the proper scope of appellate review in *Anglemyer*. There is much more to appellate review of sentences than whether the new advisory term is the starting point in reviewing a sentence. The requirement of a reasoned sentencing statement, a staple of the Indiana criminal justice system, should continue for several reasons.

A. *Three Decades of Decisional Law*

The iterations of the pre-2005 statute have always set a “fixed” or “presumptive” term and required “if the court finds aggravating circumstances or mitigating circumstances, a statement of the court’s reasons for selecting the sentence that it imposes,”¹³⁰ and provided that trial courts “may” consider

127. *Id.* at 26 (quoting *Samaniego-Hernandez v. State*, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005)).

128. 851 N.E.2d 1264 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 594 (Ind. 2006).

129. *Id.* at 1268 n.4 (citations omitted).

130. IND. CODE § 35-38-1-3(3) (2004).

delineated aggravating or mitigating circumstances.¹³¹ Despite this seemingly discretionary language, however, the Indiana Supreme Court has long interpreted these statutes to require that “when a judge increases or decreases the basic sentence, suspends the sentence, or imposes consecutive terms of imprisonment, the record should disclose what factors were considered by the judge to be mitigating or aggravating circumstances.”¹³² More recent cases focus on three requirements for sentencing statements: “a judge must identify all significant aggravating and mitigating factors, explain why such factors were found, and balance the factors in arriving at the sentence.”¹³³ The important purpose behind these requirements “is to guard ‘against arbitrary sentences and provid[e] an adequate basis for appellate review.’”¹³⁴

Hundreds of challenges have been grounded in procedural sentencing errors over the years, and many have proved successful. On the mitigating side, for example, Indiana courts have explained that “a defendant who pleads guilty deserves to have mitigating weight extended to the guilty plea in return.”¹³⁵ A lack of criminal history or longstanding mental illness—when ignored or not credited by trial courts—have similarly led to appellate reversals.¹³⁶ As to aggravators, the “presumptive sentence already assumes the underlying elements and that it is therefore improper to enhance a sentence based on an act for which the defendant is already presumed to be punished.”¹³⁷ Other examples of improper aggravating circumstances include a defendant’s criminal history if comprised of only unrelated misdemeanor convictions,¹³⁸ and victim impact unless it is of a destructive nature not normally associated with the offense.¹³⁹ The sweeping interpretation of the 2005 amendments in *Anglemyer* and *Fuller*—eliminating any need for sentencing statements or the articulation of aggravating and mitigating circumstances—would seemingly overrule all of these cases and principles.

B. Statutory Construction

Anglemyer’s view that the 2005 amendments eliminated the requirement of sentencing statements and explicit findings of aggravating or mitigating circumstances is inconsistent with the language of those amendments. Statutes pertaining to the same subject should be harmonized to produce a logical

131. *Id.* § 35-38-1-7.1(b)-(c).

132. *Gardner v. State*, 388 N.E.2d 513, 517 (Ind. 1979).

133. *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006).

134. *Id.* (quoting *Morgan v. State*, 675 N.E.2d 1067, 1074 (Ind. 1996)).

135. *Francis v. State*, 817 N.E.2d 235, 238 (Ind. 2004) (revising a fifty-year sentence for child molesting to thirty years).

136. *See, e.g.*, *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999) (reversing where the defendant lacked criminal history); *Archer v. State*, 689 N.E.2d 678, 685 (Ind. 1997) (reversing where the defendant had a mental illness).

137. *West v. State*, 755 N.E.2d 173, 186 (Ind. 2001).

138. *Wooley v. State*, 716 N.E.2d 919, 929 (Ind. 1999).

139. *Bacher v. State*, 686 N.E.2d 791, 801 (Ind. 1997).

result.¹⁴⁰ Similarly, “[t]he legislature is presumed to have intended the language used in the statute to be applied logically and not to bring about an unjust or absurd result.”¹⁴¹ Finally, if there is any ambiguity in a penal statute, the amendments must be construed strictly against the State.¹⁴²

Although the *Anglemyer* panel noted an apparent conflict between two statutory provisions, it made no attempt to harmonize those provisions. Instead, the court of appeals grounded its decision largely in the amended language that permits trial courts to impose any sentence that is statutorily and constitutionally permissible “regardless of the presence or absence of aggravating circumstances or mitigating circumstances.”¹⁴³ It noted a “conflict” between this provision and the long-standing provision that trial courts must include “a statement of the court’s reasons for selecting the sentence that is imposed” if it finds aggravating or mitigating circumstances.¹⁴⁴ Nevertheless, the court concluded that the amended statute renders “any error in such a sentencing statement moot.”¹⁴⁵

These statutes can be harmonized, however, by requiring a sentencing statement under section 1-3(3), which does not conflict with section 7.1(d) because that provision specifically requires the sentence to be permissible under statutory and constitutional law. Section 1-3(3) requires a sentencing statement, as does Article VII of the Indiana Constitution, as explained in Part C below. It would be illogical, if not absurd, for the legislature to have retained—and even amended—a lengthy list of aggravating and mitigating circumstances within the statute if it did not intend for trial courts to rely on them in fashioning a sentence.¹⁴⁶ Finally, if there is any doubt about the proper interpretation of these penal amendments, they must be resolved in favor of the defendant—and defendants benefit considerably from the requirement of a sentencing statement and articulation of aggravating and mitigating circumstances.

This view of the statutory language is further bolstered by the “main objective” in construing a statute: “to determine, give effect to, and implement the intent of the legislature.”¹⁴⁷ There is little doubt that these amendments were intended to do nothing more than eliminate the requirement of jury trials for aggravating circumstances in the wake of *Blakely* and *Smylie*.¹⁴⁸ As the amendment’s chief sponsor, Senator Long, explained, “Indiana sentencing procedures [could] be changed to avoid the need for any *Blakely* juries without also working major changes in the substantive pre-*Blakely* sentencing law.”¹⁴⁹

140. *Saintignon v. State*, 749 N.E.2d 1134, 1137 (Ind. 2001).

141. *Sales v. State*, 723 N.E.2d 416, 420 (Ind. 2000).

142. *State v. Downey*, 770 N.E.2d 794, 797 (Ind. 2002).

143. *Anglemyer v. State*, 845 N.E.2d 1087, 1090 (Ind. Ct. App.) (quoting IND. CODE § 35-38-1-7.1(d) (2004)), *vacated*, 855 N.E.2d 1012 (Ind. 2006).

144. *Id.* (quoting IND. CODE § 35-38-1-3(3) (2004)).

145. *Id.*

146. *See supra* note 122.

147. *In re K.G.*, 808 N.E.2d 631, 637 (Ind. 2004).

148. *Anglemyer*, 845 N.E.2d at 1090.

149. *Limrick*, *supra* note 119, at 22.

Senator Long, and presumably the scores of other legislators who quickly and unanimously passed the legislation, realized that this Court was “committed to uniform sentencing” and they could be “confident that, under the amendment [Long] proposed, appellate review would continue to prevent wide discrepancies in sentences from one court to another.”¹⁵⁰ The 2005 amendments rectified the *Blakely* concerns, but there is no suggestion that they were intended to do anything more, much less any evidence of an intent to fundamentally alter the time-tested statutes and procedures as the court of appeals held in *Anglemyer*.

C. Indiana Constitution

The 2005 amendments also included the requirement that sentences must be “permissible under the Constitution of the State of Indiana”¹⁵¹ *Anglemyer* barely mentions this language and did not attempt to square its holding with the decades of precedent interpreting the Indiana Constitution.

Article VII, sections 4 and 6 of the Indiana Constitution were proposed in the 1960s and took effect as constitutional amendments approved by the voters in 1970.¹⁵² Specific language was added to provide the power to review and revise sentences—a power that was previously not included. “The Commission’s comments demonstrate that the intent of the Amendment was to expand the role of appellate sentence review, not restrict it.”¹⁵³ The purpose was not only to provide for sentence review but for that review to mimic the substantive, nearly *de novo*, review that was occurring in England.¹⁵⁴

The laudable goal of the power to review and revise sentences was well stated in *Serino v. State*: “[A] respectable legal system attempts to impose similar sentences on perpetrators committing the same acts who have the same backgrounds.”¹⁵⁵ To that end, sentencing principles have been developed and applied over the years to address disparities.¹⁵⁶ For example, defendants who plead guilty in England may not only challenge their sentence on appeal, “the Court of Appeal has formulated the principle that . . . an offender’s remorse, expressed in his plea of guilty, may properly be recognized as a mitigating factor.”¹⁵⁷ The Indiana Supreme Court has taken a similar view, recognizing that an early guilty plea saves the victims from going through a full-blown trial and conserves limited prosecutorial and judicial resources; therefore, it is a mitigating

150. *Id.* at 23.

151. IND. CODE § 35-37-1-7.1(d)(2) (2004).

152. *See Walker v. State*, 747 N.E.2d 536, 537 (Ind. 2001).

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

154. *See, e.g., Walker*, 747 N.E.2d at 537-38.

155. 798 N.E.2d 852, 854 (Ind. 2003).

156. At the time of the 1970 Amendment, the English system included “a complex and coherent body of sentencing principles and policy,” which had been developed to realize the goal of eradicating disparities in the sentences imposed by trial courts. D. A. Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193, 194, 197 (1968).

157. *Id.* at 201.

circumstance entitled to significant weight.¹⁵⁸ Other principles have become ingrained in appellate review, such as maximum sentences should generally be reserved for the worst offenses and worst offenders.¹⁵⁹ The goal of consistency in sentencing and the application of these principles would be difficult, if not impossible, without a sentencing statement from trial courts.

Although Indiana courts have sometimes addressed separately the appropriateness of a sentence under Rule 7(B) from a claim that the trial court's sentencing order failed to include significant mitigating circumstances or included improper aggravating ones,¹⁶⁰ the appellate review and revise power is intimately tied to what occurs in the trial court. The constitutional power places the "central focus on the role of the trial judge, while reserving for the appellate court the chance to review the matter in a climate more distant from local clamor."¹⁶¹ Put another way, appellate sentence review requires a re-examination of all valid aggravating and mitigating circumstances in light of the nature of the offense and character of the offender.¹⁶²

In short, the constitutional review and revise power can only be exercised when trial courts make reasoned sentencing statements that articulate aggravating and mitigating circumstances. In the absence of such statements, no deference may be afforded to trial courts, and it will be exceedingly difficult for appellate advocates to craft sentencing arguments and for appellate courts to engage in meaningful appellate sentence review.

D. Supervisory Power

In addition to the statutory construction and constitutional arguments discussed above, continuing to require trial courts to articulate and weigh aggravating and mitigating circumstances as part of a well-reasoned sentencing statement would be a prudent use of the Indiana Supreme Court's supervisory power over trial courts. Article VII, Section 4 grants the court the power of "supervision of the exercise of jurisdiction by the other courts of the State,"¹⁶³ which has been applied in a variety of contexts in recent years.¹⁶⁴

The court of appeals' opinion in *Anglemyer* urged trial courts to continue making sentencing statements for the laudable reason that "a detailed sentencing statement provides us with a great deal of insight regarding the nature of the offense and the character of the offender from the trial court judge who crafted

158. *Francis v. State*, 817 N.E.2d 235, 238 (Ind. 2004).

159. *See, e.g., Buchanan v. State*, 699 N.E.2d 655, 657 (Ind. 1998).

160. *See, e.g., Noojin v. State*, 730 N.E.2d 672, 678-79 (Ind. 2000) (applying predecessor rule).

161. *Serino v. State*, 798 N.E.2d 852, 856-57 (Ind. 2003).

162. *See Carter v. State*, 711 N.E.2d 835, 841 (Ind. 1999) (applying predecessor rule).

163. IND. CONST. art. VII, § 4.

164. *See, e.g., Williams v. State*, 690 N.E.2d 162, 169-70 (Ind. 1997) (courtroom security procedures); *Winegeart v. State*, 665 N.E.2d 893, 902 (Ind. 1996) (reasonable doubt instruction).

a particular sentence.”¹⁶⁵ If sentencing statements are optional, some trial judges will make them and others will not; disparity in sentences will result. Such disparity in trial courts will make appellate review “difficult to say the least.”¹⁶⁶

Other practical considerations are worthy of mention as well. As discussed at the oral argument in *Anglemyer*, public confidence and understanding in the criminal justice system are shaken when there are wide disparities in sentences—and worse yet if a defendant with an especially bad criminal record gets a shorter sentence than one who commits the same offense and has no criminal history. The number of appeals will likely skyrocket if trial courts can say anything (or nothing) when imposing a sentence. Defendants are likely to be disgruntled with a cursory sentencing hearing or the imposition of a lengthy prison term with little, or no, explanation from the trial judge. Victims are likely to have a similar reaction to a short sentence imposed without explanation. One objective of appellate sentence review is to

negate the defendant’s perception of the sentencing judge as one who possesses unbridled power over his future. . . . The attitude of the defendant in this regard is not unimportant as a defendant who has an opportunity to air his grievances concerning his punishment is more likely to approach rehabilitation with a positive attitude than one who is convinced that one person wronged him in passing judgment¹⁶⁷

Hundreds of defendants have appealed their sentences in recent years even though trial courts generally explain their reasons in great detail. One can only imagine how many more will appeal their sentences in the coming years if trial courts say nothing in imposing a maximum or near-maximum sentence.

In sum, sentencing has worked well in Indiana for the past three decades in no small part because of the heavy lifting expected of trial courts. When trial courts carefully consider and address the aggravating and mitigating circumstances delineated in the sentencing statutes, many sentences are not appealed and appellate review of those that are appealed can place the “central focus on the role of the trial judge, while reserving for the appellate court the chance to review the matter in a climate more distant from local clamor.”¹⁶⁸ When the trial court says nothing, though, the central focus must necessarily shift to the appellate court, which no longer is *reviewing* a sentence but in effect

165. *Anglemyer v. State*, 845 N.E.2d 1087, 1091 (Ind. Ct. App.), *vacated*, 855 N.E.2d 1012 (Ind. 2006).

166. *Id.* A short step from *Anglemyer*’s holding that trial courts need not find aggravating or mitigating circumstances at sentencing is the abolition of any requirement of an opportunity for defendants (or the State) to submit and argue aggravating or mitigating circumstances. An objection to defendant’s desire to use evidence of mental illness or to make an argument about victim impact may well be sustained; the evidence is arguably not relevant if trial courts may make sentencing decisions without any regard to aggravating and mitigating circumstances.

167. J. Eric Smithburn, *Sentencing in Indiana: Appellate Review of the Trial Court’s Discretion*, 12 VAL. U. L. REV. 221, 223-24 (1978).

168. *Serino v. State*, 798 N.E.2d 852, 856-57 (Ind. 2003).

issuing the sentencing statement that would have ideally come from the trial court.

VI. DEVELOPMENTS OUTSIDE THE SENTENCING REALM

In addition to sentencing, scores of published opinions addressed other issues relating to Indiana criminal law and procedure during the survey period. This brief survey seeks to explore those issues that have had or are likely to have a significant impact on criminal cases—from beginning to end.

A. *Guilty Pleas*

Although guilty pleas are essential to the functioning of overburdened trial courts in particular, they also severely winnow the number of cases appealed. As a general rule, criminal defendants cannot appeal a conviction if they plead guilty.¹⁶⁹ However, two cases from the survey period highlight instances in which defendants can successfully challenge guilty pleas.

Indiana Code section 35-35-1-4(b) governs motions to withdraw guilty pleas made before sentencing.¹⁷⁰ The Indiana Supreme Court has explained that these motions fall into three categories.¹⁷¹ First, trial courts must deny a motion to withdraw a plea if it would “substantially prejudice[]” the State.¹⁷² Second, “[t]he court must allow a defendant to withdraw a guilty plea if ‘necessary to correct a manifest injustice.’”¹⁷³ Finally, in all other cases, the trial court may grant a motion to withdraw a plea “for any fair and just reason.”¹⁷⁴ Although the trial court’s decision, at least in the last category, is reviewed for an abuse of discretion,¹⁷⁵ the supreme court has set forth a general rule that the withdrawal

169. *Tumulty v. State*, 666 N.E.2d 394, 395 (Ind. 1996).

170. Indiana Code section 35-35-1-4(b) provides in its entirety:

After entry of a plea of guilty, or guilty but mentally ill at the time of the crime, but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea of guilty, or guilty but mentally ill at the time of the crime, for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant’s plea. The motion to withdraw the plea of guilty or guilty but mentally ill at the time of the crime made under this subsection shall be in writing and verified. The motion shall state facts in support of the relief demanded, and the state may file counter-affidavits in opposition to the motion. The ruling of the court on the motion shall be reviewable on appeal only for an abuse of discretion. However, the court shall allow the defendant to withdraw his plea of guilty, or guilty but mentally ill at the time of the crime, whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.

IND. CODE § 35-35-1-4(b) (2004).

171. *Brightman v. State*, 758 N.E.2d 41, 44 (Ind. 2001).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

of guilty pleas before sentencing “should be freely allowed whenever it appears fair or just and motions made within a few days of the initial pleading should be favorably considered.”¹⁷⁶

In *Turner v. State*,¹⁷⁷ the court of appeals addressed whether a defendant could withdraw a plea based on unknown and unknowable circumstances at the time of the plea. There, the defendant pleaded guilty to dealing cocaine only to learn before sentencing of the supreme court’s opinion in *Litchfield v. State*,¹⁷⁸ which held that trash left for collection may not be seized without a showing of reasonable suspicion. Turner asserted that the court’s opinion in *Litchfield* made the withdrawal of the plea “necessary to correct a manifest injustice because a new constitutional rule provides a credible defense against the admissibility of evidence in the State’s case against him.”¹⁷⁹ In reversing the trial court’s denial of the motion to withdraw the plea, the court of appeals agreed that the withdrawal of the guilty plea was “necessary to correct a manifest injustice, namely, the opportunity to assert a previously unavailable constitutional right”¹⁸⁰

Claims such as the one in *Turner* are properly brought on direct appeal, but most challenges to guilty pleas are brought in post-conviction relief proceedings. For example, defendants commonly challenge the voluntariness of their guilty plea through a petition for post-conviction relief. Although these challenges are generally a steep uphill climb, “defendants who can show that they were coerced or misled into pleading guilty by the judge, prosecutor or defense counsel will present colorable claims for relief.”¹⁸¹

In *Cornelious v. State*,¹⁸² the court of appeals considered whether a guilty plea was rendered involuntary when a defendant was misinformed about his ability to challenge the denial of his right to a speedy trial under Criminal Rule 4 by both the trial court and his counsel as part of the guilty plea process. Indiana law does not allow the appeal of pre-trial orders after a guilty plea.¹⁸³ In determining whether the misleading advice was material to the decision to plead guilty, the court looked to the post-conviction court’s findings, which included that the defendant’s “main concern when he pled guilty was the preservation of his ability to appeal his contention that his CR 4 right to a speedy trial had been violated” and that defense counsel made an oral motion for the appointment of counsel at the plea/sentencing hearing “for purposes of examining this Criminal Rule 4 issue.”¹⁸⁴ Concluding that these assurances that Cornelious could plead

176. *Centers v. State*, 501 N.E.2d 415, 419 (Ind. 1986).

177. 843 N.E.2d 937, 941 (Ind. Ct. App. 2006),

178. 824 N.E.2d 356 (Ind. 2005).

179. *Turner*, 843 N.E.2d at 940.

180. *Id.* at 945.

181. *Cornelious v. State*, 846 N.E.2d 354, 357 (Ind. Ct. App.) (quoting *State v. Moore*, 678 N.E.2d 1258, 1266 (Ind. 1997)), *trans. denied*, 860 N.E.2d 585 (Ind. 2006).

182. *Cornelious*, 846 N.E.2d 354.

183. *Id.* at 357 (citing *Branham v. State*, 813 N.E.2d 809, 811 (Ind. Ct. App. 2004)).

184. *Id.* at 360.

guilty and preserve the speedy trial claim were material to the decision to plead guilty, the court reversed the denial of post-conviction relief.¹⁸⁵

As a final point, *Cornelious* reiterated the important distinction between challenging a guilty plea as involuntary and advice given as part of a claim of ineffective assistance of counsel. The former “focuses on whether the defendant knowingly and freely entered the plea, in contrast to ineffective assistance, which turns on the performance of counsel and resulting prejudice,” as discussed in Part D below.¹⁸⁶

B. Confrontation Clause

Seldom do cases from Indiana’s state courts make their way to the United States Supreme Court. *Hammon v. State*¹⁸⁷ made it there and back during the survey period.

Hammon builds on *Crawford v. Washington*,¹⁸⁸ where the Supreme Court held that the prosecution may introduce a “testimonial” out-of-court statement against a criminal defendant only upon two showings: (1) the witness who made the statement is unavailable; and (2) the defendant had a prior opportunity to cross-examine the witness.¹⁸⁹ It offered no hard and fast rules defining testimonial statements, which led to some confusion in courts around the country.

In *Davis v. Washington*,¹⁹⁰ the companion case to *Hammon*, the Court shed additional light on the line between testimonial and non-testimonial statements.

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.¹⁹¹

The statements in *Davis*, which involved a 911 call in a domestic dispute, were not testimonial. The 911 call was one for help in the face of a physical threat; it conveyed events as they were unfolding to enable police to respond and resolve the emergency rather than to document a prior event for possible use in a later prosecution.¹⁹² In contrast, *Hammon* involved hearsay statements in a domestic battery case that recounted what had happened rather than what was

185. *Id.*

186. *Id.* at 358.

187. 829 N.E.2d 444 (Ind. 2005), *rev'd by Davis v. Washington*, 126 S. Ct. 2266 (2006).

188. 541 U.S. 36 (2004).

189. *Id.* at 68.

190. 126 S. Ct. 2266 (2006).

191. *Id.* at 2273-74.

192. *Id.* at 2277.

happening.¹⁹³ Because there was no ongoing emergency and the primary purpose of the officer's questioning was to establish past events potentially relevant to later prosecution, the statements in *Hammon* were testimonial and therefore not admissible at trial.¹⁹⁴

As these and other cases make clear, Confrontation Clause cases often involve some of the most difficult and emotional issues, such as domestic abuse or child molestation. In *Howard v. State*,¹⁹⁵ the Indiana Supreme Court considered whether a deposition could be used in a child molestation trial in which the child victim refused to testify after crying and throwing up.¹⁹⁶ Although reluctant adult victims of domestic violence are "left to the harsh reality of ordinary trial procedures," the procedures for child victims of sexual abuse are considerably different.¹⁹⁷ A prior statement by a child may be admitted at trial if the child is found "unavailable" to testify by the trial court—a finding that may be predicated only upon testimony from a psychiatrist, physician, or psychologist and other evidence that the child will suffer emotional distress, the child cannot participate in the trial for medical reasons, or the child is legally incompetent to testify at trial.¹⁹⁸ If one of these circumstances is met, and the trial court finds sufficient indications of reliability in the out-of-court statement, the statement may be admitted at trial provided the child was available for cross-examination when the statement was made.¹⁹⁹ The supreme court concluded that the trial court erred in finding the child witness unavailable for trial because there was no testimony from a medical professional about the nature of her condition nor did the trial court make a finding that she was unable to participate for medical reasons or was incompetent to testify.²⁰⁰

The question remained, however, whether a discovery deposition provides an adequate opportunity for cross-examination under the Sixth Amendment. Although the court acknowledged the primary motivation for taking a deposition for discovery is not to perpetuate testimony for trial,²⁰¹ it nevertheless concluded that a discovery deposition provided an adequate opportunity for cross-examination: "Whether, how, and to what extent the opportunity for cross-examination is used is within the control of the defendant."²⁰²

Defense counsel are thus in a precarious position. Unlike many states, where defense counsel have been warned that required probable cause or preliminary hearings may be viewed as "squandered opportunities" that result in waiver of

193. *Id.* at 2278.

194. *Id.*

195. 853 N.E.2d 461 (Ind. 2006).

196. *Id.* at 463.

197. *Id.* at 466 (quoting *Fowler v. State*, 892 N.E.2d 459, 462 (Ind. 2005)).

198. *Id.* at 467.

199. *Id.*

200. *Id.* at 468.

201. *Id.* at 468-69.

202. *Id.* at 470.

the right to cross-examine if a child later is deemed unavailable,²⁰³ the absence of preliminary hearings in Indiana mean defense counsel are not obligated to speak with a child victim before trial, much less take the child's deposition. If a child seems especially likely to be deemed unavailable for trial, counsel will want to be sure to carefully consider whether to take a deposition, and if one is taken, what should be asked and whether it should be videotaped.

C. Indigent Defendants: Diversion and Payment of Costs of Representation

Although the criminal justice system provides indigent defendants with some of the most basic rights, like counsel, these protections are not always equal to those of non-indigent defendants nor do they necessarily come without a price. Two cases from the survey period highlight these points.

In *Davis v. State*,²⁰⁴ a pro se defendant challenged a trial court's order that he pay more than \$16,000 to the county public defender fund "if at a subsequent time it should be determined" that he has the funds to do so.²⁰⁵ Trial courts have the statutory authority to order defendants "able to pay part of the cost of representation by the assigned counsel" to pay \$100 at the initial hearing and, if proper findings are made, "[r]easonable attorney's fees" at a later time.²⁰⁶ In *May v. State*,²⁰⁷ the court of appeals had remanded an order to pay \$750 to the public defender fund because the trial court did not conduct a hearing regarding the defendant's ability to pay.²⁰⁸ Relying on *May* and the statute, the *Davis* panel held that the trial court did not have "the authority to order a presently indigent defendant to pay restitution based on possible future earnings or other speculative prospective wealth."²⁰⁹

Although the ability of defendants to pay varies considerably from case to case, the court of appeals made clear in another case that prosecutors cannot condition participation in pre-trial diversion programs on an ability to pay required fees.²¹⁰ The Indiana Code permits prosecutors to withhold prosecution of persons charged with misdemeanors if the person agrees to take part in a diversion program, which involves a written agreement that often requires the payment of a fee and participation in a class.²¹¹ In Marion County, defendants were required to pay \$80 for the required class and a \$150 fee to participate in the diversion program. Two defendants who were unable to pay challenged this requirement as a violation of the federal Equal Protection Clause and the Equal

203. *Id.*

204. 843 N.E.2d 65 (Ind. Ct. App. 2006).

205. *Id.* at 67.

206. *Id.* at 68.

207. 810 N.E.2d 741 (Ind. Ct. App. 2004).

208. *Id.* at 745-46.

209. *Davis*, 843 N.E.2d at 68-69.

210. *Mueller v. State*, 837 N.E.2d 198 (Ind. Ct. App. 2005).

211. IND. CODE § 33-39-1-8(c) & (d) (2004).

Privileges and Immunities Clause of the Indiana Constitution.²¹² Specifically, they challenged the policy and practice of the prosecutor's office that denied entry into the program to those unable to pay and removed those who later proved unable to pay the fees from the program.²¹³

Although prosecutors enjoy broad discretion in deciding whom to prosecute, their selection criteria may not be based on "race, religion, or other arbitrary classification."²¹⁴ Supreme Court cases have recognized the impropriety of classifications based on indigency, such as requiring free transcripts for indigent defendants who desired an appeal.²¹⁵ More recently, in *Bearden v. Georgia*,²¹⁶ the Court overruled the revocation of a defendant's probation or parole for failure to pay fines or restitutions without first inquiring into the reasons for that failure and allowing alternative punishments if the person was unable to pay.²¹⁷ Relying heavily on *Bearden*, the Mississippi Supreme Court struck down a prosecutor's "bad check" program that provided for the dismissal of charges when a person promptly paid a \$500 fine and restitution.²¹⁸ Prosecutions proceeded against those unable to pay the hefty fine.²¹⁹ The Mississippi court concluded the program violated the Equal Protection Clause as discrimination against the poor: "Subjecting one to a jail term merely because he cannot afford to pay a fine, due to no fault of his own, is unconstitutional."²²⁰

In *Mueller*, the court of appeals reached the same result, although it provided some specific guidance for prosecutors and trial courts.

It should be no great burden for a court to make such indigency determinations in pretrial diversion cases, should a prosecutor not exercise his or her discretion independently to waive payment of any or all fees without court involvement. If a defendant is found to be unable to pay the fee, either by a prosecutor acting alone or upon a court's determination, he or she must be offered an alternative to full payment of the fee. This could take the form of complete waiver of the fee, partial waiver, implementation of a reasonable payment schedule, replacement of the fee with a non-financial (but reasonable) requirement such as community service, or some combination of partial waiver and a non-financial requirement.²²¹

The case was remanded to allow the trial court to make a determination regarding

212. *Mueller*, 837 N.E.2d at 200.

213. *Id.*

214. *Id.* at 201 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

215. *Id.* at 202 (citing *Griffin v. Illinois*, 351 U.S. 12 (1956)).

216. 461 U.S. 660 (1983).

217. *Mueller*, 837 N.E.2d at 203-04 (citing *Bearden v. Georgia*, 461 U.S. 660 (1983)).

218. *Moody v. State*, 716 So. 2d 562, 563 (Miss. 1998).

219. *Id.*

220. *Id.* at 565.

221. *Mueller*, 837 N.E.2d at 205.

the defendants' indigency.²²²

Despite the apparent initial resistance of the Marion County Prosecutor to the notion of offering community service or a fee waiver for indigent defendants, transfer was not sought in *Mueller*. Rather, while the case was pending the prosecutor's office developed a policy to allow defendants to pay the \$150 fee or perform thirty hours of community service.²²³

D. Ineffective Assistance of Appellate Counsel

Like a claim that trial counsel was ineffective, a claim the appellate counsel rendered ineffective assistance requires a showing of (1) deficient performance and (2) that the deficient performance resulted in prejudice.²²⁴ Claims of ineffective assistance of appellate counsel fall into three basic categories: "(1) denial of access to an appeal; (2) waiver of issues; and (3) failure to raise issues well."²²⁵ Defendants seldom prevail on such claims, but two cases during the survey period are worthy of mention not just because the defendant prevailed but because the court's approach suggests relief may be easier to obtain in the future.

In *Gray v. State*,²²⁶ the court of appeals considered a claim from the second category. In such cases, the court considers whether the issue not raised was significant and obvious from the record and whether the issue not raised was "clearly stronger" than the ones raised.²²⁷ Gray argued that appellate counsel should have raised an appellate challenge to the trial court's failure to sever a charge of unlawful possession of a firearm by a serious violent felon ("SVF") from the other charges of murder, attempted murder, and robbery.²²⁸ Trial counsel had requested bifurcation but, when that request was denied, had stipulated that Gray was a SVF. Existing authority from the court of appeals at the time held that a defendant charged only with a SVF charge was not entitled to bifurcation because the prior conviction was an essential element of the offense.²²⁹ The bifurcation issue had not been addressed in a case involving other counts.

Although acknowledging that appellate counsel is not expected to anticipate changes in the law, the court of appeals concluded that appellate counsel was ineffective for failing to raise an undecided issue that was stronger than the issues raised.²³⁰ The court noted that four months after Gray's case was decided on direct appeal, the court of appeals reversed a case in which the trial court refused to sever a robbery charge from an SVF charge because the prejudice

222. *Id.* at 205.

223. Kevin Corcoran, *Legal Fee Biased, Judges Decide*, INDIANAPOLIS STAR, Nov. 17, 2005, at B1.

224. *Fisher v. State*, 810 N.E.2d 674, 677 (Ind. 2004).

225. *Id.* at 677.

226. 841 N.E.2d 1210 (Ind. Ct. App.), *trans. denied*, 855 N.E.2d 1006 (Ind. 2006).

227. *Id.* at 1214.

228. *Id.*

229. *Id.* at 1216 (citing *Spearman v. State*, 744 N.E.2d 545 (Ind. Ct. App. 2001)).

230. *Id.* at 1217.

associated with the evidence of the prior conviction substantially outweighed its probative value for the non-SVF charge.²³¹ Moreover, although the error did not appear preserved to counsel on direct appeal, the court of appeals concluded that trial counsel had not waived the severance/bifurcation issue by agreeing to the stipulation but rather “was simply abiding by the trial court’s denial of his motions and attempting damage control.”²³²

Although claims of the third variety—failure to raise issues well—are “the most difficult for defendants to advance and reviewing tribunals to support.” When not deemed forfeited on appeal, the court of appeals granted post-conviction relief on that basis in *Hopkins v. State*.²³³ On direct appeal, appellate counsel in *Hopkins* asserted that the multiple convictions for attempted murder and Class A felony robbery violated the Indiana Double Jeopardy Clause because the robberies were elevated based on the same serious bodily injury that supported the attempted murder convictions.²³⁴ Although appellate counsel cited two Indiana Supreme Court opinions as support for her argument that the appropriate remedy was reduction of the robbery convictions to Class C felonies, the court of appeals instead reduced the convictions to Class B felonies.²³⁵ On direct appeal, the court of appeals cited and discussed, as it often does, another case in addition to those cited by *Hopkins*’ counsel in its opinion.²³⁶

On post-conviction review, the court of appeals faulted appellate counsel for not citing two other Indiana Supreme Court cases “that clearly set forth the proper analysis” for the remedy.²³⁷ It concluded that “[c]ounsel should have located and relied upon these cases. We also are confident that had we been directed to such authority, we would have had no choice but to rule in favor of *Hopkins*” in reducing the robberies to Class C felonies.²³⁸ The court did not acknowledge that the direct appeal opinion specifically cited and addressed one of these two cases,²³⁹ or that one of the cases cited by appellate counsel also cited that same case.²⁴⁰

Although it is difficult to criticize the ultimate result in *Hopkins*—the robbery convictions were reduced to Class C felonies, as required by Indiana law—pigeon-holing the claim as ineffective assistance of appellate counsel seems a bit awkward in light of all that appellate counsel did in the case. Appellate counsel asked for the appropriate remedy and cited precedent on point; the court of appeals nevertheless decided the issue incorrectly on direct appeal.

231. *Id.* (citing *Hines v. State*, 794 N.E.2d 469 (Ind. Ct. App. 2003), *adopted by* 801 N.E.2d 634 (Ind. 2004)).

232. *Id.* at 1218.

233. 841 N.E.2d 608, 612 (Ind. Ct. App. 2006).

234. *Id.*

235. *Id.* at 615.

236. *Hopkins v. State*, 747 N.E.2d 598, 604 (Ind. Ct. App. 2001).

237. *Hopkins*, 841 N.E.2d at 613.

238. *Id.* at 614.

239. *Hopkins*, 747 N.E.2d at 604 (citing *Hampton v. State*, 719 N.E.2d 803 (Ind. 1999)).

240. *See Grace v. State*, 731 N.E.2d 442 (Ind. 2000).

The appellate ineffectiveness hook is understandable in light of the narrow category of issues available on post-conviction review.²⁴¹ Nevertheless, the opinion may give hope of relief to other petitioners in the future who discover that their lawyers cited less than all the relevant authority. It may also be read by some appellate lawyers to impose an obligation to string-cite cases or include discussions of multiple cases in arguing a fairly straightforward point of law—both of which are generally frowned upon by the appellate courts.

Not all claims of ineffective assistance of appellate counsel proved successful. Claims that counsel failed to raise an *Apprendi* challenge before *Blakely* was decided have not been well received on ineffective assistance grounds because “*Blakely* radically reshaped our understanding of a critical element of criminal procedure, and ran contrary to established precedent.”²⁴² Even if counsel had raised an *Apprendi* claim, the defendant could not show the outcome of the appeal would have been different because *Blakely*—and not *Apprendi*—was viewed as invalidating Indiana’s presumptive sentencing scheme.²⁴³ Although certainly supportable, these decisions lead to an anomalous result. Defendants whose direct appeals pre-dated *Blakely* are not entitled to relief, while those whose sentencing hearings pre-dated *Blakely* (and even *Apprendi*) may be entitled to relief if they failed to pursue a timely direct appeal and instead obtained leave to pursue a belated appeal.²⁴⁴

E. Sentencing After Probation Revocation

As discussed in last year’s survey, the Indiana Supreme Court’s opinion in *Stephens v. State*²⁴⁵ has generated some confusion regarding sentencing after the revocation of probation.²⁴⁶ In *Stephens*, the court held that trial courts revoking probation have the statutory authority to order the imposition of less than the entire length of the sentence originally suspended.²⁴⁷ This was consistent with standard practices in most trial courts and was greeted with a statutory amendment confirming its correctness.²⁴⁸ However, *Stephens* also included additional language mandating that the “total sentence”—the executed time originally imposed and the executed term imposed upon revocation—cannot be “less than the statutory minimum.”²⁴⁹ The source of this rule is difficult to discern from the statute or practice, and the court of appeals confronted the

241. See *Hopkins*, 747 N.E.2d at 611 (reiterating that claims of fundamental error are not available).

242. *Wieland v. State*, 848 N.E.2d 679, 683 (Ind. Ct. App.) (quoting *Smylie v. State*, 823 N.E.2d 679, 687 (Ind. 2005)), *trans. denied*, 860 N.E.2d 590 (Ind. 2006).

243. *Id.*

244. See *supra* notes 77-89 and accompanying text (discussing belated appeals).

245. 818 N.E.2d 936 (Ind. 2004).

246. Schumm, *supra* note 119, at 919-21.

247. *Stephens*, 818 N.E.2d at 941.

248. See IND. CODE § 35-38-2-3(g) (Supp. 2005).

249. *Stephens*, 818 N.E.2d at 942.

confusion it has engendered in *Podlusky v. State*.²⁵⁰

Podlusky was originally sentenced to the statutory minimum sentence of two years, suspended to probation, for Class C felony forgery. The trial court later revoked her probation based on her failure to “communicate honestly” with probation and failure to notify probation that she had moved.²⁵¹ Judge Baker, writing for the majority, acknowledged the language from *Stephens* cited above before observing, “we in no way construe our Supreme Court’s decision in *Stephens* to mean that the trial court was required to impose the entire suspended sentence.”²⁵² The majority relied in part on the probation statute, which imposes no such requirement.²⁵³ Moreover, it noted that some probation violations—such as the relatively minor ones in this case—may not warrant imposition of such a lengthy sentence.²⁵⁴ Finally, the majority concluded by expressing its “hope that the Supreme Court will clarify—and modify, if necessary—its holding announced in *Stephens*, particularly in light of the amended version of Indiana Code section 35-38-2-3(g)(3).”²⁵⁵

Judge Mathias concurred in result, concluding that “the language in *Stephens* is unambiguous” and must be followed by trial courts “[u]nless and until our Supreme Court modifies or clarifies its *Stephens* holding”²⁵⁶ Although the *Stephens*’ language does indeed appear unambiguous, the majority’s suggestion that it be revisited is well-taken in light of both the language of the probation statute and the reality of probation revocation practice, in which executed sentences less than the statutory minimum are often deemed appropriate for especially minor violations.

F. The Anders’ Dilemma

As discussed at length in a previous Survey article,²⁵⁷ appointed appellate counsel will sometimes face a record seemingly devoid of reversible error. For decades, it appears that counsel made the best of the situation with innovation rather than resignation.

In *Packer v. State*,²⁵⁸ appointed counsel opted for the resignation road in an appeal of a revocation of probation. Counsel briefed two “issues,” oddly phrased as his inability to “construct a non-frivolous argument” as to each issue.²⁵⁹ The brief concluded with a statement that “a prayer for relief seems out of place”

250. 839 N.E.2d 198 (Ind. Ct. App. 2005).

251. *Id.* at 199.

252. *Id.* at 201.

253. *Id.*

254. *Id.* at 203.

255. *Id.*

256. *Id.* at 204 (Mathias, J., concurring).

257. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 37 IND. L. REV. 1003, 1016-19 (2004).

258. 777 N.E.2d 733 (Ind. Ct. App. 2002).

259. *Id.* at 736.

because of the inability to construct any non-frivolous argument.²⁶⁰ The court of appeals *sua sponte* adopted a new approach for counsel faced with the inability to construct a non-frivolous argument.

[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished [to] the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.²⁶¹

This so-called *Anders* briefing has been a staple of federal practice for a quarter of a century, and some states have employed similar approaches.²⁶² *Anders'* briefs were not part of Indiana practice before *Packer*, and such briefs did seem to gain traction in the years immediately following *Packer*.

Then came *Seals v. State*.²⁶³ In *Seals*, the defendant received an eight year sentence for a Class B felony after pleading guilty. Appellate counsel initially filed a "Report to the Appellate Court" in which he stated there was "no basis for appeal in the instant case" and that he could not "in good conscience further pursue an appeal that Counsel believes would be a frivolous filing"²⁶⁴ The court of appeals responded to this "report" with an order informing counsel that the report did not comply with the requirements of *Anders* and *Packer* and directing counsel to file a complying brief within thirty days.²⁶⁵ Counsel later filed a motion to withdraw his appearance along with a brief that appeared to comply with *Packer*, and the motions panel approved the brief and granted his withdrawal.²⁶⁶ The brief raised three "possible arguments" that had been researched but were determined unlikely to "bear fruit" on appeal.²⁶⁷ The State responded that appointed counsel "did not even attempt to advocate for his client on any of the recognized issues by presenting legal authority, and because he

260. *Id.*

261. *Id.* at 737 (quoting *Anders v. California*, 386 U.S. 738, 744 (1967)).

262. See generally Martha C. Warner, *Anders in the Fifty States: Some Appellants' Equal Protection Is More Equal than Others'*, 23 FLA. ST. U. L. REV. 625 (1996).

263. 846 N.E.2d 1070 (Ind. Ct. App. 2006).

264. *Id.* at 1073.

265. *Id.*

266. *Id.*

267. *Id.* at 1074.

failed to present a cogent argument, [Seals] can be deemed to have waived all of the issues on appeal.”²⁶⁸

The court of appeals agreed that the “perfunctory ‘possible argument’ demonstrate a lack of commitment and dedication to the client” and expressed further concern that it appeared appointed counsel had not “furnished Seals with a copy of the brief nor had counsel given Seals, who was incarcerated and legally blind, an opportunity to raise any issues of her choosing.”²⁶⁹ In addition, the brief failed to raise the “‘facially obvious issue’ of the appropriateness of” the sentence under Appellate Rule 7(B).²⁷⁰ Accordingly, the court remanded the case “with instructions to appoint replacement counsel for Seals within thirty days” of its decision and directed replacement counsel “to file a new brief on [Seals’] behalf” within ninety days after reviewing the record.²⁷¹

Seals could be cited as proof that the court of appeals—and even the Attorney General—will be diligent in ensuring that an indigent defendant’s right to appeal is protected. An appeal is an adversarial proceeding, however, and one should not rely on the Attorney General to zealously protect the rights of indigent defendants nor should it rely on the court of appeals to do anything more than decide the case before it. Although the Attorney General and the court of appeals should be commended for taking action to protect the rights of a blind, incarcerated defendant, they should not be expected to do so in the future. Appointed counsel should not have the option to abandon a client on appeal. Unless a defendant receives the minimum sentence all suspended with no special conditions of probation, every appeal should present—at a minimum—a plausible challenge to the sentence imposed.²⁷²

268. *Id.* at 1076 (quoting Appellee’s Brief at 5-6).

269. *Id.*

270. *Id.*

271. *Id.* at 1077.

272. *See, e.g.,* *Hole v. State*, 851 N.E.2d 302, 304 (Ind. 2006) (observing that a defendant could challenge the placement of his sentence if the trial court exercised discretion in sentencing). If, however, a defendant received a set plea, there is nothing to appeal, and the proper remedy would be the filing of a motion to dismiss the appeal after consultation with the client.