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COVER STORY

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Does Jones v. Mississippi Change JLWOP Sentencing in Indiana?
By Joel C. Wieneke

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STAFF

Assistant CLE Director:
Christine Cordial • ccordial@inbar.org

Communication Manager:
Kelsey Singh • ksingh@inbar.org

Director of CLE:
Kristin Owens • kowens@inbar.org

Director of Finance & Operations:
Sarah Beck • sbeck@inbar.org

Director of Meetings & Events:
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Director of Membership:
Carissa Long • clong@inbar.org

Executive Director:
Joe Skeel • jskeel@inbar.org

Legislative Counsel:
Paje Felts • pfelts@inbar.org

Membership Coordinator:
Julie Gott • jgott@inbar.org

Office Manager:
Kimberly Latimore Martin • klatimore@inbar.org

Outreach Coordinator:
Shanae Gay • sgay@inbar.org

Receptionist:
Chauncey Lipscomb • clipscomb@inbar.org

Section & Committee Liaison:
Rebecca Smith • rsmith@inbar.org

Section & Committee Manager:
Leah Baker • lbaker@inbar.org



INDIANA STATE BAR ASSOCIATION
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EDITOR / KELSEY SINGH ksingh@inbar.org
COPYEDITOR / REBECCA TRIMPE rebeccatheditor@gmail.com
GRAPHIC DESIGN / BURKHART MARKETING PARTNERS info@burkhartmarketing.com
WRITTEN PUBLICATIONS COMMITTEE CO-CHAIRS / COLIN FLORA & PROF. JOEL SCHUMM wpc@inbar.org
ADVERTISING / KELSEY KOTNIK kkotnik@inbar.org

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CORRECTION TO *RES GESTAE* VOLUME 65 NUMBER 3, OCTOBER 2021

The article “The Dispossessed: Observations on Indiana’s Eviction Crisis” incorrectly listed Jon R. Pactor as its author. The correct author is Kent L. Hull. The *Res Gestae* team offers Mr. Hull its sincerest apologies for the error, and thanks him for sharing his efforts and experience with the ISBA membership.

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Contributors



Clayton C. Miller
Attorney
Clayton Miller Law, P.C.
clay@claytonmillerlaw.com



Lesley Crane
Cofounder & Chief Diversity Officer
Thought Kitchen, LLC
lesley@thought-kitchen.com



Margaret Christensen
Office Managing Partner
Dentons Bingham Greenebaum LLP
margaret.christensen@dentons.com



Joel C. Wieneke
Senior Staff Attorney
Indiana Public Defender Council
jwieneke@pdc.in.gov



Michelle Altobella, JD
Chief Privacy Officer
Indiana University Health, Inc.
maltobel@iuhealth.org



Vienna Bottomley
Managing Associate
Dentons Bingham Greenebaum LLP
vienna.bottomley@dentons.com



Mark S. Zuckerberg
Consumer Bankruptcy Specialist
Bankruptcy Law Office of
Mark S. Zuckerberg, P.C.
debtномо@aol.com



Gwendolyn Clark
Legal Intern
Indiana University Health, Inc. (Student)
gclark6@iuhealth.org



Kathy L. Osborn
Partner
Faegre Drinker Biddle & Reath LLP
kathy.osborn@faegredrinker.com



Amanda K. Quick
Deputy Attorney General
Office of Attorney General
Todd Rokita
Amanda.Quick@atg.in.gov



Joel M. Schumm
Clinical Professor of Law
IUPUI
jmschumm@iupui.edu



Elizabeth A. Charles
Associate
Faegre Drinker Biddle & Reath LLP
elizabeth.charles@faegredrinker.com

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President's Perspective

THE ART AND SCIENCE OF THINKING LIKE A LAWYER

By Clayton C. Miller

PRESIDENT'S PERSPECTIVE

I love being a lawyer. But I didn't always want to be a lawyer.

As a youth, I also contemplated becoming an architect. Whether the result of too many hours spent playing with my trove of Lincoln Logs, or the influence of watching my parents go through the process of putting an addition onto my childhood home in Muncie, my glimpse of the creative problem-solving that is the architect's craft looked like fun. A focus on good design offered endless possibilities for improving one's environment, even on the most modest of scales.

Even though I was drawn more toward the pursuit of aesthetic outcomes than to mastering the essential engineering principles on which such outcomes depended, the prospect of shaping the built environment in response to a particular need and for a particular purpose nevertheless struck me as a stimulating and potentially fulfilling way to earn a living. I was perhaps also responding to a less consciously expressed impulse to make a lasting mark, as evoked by Winston Churchill's 1943 statement that "We shape

our buildings; thereafter they shape us." It wasn't until I was in college that I realized my interests and talents lay elsewhere. A post-collegiate 3-year stint working on Capitol Hill in Washington cemented my interest in the law, with its own distinct opportunities to make a lasting mark.



During my third year pursuing a J.D. in Bloomington, the law school celebrated its sesquicentennial. In addition to teaching me and many of my classmates a new word for a 150th anniversary, the institution also marked the occasion by commissioning a painting by a local artist, Rudy Pozzatti, who died this past March at age 96.

In accepting the finished product, the law school's Dean Alfred Aman noted how even though legal education entails elements of scientific study, with its emphasis on knowing the rules and how to find them, Pozzatti's abstract image evoked the artistic side of legal study and practice. We are trained on a broad range of basic rules governing particular subject areas, with a related emphasis on developing

research skills to identify relevant cases, statutes and regulations to be invoked when answering our clients' questions and advocating on their behalf. But an occasional misconception about the lawyer's craft is that the answers to clients' questions and solutions to their problems are already out there just waiting for someone with legal training to come along and identify them. I can't speak for all lawyers, but at least based on my own experience I can testify that that is almost never the case. We're not mere technicians, but are creative problem-solvers. And even when the

and, in our clients' eyes, potentially beautiful. Few of us will ever author a widely-cited judicial precedent, but even a carefully crafted contract can provide invaluable protection and guidance to parties facing changing circumstances and relationships, to say nothing of the lasting benefit of obtaining fair compensation for a client's loss.

I've always felt that the ability to "think like a lawyer" is a lofty goal to strive for and is also not a mindset reserved just for those of us in the legal profession. And while others might fairly – but hopefully gently –

"I've always felt that the ability to 'think like a lawyer' is a lofty goal to strive for and is also not a mindset reserved just for those of us in the legal profession."

answer to a question is immediately clear, the reasoning must still account for the specific unique facts presented. Hence, the "art" of lawyering, which to be effective must be married with the science of understanding the rules and their framework. Maybe my calling as an attorney is not so far removed from the discipline of architecture after all. Surely a tightly-structured brief calls upon similar skills as used to design a striking but also functional and physically sound new building.

Of course, the work product of lawyers and architects differs greatly. While lawyers' cathedrals are generally confined to the written and spoken word, their impact can be no less sweeping and impactful

point out multiple examples of when I may have fallen short of this goal, I find great appeal in the prioritization of concise communication and logical, clear-headed analysis that are hallmarks of thinking like a lawyer.

Although I readily admit my bias on this subject, I'm convinced the world would be a better place if more of our fellow citizens thought like lawyers in our daily interactions. That's not to suggest we should view every encounter as adversarial or an opportunity to advocate with zeal. Rather, when reacting to the news of the day and formulating our opinions we can all be alert for leaps in our own as well as others' logic, and wary of other barriers to truth





or well-reasoned positions. Outside the courtroom our goal should not necessarily be to win every argument, but to bring perspective, as well as openness to others' perspectives, and ultimately help reach better outcomes. As trained advocates, lawyers also can listen for possible underlying motivations in others' arguments, whether or not wholly benign, and respond in ways that add light rather than heat.

As I stated during the ceremony this past October at which I accepted the ISBA president's gavel from my estimable predecessor, Michael Tolbert, I hope to use this bully pulpit to, among other things, appeal to intelligent engagement that rejects cynicism about our collective civic life. We lawyers serve society by serving our clients as well as by active participation in the life of our respective communities. But to channel the 19th-century children's author Hans Christian Anderson, when the Emperor is parading in public with no clothes, lawyers should not be shy about pointing out the delusion, as delicately as the context warrants, even if – indeed, especially if – the Emperor is our client. Let us strive not to mislead ourselves, nor others, in the face of disappointing or inconvenient facts, but rather face them forthrightly and honestly.

To be sure, as I emphasized earlier, thinking like a lawyer requires creativity, and it can be tempting to grasp for any rationalization that advances a client's immediate cause. But there are limits: For instance, being zealous advocates for our clients' interests and preserving their confidentiality does not compel us to promulgate or perpetuate falsehoods.

Anyone can be a Yes Man or Woman. I submit to you, however, that our calling as legal professionals demands that we speak truth as best as we can discern it, even if that means being willing to sometimes say "no," regardless of the depth of a client's pockets. Again, practicing law is more than a trade: It's a profession. Also, Hoosier lawyers have a proud legacy of speaking out and stepping up to help solve the challenges of the day, and I am convinced there remains no shortage of opportunities for productive involvement, in ways large and small, to advance the cause of justice and enhance our collective wellbeing. So with the conviction of Hans Christian Anderson's child bystander exposing the Emperor's nakedness, but without that child's naivete, and with the clear-eyed vision informed by our training and experience as lawyers, may we each combine the art and science of the law to find ways to serve both our clients and our fellow citizens. 

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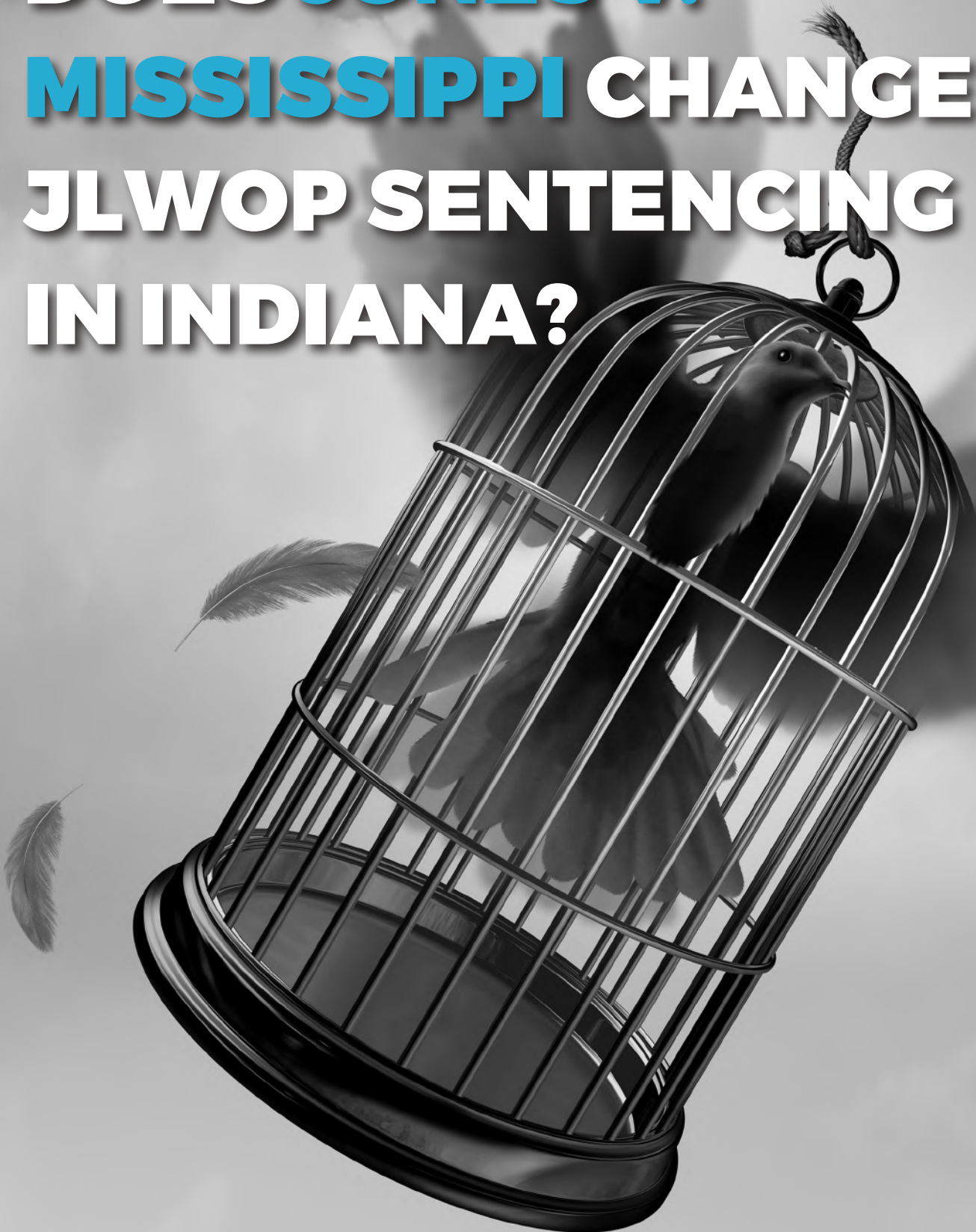
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**DOES JONES V.
MISSISSIPPI CHANGE
JLWOP SENTENCING
IN INDIANA?**



By Joel C. Wieneke

Indiana is a member of the quickly shrinking minority of states in one of the last two countries in the world sentencing children to die in prison.¹² Just nine years ago, the Indiana Supreme Court rejected a claim that juvenile life without parole (JLWOP) was unconstitutional, relying largely on the fact the overwhelming majority of states allow for that sentence. That is no longer the case. And the characterization of a life sentence as being a “death-in-prison sentence” is not a characterization of a defense attorney using hyperbole to wrench your attention. Rather, it is the nomenclature of the judiciary itself: “LWOP is the harshest punishment the Constitution permits against any child. It’s a denial of hope, a killer of behavior and character improvement, and a guarantee—regardless of future potential—of a death behind bars.”³ Someday, Indiana may join the group of states that have abolished death-in-prison sentences for children, but until it does, practitioners and courts need to be aware of the considerations when imposing this penalty, and there may be no better way to raise the topic than in context of the recent decision from the Supreme Court of the United States.

The march away from JLWOP has largely been inspired from the top down. *Jones v. Mississippi*, 593 U.S. ___, 141 S. Ct. 1307 (2021), marked the fifth installation in the recent progression of Supreme Court pronouncements of Eighth Amendment sentencing distinctions for juveniles. Starting with *Roper v. Simmons*, 543 U.S. 551 (2004), the Supreme Court ruled the characteristics of children (anyone who had committed the offense before reaching 18 years of age) rendered capital punishment cruel and unusual. Next was *Graham v. Florida*, 560 U.S. 48 (2010), which held those same characteristics made imposition of life without parole for non-homicide offenses cruel and unusual for youthful offenders. Then came *Miller v. Alabama*, 567 U.S. 460 (2012), which held mandatory imposition of life without parole upon youthful offenders was cruel and unusual punishment. In doing so, the *Miller* court explained that life in prison should only be imposed upon the rare child who was irredeemable or permanently incorrigible. Every child deserved a hearing to consider whether the child’s offense could be explained, in part, by the transient characteristics of youth. The court then decided *Montgomery v. Louisiana*, 577 U.S. 190 (2016), which held *Miller* had been a substantive change in Eighth Amendment jurisprudence, and thus retroactive in effect.

In 2006, Brett Jones was initially sentenced to serve life-without parole, a sentence that was mandated for his murder conviction in Mississippi at the time.⁴ However, in the wake of *Miller* and *Montgomery*, the Mississippi Supreme Court ordered a new sentencing hearing where his youth could be taken into consideration and the court could exercise discretion in selecting the appropriate sentence.⁵ After the new sentencing hearing, the court acknowledged its

discretion but ordered life-without-parole, citing factors “relevant to the child’s culpability.”⁶ The question presented on certiorari to the Supreme Court was: “Whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole?”⁷

The court held that *Miller* and *Montgomery* expressly rejected a

requirement of a finding of permanent incorrigibility. “Rather, *Miller* repeatedly described youth as a sentencing factor akin to a mitigating circumstance.”⁸ The “discretionary sentencing procedure [alone] would make life-without-parole sentences relatively rare for juvenile offenders.”⁹ The court made clear no explicit or implicit finding of permanent incorrigibility is required to satisfy the safeguards provided by the Cruel and Unusual Punishments Clause of the

Eighth Amendment.¹⁰ As a result, the SCOTUS ended the rapid expansion of the implication of youth in the context of the Eighth Amendment. But the court made clear states may be more protective and require such a finding at sentencing, impose other protections such as substantive appellate review of all life-without-parole sentences, or may simply prohibit LWOP sentences for all offenders under age 18.¹¹

A three-justice minority dissented, with Justice Sotomayor writing, “the Court distorts *Miller* and *Montgomery* beyond recognition.”¹² Sentencing discretion was not the end of *Miller*, but a necessary component to “give effect to *Miller*’s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity[.]”¹³

National commentators have shared the concerns of the dissent¹⁴ and suggested *Jones* will make it easier to impose JLWOP.¹⁵ This article is offered to look at how *Jones* impacts Indiana’s current sentencing scheme for youthful offenders facing life in prison.¹⁶

"Rather, *Miller* repeatedly described youth as a sentencing factor akin to a mitigating circumstance."

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INDIANA’S LWOP SENTENCING STATUTE REQUIRES A SPECIFIC FINDING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES, INCLUDING YOUTH

The first step in considering *Jones*’ impact is Indiana’s statutory scheme for murder convictions and life-without-parole sentences. Indiana Code section 35-50-2-3, which provides the sentences for murder, permits life-without-parole for persons at least 16, but less than 18 years of age. Indiana Code section 35-50-2-9 controls substantive and procedural issues for seeking and imposing the death penalty and life-without-parole. To impose a death or life-without-parole sentence, the state must allege separately and prove beyond a reasonable doubt one of several aggravating circumstances. Additionally, seven specific mitigating circumstances, as well as a catchall “[a]ny other circumstances appropriate for consideration” are listed. The imposition of the sentence must be

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supported by a finding the mitigating circumstances are outweighed by “any aggravating circumstances that exist.” I.C. § 35-50-2-9(l). Specifically included in the list of mitigating circumstances is that the defendant was less than 18 at the time of the murder.

YOUTH AND ITS ATTENDANT CIRCUMSTANCES WILL BE USED ON APPEAL TO INFORM THE ANALYSIS OF “CHARACTER OF THE OFFENDER” TO DETERMINE WHETHER A LIFE SENTENCE IS APPROPRIATE

A “trial court is under no obligation to find that a mitigating circumstance exists simply because it is supported by some evidence in the record.”¹⁷ Specifically, our appellate courts have held youth is not automatically a significant mitigating circumstance. *See, e.g., Smith v. State*, 872 N.E.2d 169, 178 (Ind. Ct. App. 2007), *trans. denied*. “There are both relatively old offenders who seem clueless and relatively young ones who appear hardened and purposeful.” *Ellis v. State*, 736 N.E.2d 731, 736 (Ind. 2000). This rationale has been used to reject appellate arguments on the mitigation of youth for a 20-year-old offender in a post-*Miller/Montgomery* appeal.¹⁸ But where the offender was less than 18, and received a life sentence, the trend is that youth is a substantial mitigating circumstance. Recent Indiana Supreme Court cases demonstrate that life sentences of youthful offenders—whether de jure or de facto—are going to be subject to substantial appellate scrutiny using the appellate court’s authority to review and revise sentences under Indiana Constitution Article 7, Section 4, and Indiana Appellate Rule 7(B).

APPLICATION OF APPELLATE RULE 7(B) TO DE JURE LIFE-WITHOUT-PAROLE

Our supreme court has reviewed the propriety of a JLWOP sentence on just two occasions.¹⁹ The first time, in *Conley v. State*, 972 N.E.2d 864 (Ind. 2012), which was handed down a little over a month after the *Miller* decision was issued, youth was not discussed in the context of the court’s Appellate

Rule 7(B) review. But that may have been more of a product of how Conley’s youth was argued on appeal than a demonstration of the court’s rejection of mitigating weight for youth. Conley’s counsel had briefed the case without the benefit of the *Miller* decision, but rather infused with the hope that briefing in the *Miller* case had provided. Conley mounted a full-steam-ahead

challenge to the constitutionality of LWOP applied to anyone who committed their offense before reaching age 18, arguing the same attributes of youth that made imposing the death penalty inappropriate in *Roper*, and life-without-parole in *Graham*, should lead to a rejection of life-without-parole for offenders who have killed as well.²⁰ However, the court, with the benefit of





the *Miller* decision, recognized that a life sentence for juveniles should be rare in application, but that the “evolving standards of decency that mark the progress of a maturing society”²¹ had not reached the point of abolishing JLWOP in the United States, as long as it was discretionary.²² Ultimately, Conley’s sentence was affirmed without analysis by the majority as to how Conley’s character should be viewed through the lens of youth.

However, just five years later, the second time our Supreme Court reviewed a JLWOP sentence, in *Taylor v. State*, 86 N.E.3d 157 (Ind. 2017), the court began its analysis of the mitigating weight of youth by stating poignantly “children are different.”²³ “[J]uveniles are less culpable than adults and therefore are less deserving of the most severe punishments.” *Id.* The reality of Taylor’s youth was identified as the most significant mitigating circumstance, and despite characterizing his crime as “heinous and senseless,” and elsewhere as “grievous,” the court revised his sentence to a term of 80 years for his murder conviction and firearms enhancement, running an additional conspiracy to commit murder conviction concurrent to those sentences.²⁴

APPLICATION OF ROPER, GRAHAM, AND MILLER CONSIDERATIONS IN REVIEWING TERM-OF-YEARS SENTENCES FURTHER DEMONSTRATES THAT JONES MAY NOT IMPACT INDIANA MUCH

In the gap of time between *Conley* and *Taylor*, the Indiana Supreme Court had revised two term-of-years sentences for juvenile offenders, which would have resulted in the defendants dying in prison despite the sentences being for a term of years. In *Fuller v. State*, 9 N.E.3d 653 (Ind. 2014), and *Brown v. State*, 10 N.E.3d 1 (Ind. 2014), issued on the same day, the court reviewed separate appeals from juvenile co-perpetrators of a robbery and double homicide. Both decisions authored by Justice Rucker read very similarly and cited at length the prevailing Eighth Amendment precedents for juveniles that had been

developed by that time: *Roper*, *Graham*, and *Miller*.

The Supreme Court has discerned three significant gaps between juveniles and adults. First, as compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility. Second, they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure, and they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. Finally, a child’s character is not as well formed as an adult’s and his actions are less likely to be evidence of irretrievable depravity. These salient characteristics mean that it is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.²⁵

The court explained in each decision the 150-year sentence “forswears altogether the rehabilitative ideal.”²⁶ In *Brown*, the court reduced the aggregate sentence to 80 years, but in *Fuller*, the court reduced the sentence to 85 years, noting Fuller’s act of shooting one of the victims warranted a higher sentence than *Brown*, whose role in the murders was merely as an accomplice.²⁷

Fuller and *Brown* had another co-defendant whose case could have clarified how significant the 18-year-old dividing line is when using the guideposts from *Roper*, *Graham*, and *Miller* in reviewing sentences. Na-Son Smith happened to be 18 when he participated alongside Fuller and Brown in the crime.²⁸ In fact, according to his former counsel, Smith had only been 18 years old for six weeks at the time of the offense. The trial court had found Smith’s youth to be a mitigating circumstance, but still sentenced him to the maximum aggregate sentence

Continued on page 36...

COVID-19 AND BANKRUPTCY FILINGS

By Mark S. Zuckerberg
and Amanda K. Quick



The large decrease in bankruptcy filings has been one of the more surprising and unexpected results of the COVID-19 pandemic which has seen millions of jobs lost, record numbers collecting unemployment benefits, and the closure of innumerable small businesses. In fact, bankruptcy filings are at their lowest since 1985 according to the Administrative Office of the U.S. Courts. As of June, commercial filings fell 17.7% to 18,511 compared with 2020, and personal filings plummeted 32.7% to 443,798. Although this may come as a surprise, there are several reasons for the drop in new bankruptcies. A combination of pandemic benefits from the government, eviction and foreclosure moratoriums, a freeze on the repayment of federally backed student loans, and a halt on repossessions and collection efforts have helped many households stay afloat during this unprecedented time. However, as extended federal benefits and moratoriums come to an end, it is only a matter of time before both consumers and businesses are forced to turn to bankruptcy to free themselves of the debt accumulated during the pandemic.

CARES ACT

In March 2021, President Joe Biden signed the COVID-19 Bankruptcy Relief

Extension Act (Extension Act). The Extension Act extends individual and small business bankruptcy relief provisions that were part of last year's CARES Act through March 27, 2022. Some of the key provisions of the Extension Act include an increased eligibility for the Small Business Reorganization Act (SBRA) for businesses filing under Subchapter V of Chapter 11. The SBRA makes Chapter 11 a much more streamlined and inexpensive process. Through March 27, 2022, businesses with debt up to \$7.5 million are eligible to file a Subchapter V Chapter 11 case.

As for individual debtors, the Extension Act amends the definition of "income" in the Bankruptcy Code for Chapter 7 and 13 debtors to exclude COVID-19 related payments for purposes of filing bankruptcy. Similarly, it also clarifies the calculation of disposable income for confirmation of Chapter 13 plans shall not include COVID-19 related payments. The Extension Act further extends assistance to Chapter 13 debtors by allowing those individuals and families to seek payment plan modifications if they

are experiencing a material financial hardship due to the pandemic. This includes extended Chapter 13 plan payments for up to seven years.

There are also several other provisions set to expire on December 27, 2021, that have impacted the Bankruptcy Code. As of that date, COVID-19 stimulus payments will no longer be excluded from property of the bankruptcy estate. Additionally, Chapter 13 debtors that have missed three or fewer mortgage payments due to COVID-19, or have entered into a mortgage modification agreement or forbearance, shall no longer be permitted to seek an early discharge. Also set to expire in December are provisions which currently permit any party in standing, such as mortgage servicers, to seek modification of a Chapter 13 plan to provide for payment of CARES Act supplemental proofs of claim.

FEDERAL EVICTION MORATORIUM

On August 26, 2021, the U.S. Supreme Court issued an order vacating the Centers for Disease Control and Prevention's most recent nationwide

eviction moratorium. Previously, the CDC had issued an order banning evictions of residential tenants in counties experiencing high levels of community transmission of COVID-19. The justification being that mass evictions would worsen the spread of the virus and its impact on our communities. As a result of the Supreme Court's order, residential landlords in most localities may once again pursue eviction proceedings regardless of a tenant's financial status as impacted by the pandemic. This has the potential to affect millions of Americans that have fallen behind on rental payments.

However, several states and local governments have taken action and extended their own eviction bans. This includes New York, which has extended its eviction moratorium until January 15, 2022. Illinois and California's moratoriums are set to expire later this fall, and New Jersey, New Mexico and Washington, D.C., have also extended their respective moratoriums. Advocates of the moratoriums argue the bans must stay in place until more COVID-19 rental assistance reaches tenants and landlords. The painfully slow rollout of federal relief has become a serious problem for millions of Americans desperate for aid.

Congress allocated more than \$45 billion in relief to tenants and their landlords, but many states have only issued a small percentage of their share of the funds. The slow rollout of funds, technology problems, third-party vendor issues and an often-convoluted application process have resulted in funds not reaching those most in need. In addition, some states are forcing tenants to provide more documentation than required by federal law.

STEVE WILLIAMS
MEDIATOR

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47 Years Litigation Experience
646 Walnut Street, Terre Haute, IN 47807
steve@williamsinjurylaw.com
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This has helped create additional, unnecessary hurdles. Since the eviction moratorium has officially come to a halt, renters across the nation face an uncertain future and uncompensated landlords continue to struggle financially.

MORTGAGE FORECLOSURE MORATORIUM

The mortgage foreclosure moratorium has been essential to the survival of millions of people suffering from the financial fallout of the pandemic. However, the foreclosure moratorium on federally backed mortgages ended on July 31, 2021. Following its expiration, millions of borrowers across the country remain painfully far behind on mortgage payments. Although some states and local governments have elected to extend these moratoriums, the vast majority of Americans no longer have this temporary protection.

The real estate market has been hot recently, but most fail to recognize the looming tidal wave of foreclosures anticipated in 2022. The problem is that supply in the form of foreclosed homes, as well as homes voluntarily sold to avoid foreclosure, is about to overwhelm demand on a large scale. When the wave of foreclosures finally hits, housing prices are going to plummet as they did in the 2008 real estate crash. People across the country are going to find themselves once again with negative equity in their homes. At that point, it often makes more sense to simply walk away than it does to continue making payments.

It is estimated that around 2 million homeowners are delinquent on mortgage payments, and billions in federal aid has not yet

been distributed. Many of these homeowners are still in forbearance, but that safety net is about to be removed as well. As homeowners exit forbearance, some could be considered for monthly payment reductions or other repayment options depending on who has backed their mortgages. Of course, even for those with these options, there is always the problem of lack of communication from mortgage servicers.

"The real estate market has been hot recently, but most fail to recognize the looming tidal wave of foreclosures anticipated in 2022."

UNEMPLOYMENT BENEFITS

During the pandemic, the federal government granted an extension for people already receiving unemployment benefits. Automatic, additional payments of \$300 per week were available to all people that qualified for regular unemployment benefits – at times the extra funds were as high as \$600 per week. States also were permitted to provide Pandemic Unemployment Assistance (PUA) to individuals that were self-employed, seeking part-time employment, or who otherwise would not qualify for regular unemployment compensation. To qualify for PUA, individuals had to be unemployed, partially employed, or unable or unavailable to work because of certain health or economic consequences of the COVID-19 pandemic. However, all of these additional

unemployment benefits ended on September 6, 2021, including Federal Pandemic Unemployment Compensation, Pandemic Emergency Unemployment Compensation, Mixed Earners Unemployment Compensation, and PUA. For those states that had not already canceled these additional benefits, they have now expired nationwide. The end of these employment benefits represents the largest such change in America history. According to

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estimates by the Century Foundation, 7.5 million Americans lost benefits.

SNAP BENEFITS

Another type of federal aid that has increased during the pandemic is Supplemental Nutrition Assistance Program (SNAP) benefits. There was a 15% increase in maximum benefits available to eligible recipients, which translated to about \$27 in additional benefits available per person each month. These additional benefits expired on September 30, 2021. However, earlier this year, the Biden administration announced that starting on October 1st there would be a permanent increase to SNAP benefits in an effort to bridge the gap for the millions of Americans struggling to provide food to their families. The increase will last as long as an additional emergency allotment remains available to claimants, and a modest increase will remain once the emergency allotments expire. The emergency allotments do not currently have an expiration date, and are still available in the vast majority of states. As it stands, the average amount of SNAP benefits available to each person has increased to \$251 per month.

STUDENT LOAN REPAYMENT SUSPENSION

In August, the U.S. Department of Education announced a final extension of federally backed student loan payments to January 31, 2022. The moratorium includes the following relief measures for eligible loans: (1) suspension of loan payments; (2) 0% interest rate; and (3) stopped collections on defaulted loans. This was announced as the prior extension was set to expire and will provide a continued reprieve

for the more than 40 million student loan borrowers in the country. According to the Department of Education, this will be the final extension. The extension is intended to give borrowers enough time to transition into repayment plans while simultaneously reducing the risk of default and delinquency. It is hoped that the emphasis on finality will give borrowers more certainty than the rolling extensions have provided. According to the Federal Reserve, the payment suspension has saved Americans nearly \$7 billion per month in payments, and \$5 billion per month in interest.


However, student loan borrowers still have hope for relief after a

"It can hardly come as a surprise that bankruptcy filings are expected to spike into 2022 and beyond..."

bi-partisan bill named the FRESH START Through Bankruptcy Act of 2021 was introduced in Congress. The act would give bankruptcy debtors more access to student loan debt cancellation. Currently, it is extremely difficult for debtors to get a discharge of student loan debt. The proposed act would allow student loan borrowers that file for bankruptcy relief to discharge federally backed student loans after a period of 10 years from the date the first student loan payment is due. Those borrowers with private student loans or federal loans that have been due less than 10 years may still be able to obtain a

discharge of the debt through the current "undue hardship" standard. Another important provision of the proposed legislation is its attempt to bring accountability back to colleges and universities. Educational facilities would be required to partially reimburse the federal government for each student loan discharged. This particularly would apply to colleges and universities with a high percentage of the student population with student loans, colleges with consistently high default rates, and those with low repayment rates.

CONCLUSION

The moratoriums on evictions, foreclosures, and federally backed student loan payments were always intended to be temporary and tied to the COVID-19 pandemic. The same is true for extended unemployment benefits and other federal relief programs. Although it may have felt like it at times, the pandemic will not last forever. Millions of individuals are facing a cliff of insurmountable debt as the various federal pandemic-related relief programs expire. This is further compounded by the question of how much medical debt individuals incurred during the pandemic. Millions of people that lost jobs during this unprecedented time also lost employer-sponsored health coverage. As a result, it can hardly come as a surprise that bankruptcy filings are expected to spike into 2022 and beyond – perhaps even at levels that may surpass those of the 2008 recession. 

PUT YOUR MONEY WHERE YOUR MOUTH IS: DIVERSIFYING YOUR ORGANIZATION'S SUPPLY CHAIN

By Lesley Crane



These days, diversity, equity, and inclusion, or DEI, is on everyone's mind. Often, we think about it from a human resource perspective – how to hire diverse talent. Of course, this is a critical piece of the DEI picture. Study after study tells us that a diverse workforce is a smarter workforce, a happier workforce, a better workforce.

In addition to hiring a diverse workforce, smart leaders seek to retain those diverse employees. That is also a function of human resources. As leaders of organizations, we search out the best ways to give our teams a sense of belonging. We need to give our workforce the confidence that their input matters, their feedback is valuable and their contribution to our mission is critical to our effort's success. If leaders can do this, their diverse workforce will feel a deep sense of belonging and inclusion.

Despite these efforts, the DEI conversation is often missing another important element—supplier diversity. I do not underestimate or intend to diminish the importance of the human resource component of DEI because it is absolutely critical. In addition, by bringing awareness to your organization's supply chain, you can strengthen your commitment to DEI.



What do I mean by supplier diversity? Supplier diversity is an organization's commitment to intentionally purchase goods and services in a strategic, methodical way from diverse suppliers. It is similar to "Shop Small," "Shop Local," "Indiana Grown," and "Made in USA" initiatives in that the organization is specifically spending its money with businesses it wants to support. It is also a measurable, tangible way to demonstrate your firm's support of DEI.

Diverse suppliers may look different for different entities. For example, when I was commissioner of the Indiana Department of Administration, the Division of Supplier Diversity certified women-owned business entities, minority-owned business entities, and Indiana Veteran Owned Small Businesses. The state has goals for spending our tax dollars with all three kinds of entities, which are expressed in percentages across several different

categories. There are other programs that certify businesses owned by someone living with a disability or a member of the LGBTQIA+ community. The philosophy behind the movement is to support those who have historically been members of excluded groups in the business community and could benefit from a little extra support.

Why invest in diverse suppliers? The arguments are numerous. One study cited by Michigan State University found that companies who dedicate 20% or more of their spend to diverse suppliers can attribute as much as 15% of their annual sales to supplier diversity programs. Another study put the return on investment in diverse suppliers at 133%.

Since 1983, The State of Indiana has set goals for spending tax dollars with these under-represented and under-utilized businesses. Some other entities in our state who also have supplier diversity goals

are our state's public colleges and universities, the City of Indianapolis, and the Indianapolis Airport Authority. Buying from diverse suppliers, who are most often small businesses, supports local economies. It provides jobs and it helps small businesses grow.

In my short tenure at the Indiana Department of Administration, I met many small business owners who wanted to do business with larger businesses who struggled with how to get started. Just the smallest amount of time spent with these neophyte businesses would yield great results as they become more sophisticated partners. Several large Hoosier employers, private companies, do an excellent job cultivating these suppliers. They understand it is in the community's best interest for small, diverse firms to succeed.


How can a law firm take action? It can seem daunting, but it does not

need to be hard. Here are a few easy ways to improve your firm's supplier diversity spend:

1. Search the Indiana Department of Administration's website and see if any of your current vendors or suppliers are certified. You also can use other entities such as the Mid-States Minority Supplier Development Council, Great Lakes Women's Business Council, National LGBT Chamber of Commerce, and others. This will help you determine what your current diversity spend is.
2. Determine what you want your firm's goals to be. The State of Indiana recently completed its five-year disparity study and determined, for professional services, the disparity for minorities is 9%, for women is 13%, and for veterans is 5%. A firm may not want to set its goals this high to start, especially if after completing step one, it is starting at 0%. Set a stretch goal, but a realistic stretch goal for your firm.
3. Take a look at your current vendor types by group. How does your firm currently spend money? Office supplies? Marketing services? Insurance? Then take another look at the certified list mentioned in step one and try to find vendors in those same areas you also can use to meet your needs. You might be surprised at the capacity, professionalism, and high level of service you receive from these small businesses.
4. If this seems completely overwhelming or more than your firm wants to tackle on its own, you can work with a consulting firm like Thought Kitchen. This is one of the services we provide for our

clients. We make improving supplier diversity easier for your business by working with your business's subject-matter experts to craft a plan to help your firm meet its goals. This is a classic win-win.

It is my profound belief if we can get more businesses to invest in other, diverse businesses it will be for our collective benefit. Not

only is it the right thing to do, we all reap rewards in the form of additional tax revenue, jobs, and community growth. It truly is a goal we can achieve if we work toward it together. 

Lesley Crane is a member of the Indiana State Bar Association and the Cofounder & Chief Diversity Officer of Thought Kitchen, a consulting and coaching firm.

"Not only is it the right thing to do, we all reap rewards in the form of additional tax revenue, jobs, and community growth."



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INDIANA PEER REVIEW PRIVILEGE

By Michelle Altobella, JD and Gwendolyn Clark



During the deposition, defense counsel stated an objection to the question posed and instructed the witness not to answer based upon the peer review privilege. While the information sought may have been relevant to the proceeding, the deponent was precluded from disclosing any information deemed privileged under the Indiana peer review statute found at Indiana Code 34-30-15 et seq. If your practice rarely involves interactions with the medical community, then you may not be as familiar with the statutory privilege afforded to peer review committees, and this article is intended to provide a fundamental overview.

CONFIDENTIAL AND PRIVILEGED PROFESSIONAL REVIEW ACTIVITY BY PEER REVIEW COMMITTEES

Peer review committees serve the important role of conducting professional review activities to ensure safe, quality patient care within health care facilities. In order to qualify as a peer review committee in Indiana, the committee must meet certain criteria, which generally involves being organized by a hospital or other health care facility and at least 50% of the committee members are health care providers.¹ Peer review committees are responsible for evaluating: (i) qualifications of health care providers (i.e. activities of a credentials

committee in reviewing applications submitted by physicians requesting appointment to the medical staff in order to practice medicine within the hospital), (ii) patient care rendered by health care providers (i.e. activities of a quality committee in its ongoing monitoring of quality performance metrics), and (iii) merits of a complaint against a health care provider (i.e. activities of a medical executive committee in conducting an investigation).²

Peer review committees are an essential aspect of health care. In carrying out its duties, all peer review committee proceedings are confidential and privileged.³ Specifically, no participant in a peer review committee may disclose the *communications* to, the *records* of or *determination* of the peer review committee outside the peer review committee, unless otherwise permitted under the Indiana peer review statute.⁴ The privilege extends to any information acquired during the peer review committee proceeding as well as any opinion, recommendation, or evaluation of the committee or any committee member.⁵ As a result, this ensures a protected setting whereby health care providers may freely discuss, collaborate and resolve matters in the best interest of patient care.

PEER REVIEW PRIVILEGE IN LEGAL PROCEEDINGS

The *communications* to, *records* of or *determinations* of a peer review committee may not be subject to a subpoena, discovery or admissible in evidence in any legal proceeding, unless otherwise permitted under the statute (discussed below).⁶ As such, institutions operating peer review committees are diligent in ensuring all communications

and records are clearly marked internally, i.e. Confidential-Peer Review Privileged Communication-Not Subject to Disclosure.

A restraining order or injunction may not be issued against a peer review committee (or any of its participants) acting in good faith while carrying out its duties, which ensures the professional review activity is not disrupted.⁷ No witness can be questioned about their participation in a peer review proceeding, including the nature of what was discussed and their opinions formed.⁸ And, all organizations and witnesses involved in peer review committees are required to expressly invoke the evidentiary peer review privilege in all legal proceedings.⁹



PERMISSIBLE DISCLOSURES

There are limited circumstances, however, in which it is permissible to disclose peer review privileged information if certain conditions are satisfied. For example, if a health care provider is under investigation, then they are permitted access to records accumulated about them by the peer review committee.¹⁰ To ensure quality patient care across the continuum, a peer review committee of one hospital may disclose peer review protected information to the peer review committee of another hospital, which receiving committee will be required to extend the same confidentiality and peer review privilege protections as the originating committee.¹¹

Continued on page 35...

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By Joel M. Schumm



MARIJUANA ODOR, JURY INSTRUCTIONS, AND BURGLARY

The Indiana Supreme Court issued opinions in three criminal cases during September. Two Court of Appeals' opinions addressed burglary, and other opinions are summarized in the online version of this article.

WARRANT BASED ON MARIJUANA ODOR

In *Bunnell v. State*, 172 N.E.3d 1231, 1233 (Ind. 2021), the justices considered the following issue of first impression: “whether an officer who attests only that they possess the necessary training and experience to detect the smell of raw marijuana allows a warrant-issuing judicial officer to infer that the affiant is qualified to recognize this odor.” Some Court of Appeals’ opinions had “suggested or held that an officer’s general statement to this effect may not suffice for a probable-cause determination.” *Id.* at 1237. The Indiana Supreme Court disapproved of those cases and concluded “[b]ecause trained and experienced law enforcement officers require no exceptional olfactory

acuity to identify the distinctive scent of raw marijuana, an officer seeking a search warrant on this basis need not detail their qualifications—beyond their ‘training and experience’—to identify the drug’s smell.” *Id.* at 1233.¹

Justice Massa’s concurring opinion underscored that “[d]etectives and magistrates should heed the lesson” of including the “six magic words”—“based on my training and experience”—to avoid suppression of evidence in a future case. *Id.* at 1238.

SUPPLEMENTAL JURY INSTRUCTION ALLOWED

Ramirez v. State, No. 20S-LW-430, 2021 WL 4316079 (Ind. Sept. 23, 2021), addressed and rejected several evidentiary and sentencing claims in a life-without-parole direct appeal. A trial court’s ability to instruct or assist a deliberating jury is briefly discussed below.

By statute, if a deliberating jury “desires to be informed as to any point of law arising in the case; the jury may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or the attorneys representing the parties.” Ind. Code § 34-36-1-6. The statute reflects a “policy of greater flexibility in jury management, empowering—indeed, requiring—a trial court to respond to a jury’s question when it determines, in its discretion, that the question concerns a point of law involved in the case.” *Ramirez*, 2021 WL 4316079, at *10 (cleaned up).

Consistent with the plain language of the statute and earlier precedent, the justices held “a trial court is no longer required to identify a legal

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lacuna in the final instructions before responding to a jury's question" because the statute "requires only that a jury's question seek information concerning a legal issue before it." *Id.*


INVOLUNTARY MANSLAUGHTER INSTRUCTION WAS PROPER

In *Larkin v. State*, 173 N.E.3d 662, 668 (Ind. 2021), the Indiana Supreme Court upheld the trial court's decision to instruct the jury on involuntary manslaughter in a voluntary manslaughter prosecution, concluding involuntary manslaughter "was a factually included lesser offense, there was a serious evidentiary dispute, and Larkin had fair notice."²

Justice David dissented, noting in part he did "not believe that the State should be able to seek a lesser included instruction mid trial once it realizes things aren't going well or use a vague charging information to ambush a defendant." *Id.* at 672. Court of Appeals Opinions

In a pair of cases, the Court of Appeals reversed or reduced convictions for burglary.

In *Wilburn v. State*, No. 20A-CR-1709, 2021 WL 4258828, at *6 (Ind. Ct. App. Sept. 20, 2021), the court reversed a burglary conviction because the defendant entered a "business establishment during its hours of operation through an unlocked public entrance," which failed to meet the "breaking" element of the offense.

In *Fix v. State*, No. 20A-CR-1566, 2021 WL 4398237, at *1 (Ind. Ct. App. Sept. 27, 2021), the defendant "broke and entered the victim's home unarmed but subsequently obtained and used a deadly weapon against the victim." Because the "Indiana Supreme Court has consistently interpreted the burglary statute to mean that the burglary offense itself is complete upon entry," the Court of Appeals found insufficient evidence for the deadly weapon element and ordered remand for entry of a lesser offense. *Id.* at *6-7. 

FOOTNOTES

1. A week later, the Court of Appeals held "the odor of burnt and raw marijuana, by itself, was not enough to establish probable cause to **arrest** [a suspect] for possessing marijuana," distinguishing *Bunnell*, which involved probable cause for a **search warrant**. See *I.G. v. State*, No. 21A-JV-479, 2021 WL 4127197, at *4 & n.2 (Ind. Ct. App. Sept. 10, 2021) (emphasis added).
2. The majority also rejected three other claims raised by Larkin, finding sufficient evidence to overcome his self-defense claim, no abuse of discretion in denying a motion to dismiss for prosecutorial misconduct, and no abuse of discretion by considering the handgun as an aggravator at sentencing. *Id.* at 667-671.

The full texts of all Indiana appellate court decisions, including those issued not-for-publication, are available via Casemaker at www.inbar.org or the Indiana Courts website at www.in.gov/judiciary/opinions. A more in-depth version of this article is available at inbar.org.

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By Margaret Christensen
and Vienna Bottomley



REPORTING AND PROFESSIONAL RESPONSIBILITY:

A LAWYER'S OBLIGATION TO REPORT CHILD ABUSE IN THE WAKE OF **BLICKMAN**

Recently, in *Matter of Blickman*, 164 N.E.3d 708 (Ind. 2021), the Indiana Supreme Court partially addressed an attorney's ethical obligation when confronted with an extremely difficult situation: What should a lawyer do after learning about suspected child abuse or neglect while representing a client? In *Blickman*, the court provided some guidance but ultimately left the most contentious question—how a lawyer's statutory duty to report suspected child abuse should be reconciled with their duty of client confidentiality—unresolved.

Indiana law is clear that “an individual who has reason to believe that a child is a victim of child abuse or neglect” has a **duty** to “make a report.” Indiana Code

§ 31-33-5-1. This law applies to *anyone* who becomes aware of possible child abuse, and there is no statutory exception for attorneys. Individuals also have a duty to report suspected child abuse “immediately.” I.C. § 31-33-5-4. In *C.S. v. State*, 8 N.E.3d 668, 671–72, 692 (Ind. 2014), for example, the Indiana Supreme Court held a high school principal violated Indiana’s reporting statutes by waiting a mere four hours to report a student’s rape to the Department of Child Services (DCS). These mandatory reporting

or assisted a criminal act under Rule 1.2(d) by not immediately instructing his client to report the child abuse. *Id.* at 714–16. It then considered whether he had committed a criminal act reflecting adversely on his fitness as a lawyer under Rule 8.4(b) by failing to report the abuse directly to DCS. *Id.* at 716–17.

I. A LAWYER SHOULD PROMPTLY ADVISE A CLIENT TO IMMEDIATELY REPORT SUSPECTED CHILD ABUSE

"In *Blickman*, outside counsel for a private high school learned from a student’s father that the father believed a teacher had engaged in a series of inappropriate sexual electronic communications with his daughter. "

statutes as applied to an attorney, however, stand in tension with a lawyer’s obligation under Indiana Rule of Professional Conduct 1.6’s confidentiality provision, which generally requires a lawyer to “not reveal information relating to representation of a client.”

In *Blickman*, outside counsel for a private high school learned from a student’s father that the father believed a teacher had engaged in a series of inappropriate sexual electronic communications with his daughter. 164 N.E.3d at 710. The attorney told his client he needed time to research the issue and informed the school it was required to immediately make a report to the DCS the next morning. *Id.* The court first analyzed whether the lawyer acted incompetently under Rule 1.1

The Supreme Court in *Blickman* concluded the lawyer did not violate the Rules of Professional Conduct by waiting until the day after he discovered the suspected child abuse to advise the school to make a report. *Id.* at 715–16. In its decision, the court cited the reporting statutes’ complexity and counsel’s lack of knowledge of the statutes. *Id.* It also emphasized, while “it would have been better” for the attorney to have been more familiar with Indiana’s reporting requirements, Rule 1.1 requires less than perfection. *Id.* at 715. The court also found significant the fact the lawyer did not “remain willfully ignorant” of the statutory requirements but rather, promptly researched the issue before telling his client a report should be made “right away” early the next morning. *Id.* at 716.



Based on this discussion, it is not clear the court would have reached the same conclusion if the school's outside counsel had been more knowledgeable about the reporting statutes, or if he had waited to complete other tasks before researching the issue and reporting back to his client. Others should take note and not delay when advising a client of their legal obligation to immediately report suspected child abuse. Ignorance of the statutory requirements may be harder to demonstrate in the wake of this decision, and the court has made clear that willful ignorance is no defense. Additionally, a lawyer should make clear to their client that time is of the essence when reporting child abuse.

II. THE TENSION BETWEEN INDIANA'S STATUTORY REPORTING REQUIREMENTS AND RULE 1.6 REMAINS UNRESOLVED

Next, in addressing the lawyer's failure to directly report the abuse, the Indiana Supreme Court recognized the longstanding tension between the reporting statutes and Rule 1.6's confidentiality provision. *Id.* at 717. The court in *Blickman* cited various, differing viewpoints on the conflict, including a 2015 advisory opinion from the Indiana State Bar Association offering as a solution that a lawyer "must" report suspected child abuse if they believe that doing so is reasonably necessary "to prevent reasonably certain death or substantial bodily harm" *Id.* at 717. Rule 1.6(b)(1) allows a lawyer

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never executed, or his client claimed to have already fully disclosed the suspected abuse to DCS. *Id.* at 713. The court further found he also could not cure his attempts to silence the student and her family by emailing their lawyer after the fact to clarify the proposed agreement would not actually prohibit communications with DCS and law enforcement. *Id.* at 714.

IV. MAJOR TAKEAWAYS FROM THE COURT'S OPINION

The Indiana Supreme Court declined to address whether an attorney is required to report suspected child abuse they discover during representation. But even if a lawyer, citing Rule 1.6's confidentiality provision, does not directly report suspected child abuse, they still must advise a client to make an immediate report and cannot stand in the way of a victim's family's attempts to cooperate with authorities investigating the abuse. Furthermore, any attempts to enforce a confidentiality clause in this context brings harm not just to the client, but to the attorney as well. Indiana lawyers are likely waiting for further guidance as this statute is interpreted in the coming years. But for now, the *Blickman* opinion does provide some inarguable "black and white" guidance in an area that is decidedly gray. 



By Kathy L. Osborn
and Elizabeth A. Charles



APPELLATE CIVIL CASE LAW UPDATE (SEPTEMBER)

In September, the Indiana Supreme Court issued three civil opinions and the Indiana Court of Appeals issued eight published civil opinions. The Supreme Court decisions and two select Court of Appeals decisions are summarized below.

INDIANA SUPREME COURT

The Indiana Supreme Court affirmed the trial court's grant of summary judgment in favor of Tyson Fresh Meats finding it did not owe a duty of care to the traveling public. *Reece v. Tyson Fresh Meats, Inc.*, No. 21S-CT-435, 2021 WL 4271793 (Ind. 2021). Indiana common law requires one who occupies or owns land has a duty to the traveling public on adjacent highways to exercise reasonable care to prevent injury from "unreasonable risks" created by the occupier or owner. To clarify what

types of land uses or conditions implicate this duty in cases where motorists claim their views were obstructed, the court adopted a bright-line rule that when a visual obstruction is “wholly contained on a landowner’s property, there is no duty to the traveling public.”

In *Southlake Indiana, LLC v. Lake Cty. Assessor*, No. 21S-TA-239, 2021 WL 4305229 (Ind. 2021)*, the Indiana Supreme Court determined when a property’s assessment increases by more than 5% over the previous year, and the Indiana Board of Tax Review finds neither party’s assessment correct, Indiana statutory law requires the assessment reverts to the assessment for the prior tax year. The Ross Township assessor in Lake County increased the tax

assessments for the Southlake Mall, owned by Southlake Indiana, LLC (Southlake), for the tax year 2014 and issued notices changing the property-tax assessments for tax years 2011, 2012, and 2013. The new assessed values were more than double the 2010 assessment and the original 2011-2013 assessments. Southlake appealed all four tax-year assessments. The state board found deficiencies in the assessments presented by both parties. The state board then assessed the property value of the mall. Southlake argued the tax court and state board erred by not applying the reversionary clause in Indiana Code section 6-1.1-15-17.2(b) which states, “If neither the assessing official nor the taxpayer meets the burden of proof under this section, the assessment

reverts to the assessment for the prior tax year, which is the original assessment for that prior tax year.” The statute applies when a review or appeal increases by more than 5%. The court held the reversionary clause was triggered because the state board found both parties’ assessments were deficient, thus neither party met its burden of proof.

Under Indiana law, the Indiana Supreme Court held that schools alone can define what ancillary duties it may require of teachers. *Culver Cmty. Tchrs. Ass’n v. Indiana Educ. Emp. Rels. Bd.*, No. 21S-PL-64, 2021 WL 4204818 (Ind. 2021). Teachers may then bargain for additional wages associated with performing these ancillary duties,






but they cannot bargain for anything other than wages, salary, and benefits.

INDIANA COURT OF APPEALS

The Indiana Court of Appeals addressed the issue of the equitable doctrine of reformation, which will reform a written contract when, through mutual mistake or mistake of one of the parties and fraud by the other party, the contract does not correctly express the agreement of the parties. *Cutter v. Jirus*, No. 21A-PL-200, 2021 WL 4468445 (Ind. Ct. App. 2021). The party seeking reformation on the basis of mutual mistake must show by clear and convincing evidence (1) the true intentions of the parties to an instrument; (2) a mistake was made; (3) the mistake was mutual; and (4) the instrument does not reflect the true intentions of the parties.

In *Indiana Office of Utility Consumer Counselor v. Citizens Wastewater of Westfield, LLC*, No. 20A-EX-2199, 2021 WL 4005662 (Ind. Ct. of App. 2021), The Indiana Court of Appeals affirmed it was reasonable for the commission to conclude I.C. § 8-1-2-6(b) permits the valuation of a public utility to be based on factors other than tangible property in cases filed pursuant to I.C. § 8-1-30.3-5. 

*Asterisked cases are those in which the authors' firm, Faegre Drinker Biddle & Reath LLP, represented one or more of the parties.

The full texts of all the Indiana appellate court decisions, including those issued not-for-publication, are available via Casemaker at www.inbar.org or the Indiana Courts website at www.in.gov/judiciary/ opinions. A more in-depth version of this article is available at inbar.org.

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A peer review committee may issue a limited written waiver of the peer review privilege in favor of the attorney general for its use in conducting a provider investigation under IC 25-1-7; however, under this limited waiver, the peer review privilege remains intact except for the attorney general's use incident to the investigation to identify information otherwise discoverable or admissible from original sources other than the peer review committee proceedings.¹² Further, upon request or its own initiative, a peer review committee may determine to issue a written waiver of the peer review privilege whereby all such information subject to the written waiver may thereafter be disclosed in the subject legal proceeding.¹³


It is also permissible for a hospital to disclose the *final action taken* as a result of peer review committee proceedings (i.e. restrictions placed on a provider's clinical privileges or termination of a provider's clinical privileges at the hospital) without violating the Indiana peer review statute.¹⁴ In the leading Indiana Court of Appeals case of *Fridono v. Chuman*, the court (citing *Terre Haute Regional Hospital v. Basden*¹⁵) recognized "the purpose of the peer review privilege is to foster an effective review of medical care by permitting the members of the peer review panel to communicate 'candidly, objectively and conscientiously' and that a "limitation on the circumstances in which 'final action' may be disclosed would place an unreasonable burden on litigants . . . without furthering the purpose of the peer review privilege;" and, as a result, the court held "the 'determinations of a peer review committee are distinct from

the 'final action taken' by a hospital," whereby disclosing the results or consequences of the final action is permitted as being outside the scope of the privilege.¹⁶

Lastly, peer review protected information may be used by hospitals for internal business purposes, including for quality review and assessment, utilization review and management, risk management and incident reporting, safety, prevention and correction, reduction of morbidity and mortality, scientific, statistical, and educational purposes, and legal defense, without waving the peer review privilege.¹⁷

IMMUNITY FOR PARTICIPANTS OF PEER REVIEW COMMITTEES

To foster robust evaluation, monitoring and delivery of the highest standards of quality patient care, members participating in a peer review committee are immune from liability as long as they are acting in good faith.¹⁸

Likewise, any person who in good faith as a witness or in some other capacity furnishes records, information or assistance to a peer review committee is immune from liability, unless the person knowingly furnishes false records or information.¹⁹ 

FOOTNOTES

1. IC 34-6-2-99(2)
2. IC 34-6-2-99(1)
3. IC 34-30-15-1(a)-(b)
4. IC 34-30-15-1(c)
5. IC 34-30-15-2
6. IC 34-30-15-9
7. IC 34-30-15-18
8. IC 34-30-15-3(c)
9. IC 34-30-15-10
10. IC 34-30-15-4
11. IC 34-30-15-8
12. IC 34-30-15-11
13. IC 34-30-15-10
14. IC 34-30-15-1(d)
15. 524 N.E.2d 1306 (Ind.Ct.App. 1988)
16. 747 N.E.2d 610 (Ind.Ct.App. 2001)
17. IC 34-30-15-21
18. IC 34-30-15-15
19. IC 34-30-15-16



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of 150 years in prison, just as it did *Brown and Fuller*.²⁹ Smith challenged his sentence upon appeal, but in a memorandum decision, the Court of Appeals affirmed.³⁰ Of course, other contributing factors may have justified Smith's sentence, but despite being not much older than Fuller and Brown, his final appellate decision reads much different than theirs, without even a cursory discussion of how the mitigation of youth impacted the sentence (beyond recognition that the trial court found it was mitigating).³¹ That said, Smith did not seek transfer as Fuller and Brown did, so we do not have the benefit of knowing how our supreme court would treat the mitigation of youth for someone so close to 18, but just over, in context of the recent shift in the law.

More recently, our Supreme Court has applied these sentencing considerations in *Stidham v. State*, 157 N.E.3d 1185 (Ind. 2020), *reh'g denied*, and *Wilson v. State*, 157 N.E.3d 1163 (Ind. 2020), *reh'g denied*. Both cases were post-conviction proceedings, which presented the court with a term-of-years sentence that would exceed the life span of the defendants, who had committed their offenses before reaching age 18. And both cases were resolved by the court utilizing its authority to review and revise sentences. In *Wilson*, the court

reached the issue by holding Wilson's appellate attorney provided ineffective assistance of counsel by not raising a challenge to his sentence on appeal, and in *Stidham*, the court reached this issue by overlooking *res judicata* due to significant shifts in the law—both high bars to overcome.

In *Wilson*, the Indiana Supreme Court recognized a split in national authority as to whether *Miller's* requirement to consider age and its attendant circumstances applied to term-of-years sentences.³² The court found "*Miller, Graham, and Montgomery* expressly indicate their holdings apply only to life-without-parole sentences,"³³ and refused to apply *Miller's* sentencing standard to term-of-years sentences in Indiana. Nevertheless, the court held Wilson's appellate counsel should have raised a challenge to Wilson's sentence under Appellate Rule 7(B), finding that had the authority of *Fuller* and *Brown* been presented on direct appeal, the Court of Appeals likely would have revised Wilson's sentence.³⁴

Rather than remanding, the court decided to review the appropriateness of Wilson's sentence. Despite rejecting application of the holding in *Miller*, the court looked to Wilson's young age, the realities of youth, and the precedents of *Fuller* and *Brown*, which in turn

rely upon the underpinnings of *Roper, Graham, and Miller*.


Since Wilson was only sixteen, his age is a major factor that requires careful consideration during Appellate 7(B) review. Even though the heightened constitutional requirements in *Miller* and *Graham* were limited by the U.S. Supreme Court to life-without-parole sentences, in *Brown and Fuller* we made clear that we are free to apply the developmental science undergirding those cases more broadly through our unique ability to consider a sentence's appropriateness[.]³⁵

The court made clear the "main factor weighing in favor of a shorter sentence is Wilson's age."³⁶ As a result, the court revised Wilson's sentence downward to 100 years, giving special consideration as to whether it would provide him a "reasonable hope for a life outside of prison," and "opportunity and incentive to rehabilitate."³⁷

Matthew Stidham had originally challenged the propriety of his sentence under the former "manifestly unreasonable" standard, but the court held the shift to revision of "inappropriate" sentences in Appellate Rule 7(B), combined

with the juvenile sentencing shift, warranted reconsideration of his 138-year-sentence.³⁸ Applying those considerations—the realities of youth and its attendant circumstances—the court concluded Stidham’s maximum sentence of 138 years was inappropriate, and reduced it to 88 years.³⁹

At the same time the Indiana Supreme Court rejected application of *Miller* sentencing requirements for term-of-year sentences in *Wilson*, it found the considerations of youth and its attendant circumstances as discussed in *Miller* are so influential to Indiana law as to: (1) outweigh the fairly rigid jurisprudential concept of *res judicata*; (2) render the failure to challenge a sentence on appeal ineffective assistance of counsel; and (3) warrant significant downward revisions of sentences on appeal.

In conclusion, *Jones v. Mississippi* removed any requirement a sentencing court expressly or even implicitly find how youth mitigated against a life sentence to comply with the requirements of the Eighth Amendment. However, in Indiana, our death penalty and life-without-parole statute requires a formal finding of an aggravating factor balanced against any mitigating circumstances before imposing life without parole for any defendant. Being less than 18 years of age at the time of the offense is one of those mitigating circumstances, and one that is hard to ignore, especially now. Moreover, in the context of a term-of-years sentence that is likely to keep a youthful offender in prison until he dies, that sentence is going to be subjected to close scrutiny on appeal and will often be reversed even where the offender has committed a heinous offense. Our Supreme Court’s willingness to infuse its analysis of the character of youthful offenders with the considerations in the United States Supreme Court’s Eighth Amendment juvenile sentencing jurisprudence is a key indicator that *Jones v. Mississippi*’s impact on Indiana will be minimal. 

FOOTNOTES

1. The Campaign for Fair Sentencing of Youth claims that 25 states and D.C., have abolished the sentence, and another 6 have no persons serving such a sentence, while the Sentencing Project reports that 25 states and D.C. have abolished the sentence, plus another 9 states have no one serving that sentence. See, <https://cfsy.org/> (last checked, October 15, 2021); see also, <https://www.sentencingproject.org/publications/juvenile-life-without-parole/> (last checked, October 15, 2021).
2. The Juvenile Law Center and Sentencing Project both report that the United States is the last country to regularly permit JLWOP sentences. See, <https://jlc.org/issues/juvenile-life-without-parole#:~:text=The%20United%20States%20is%20the,is%20condemned%20by%20international%20law> (last checked, October 15, 2021); see also, <https://www.sentencingproject.org/publications/juvenile-life-without-parole/> (last checked, October 15, 2021).
3. *Taylor v. State*, 86 N.E.3d 157, 165 (Ind. 2017).
4. *Jones*, 141 S. Ct., at 1312.
5. *Id.*
6. *Id.* at 1313.
7. Petition for Writ of Certiorari at i, *Jones v. Mississippi*, No. 18-1259 (U.S. March 29, 2019).
8. *Jones*, 141 S. Ct., at 1315.
9. *Id.* at 1318.
10. *Id.* at 1322.
11. *Id.* at 1323.
12. *Jones*, 141 S. Ct. at 1330 (J. Sotomayor, dissenting).
13. *Id.* at 1331 (quoting *Montgomery*, 577 U.S. at 208).
14. Adam Lamparello, Appellate Advocacy Blog, Life Imprisonment Without Parole for Juvenile Offenders: An Analysis of *Jones v. Mississippi*, April 24, 2021 https://lawprofessors.typepad.com/appellate_advocacy/2021/04/life-imprisonment-without-parole-for-juvenile-offenders-an-analysis-of-jones-v-mississippi.html (“Holding that a sentence of life without parole is permissible simply because the lower court had the discretion to impose a lesser sentence – even if the court did not meaningfully exercise this discretion as *Miller* and *Montgomery* contemplate – eviscerates the precedential value of these decisions.”)
15. Andre Cohen, Brennan Center, Supreme Court: Let’s Make It Easier for Judges to Send Teenagers to Die in Prison, April 27, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-lets-make-it-easier-judges-send-teenagers-die-prison>;
16. The subject of life-without-parole sentencing for youthful offenders in Indiana
17. *Saylor v. State*, 686 N.E.2d 80, 85 (Ind. 1997).
18. *Sanders v. State*, 71 N.E.3d 839 (Ind. Ct. App. 2017), trans. denied
19. *Taylor v. State*, 86 N.E.3d 157, 165 (Ind. 2017).
20. Amended Brief of Appellant at 47–50, *Conley v. State*, No. 58S00-1011-CR-634 (Ind. Dec. 9, 2011).
21. *Conley*, 972 N.E.2d at 877 (quoting, *Graham*, 130 S. Ct. at 2021).
22. *Conley* has sought post-conviction relief, and the Court of Appeals ruled in his favor on multiple claims. *Conley v. State*, 164 N.E.3d 787 (Ind. Ct. App. 2021), vacated on trans. However, transfer has been granted, and oral argument took place September 9, 2021. See, *Conley v. State*, 21S-PC-256.
23. *Taylor*, *Id.* at 167.
24. *Id.* at 167.
25. *Fuller*, 9 N.E.3d at 657-58 (quoting, *Brown*, 10 N.E.3d at 7) (cleaned up).
26. *Fuller*, 9 N.E.3d at 658; *Brown*, 10 N.E.3d at 8.
27. *Fuller*, 9 N.E.3d at 659; *Brown*, 10 N.E.3d at 8.
28. *Smith v. State*, Case No. 48A02-1210-CR-872, 2013 WL 3874843 (Ind. Ct. App., July 25, 2013).
29. *Id.* at 3–4.
30. *Id.* at
31. It is also notable *Smith* did not seek transfer after losing his sentence challenge at the Court of Appeals. It is possible that had transfer been sought, the Indiana Supreme Court would have used its authority to revise his sentence as well. We do know that both *Fuller* and *Brown* lost their sentencing challenges at the Court of Appeals, just as *Smith* did. See, *Brown v. State*, 2013 WL 3894117, Case No. 48A02-1212-CR-1007 (Ind. Ct. App., July 30, 2013);
32. *Wilson*, 157 N.E.3d at 1173.
33. *Id.* at 1176.
34. *Id.* at 1180.
35. *Id.* at 1182.
36. *Id.* at 1184.
37. *Id.*
38. *Stidham*, 157 N.E.3d at 1192–1193.
39. *Id.* at 1198.

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