

# Robust Appellate Review of Sentences: Just How British Is Indiana?

The Honorable Randall T. Shepard

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

The Honorable Randall T. Shepard, *Robust Appellate Review of Sentences: Just How British Is Indiana?*, 93 Marq. L. Rev. 671 (2009).  
Available at: <http://scholarship.law.marquette.edu/mulr/vol93/iss2/12>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

# ROBUST APPELLATE REVIEW OF SENTENCES: JUST HOW BRITISH IS INDIANA?

RANDALL T. SHEPARD\*

While the notion of appealability of sentences is widespread, such appeals in most jurisdictions occur under standards like “abuse of discretion” or “plain error” or simply “excessive.” In the late 1960s, Indiana began the process of importing into its constitutional law a piece of British doctrine that contemplates a more robust role for appellate courts. For two decades, this appeared to produce little if any difference in outcomes. In the first decade of the new century, however, a series of rule changes has prompted movement toward the original design.

## I. A MODERN BRITISH IMPORT

The typical approach to sentencing appeals in the nation’s state courts permits modification of sentences only where the trial court has abused its discretion or a computational error occurred below.<sup>1</sup> For most of Indiana’s history, the state limited appellate courts to these sorts of tasks. Nearly forty years ago, substantial amendments to the Indiana Constitution conferred upon the Indiana Supreme Court “the power to review all questions of law and to review and revise the sentence imposed.”<sup>2</sup> Section 4 was part of constitutional alterations ratified by the voters in 1970, to become effective in 1972, as part of the rewritten judicial article. The new judicial article resulted from efforts of the Judicial Study Commission, created by the Indiana General Assembly to study the needs of the state for reform of the judicial system, to continuously survey and study the judicial system’s operation, and to submit suggestions or recommendations for changes to the judicial branch.<sup>3</sup> “The Commission’s work on the revised Article began in 1965 and culminated with its 1966 proposal of the new judicial article.”<sup>4</sup>

At an early meeting of the Judicial Study Commission, the Commission’s chair recommended that the project ought to “[s]tart with the model article,”

---

\* Chief Justice of Indiana. A.B., Princeton University, 1969; J.D., Yale Law School, 1972; LL.M., University of Virginia Law School, 1995.

1. 5 AM. JUR. 2D *Appellate Review* § 786 (2007).

2. IND. CONST. art. VII, § 4.

3. Act of Mar. 3, 1965, ch. 47, 1965 Ind. Acts 75–77.

4. *McCullough v. State*, 900 N.E.2d 745, 747 (Ind. 2009).

an apparent reference to the 1962 Model Judicial Article of the American Bar Association (ABA).<sup>5</sup> Two related sections of the ABA model article granted appellate power “to review and revise the sentence imposed.”<sup>6</sup> The structural language of the Indiana Commission’s eventual proposal mirrored Section 3 of the ABA version, authorizing the court of appeals to “exercise appellate jurisdiction under such terms and conditions as the Supreme Court shall specify by rules” that include the authority to review and revise sentences in criminal cases.<sup>7</sup> Moreover, the Indiana Commission’s commentary to its proposed Section 4 employed precisely the same language used by the ABA explaining its model provision. The ABA explained: “The proposal that the appellate power in criminal cases include the power to review sentences is based on the efficacious use to which that power has been put by the Court of Criminal Appeals in England.”<sup>8</sup> This ABA language was utilized in its entirety by the Commission in its report, and it represents the only commentary explaining the grant of the power to review and revise. In placing the matter before the voters for ratification, the Indiana legislature endorsed the Commission’s report as constituting official legislative history.<sup>9</sup>

At the time the ABA and the Indiana Commission were engaged in drafting, the English statute establishing the court of appeal, criminal division, set forth that court’s power to review and revise sentences as follows:

On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal.<sup>10</sup>

An observer of the British system as it had developed up through the time of Indiana’s constitutional change concluded that, quite aside from correcting

---

5. *Id.* at 748 (quoting Minutes from a Meeting of the Indiana Judicial Study Commission 2 (May 17, 1966)).

6. MODEL STATE JUDICIAL ARTICLE §§ 2(2)(B), 3 (1962), reprinted in Ivan Lee Holt, Jr., *The Model State Judicial Article in Perspective*, 47 J. AM. JUDICATURE SOC’Y 6, 9 (1963), quoted in *McCullough*, 900 N.E.2d at 748.

7. Compare MODEL STATE JUDICIAL ARTICLE § 3 with IND. JUDICIAL STUDY COMM’N, REPORT OF THE JUDICIAL STUDY COMMISSION 141 (1966).

8. MODEL STATE JUDICIAL ARTICLE, *supra* note 6, § 2(2)(B) cmt.

9. In the Joint Resolution agreeing to the proposed amendment, the General Assembly advised that “[t]he report of the Judicial Study Commission and the comments to the article contained therein may be consulted by the Court of Justice to determine the underlying reasons, purposes, and policies of this article and may be used as a guide in its construction and application.” Act of Mar. 10, 1969, ch. 457, sched., 1969 Ind. Acts 1853. My colleague, Justice Brent Dickson, has recently examined this history in great detail. See generally *McCullough*, 900 N.E.2d 745.

10. Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, § 4(3) (Eng.).

excessive or erroneous individual sentences, the frequent exercise of review by the court of appeal and the court's own broad attitude about its function had led to the development of policies in general terms, producing a kind of common law in sentencing.<sup>11</sup> The court developed this common law through making reference to the basic penal philosophy at work in the high volume of its decisions, such as when it undertook inquiry about a given offender and seemingly conflicting goals of "deterrence or retribution on the one hand and rehabilitation on the other."<sup>12</sup>

Subsequent to Indiana's borrowing of the British formulation, Parliament engaged in two turnabouts concerning the court's authority. In 1968, Parliament enacted a provision limiting appellate sentence review, providing that an appellant could not be "more severely dealt with on appeal than he was dealt with by the court below."<sup>13</sup> Two decades later, Parliament reversed itself, such that present law authorizes the court of appeal, if a criminal sentence "has been unduly lenient," to "pass such sentence as they think appropriate."<sup>14</sup>

## II. IMPLEMENTING THE AUTHORITY

For a number of years after the voters adopted these constitutional amendments, the state's appellate courts conducted sentencing appeals in much the same way.

An early decision by the Indiana Court of Appeals suggested that the appellate judges thought nothing had changed. In *Wills v. State*, the court said: "Where, as here, the penalty assessed is in keeping with that prescribed by the legislature, we cannot interfere. We cannot rewrite the statute nor absent an abuse of discretion substitute what we deem to be a more equitable penalty."<sup>15</sup> In *Beard v. State*, the Indiana Supreme Court announced that it would not exercise the power granted under Section 4 until a program of policies and procedures governing this authority could be established.<sup>16</sup> There followed a series of cases in which both appellate courts simply declined to employ the revising power. The supreme court declined to review sentences, saying such power could not "be rationally exercised until the Court has developed procedures for its use."<sup>17</sup> The court sometimes used stronger

---

11. D.A. Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193, 217-18 (1968).

12. *Id.* at 204.

13. Criminal Appeal Act, 1968, c.19, § 11(3) (Eng.).

14. Criminal Justice Act, 1988, c. 33, § 36(1) (Eng.).

15. 318 N.E.2d 385, 388 (Ind. Ct. App. 1974) (internal citations and quotation marks omitted).

16. 323 N.E.2d 216, 219 (Ind. 1975).

17. *Miller v. State*, 364 N.E.2d 129, 132 (Ind. 1977).

language to describe this decision to reject outright requests to review sentences under the new grant of constitutional authority, once calling it a “refusal” to act.<sup>18</sup>

Some seven years after the voters changed the constitution, the supreme court promulgated the Indiana Rules for the Appellate Review of Sentences. They took but a single page to print, and the heart of the matter consumed just two sentences:

(1) The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.

(2) A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed.<sup>19</sup>

One respected observer imagined that the adoption of rules might “encompass a broader approach to sentencing policy under which the appellate courts will exercise supervisory jurisdiction over the procedure by which sentences are imposed,” in addition to focusing the attention of reviewing courts on the proportionality of the sentence.<sup>20</sup> This prediction took a cue from earlier observations by the supreme court itself that the amendment appeared to go “beyond that power which this Court has always possessed.”<sup>21</sup>

While the adoption of formal rules did not immediately lead to relief for even a single prisoner, there was counterintuitive movement in death penalty cases. In contrast to appellate review of prison terms and what turned out to be a nearly irrebuttable presumption that the trial court’s sentence was appropriate, the supreme court came to see its review of capital cases under Section 4 as part and parcel of the sentencing process. In capital cases, the court said, the rules on sentence revision “stand more as guideposts for our appellate review than as immovable pillars supporting a sentence decision.”<sup>22</sup> Rather than relying on the judgment of the trial court, the court began

---

18. *Parker v. State*, 358 N.E.2d 110, 114 (Ind. 1976).

19. Order Adopting Rules for the Appellate Review of Sentences—Rule 2 (effective Jan. 1, 1978), in *INDIANA CASES: CASES DECIDED IN THE SUPREME COURT AND COURT OF APPEALS: REPORTED IN THE NORTHEASTERN REPORTER, SECOND SERIES, VOLUME 370*, at xxiv–xxv (1977) (current version of the appellate standard of review is found at IND. R. APP. P. 7(b) (2000) (amended 2002)).

20. J. Eric Smithburn, *Sentencing in Indiana: Appellate Review of the Trial Court’s Discretion*, 12 VAL. U. L. REV. 219, 231–32 (1978).

21. *Parker*, 358 N.E.2d at 114.

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

embarking on its own review of the mitigating and aggravating circumstances “to examine whether the sentence of death is appropriate.”<sup>23</sup> The object of this review, the court announced, was to assure “‘consistency . . . in the evenhanded operation’ of the death penalty statute” by examining each capital case in light of earlier ones.<sup>24</sup> These doctrinal announcements did not accompany the grant of any relief to claimants, but they did lay the groundwork for future reviews where claimants prevailed.

### III. A MID-COURSE CORRECTION

Well into the 1980s, it appeared that the constitutional change had not made much difference in sentencing. Whether the chance for a more searching appellate review altered local sentencing cannot be known, but the available evidence is that no appellant prevailed.

In the 1984 case of *Cunningham v. State*, the court of appeals for the first time applied the rule on review of sentences to modify a sentence otherwise authorized by applicable statutes.<sup>25</sup> The defendants, a married couple, were convicted of various charges of theft, conversion, and perjury stemming from a scheme to obtain food stamps.<sup>26</sup> The trial judge sentenced the husband to consecutive terms totaling sixteen years’ imprisonment.<sup>27</sup> The court of appeals concluded that the trial judge had not adequately weighed the mitigating evidence, and directed that the order for consecutive sentences be modified to concurrent terms of two years’ imprisonment.<sup>28</sup> In the course of its analysis, the *Cunningham* court said:

We are in as good a position as the trial court to make these determinations based upon the record before us in a proper case. All the material available to the trial court at time of sentencing is equally available to us on appeal. It is contained in the record. Further, *the appellate process is uniquely suited to dispassionate consideration of the subject free of the everyday pressures of a trial courtroom.* Although loath to review any sentence imposed by a trial court, we are constitutionally mandated to do so when, as in this case, it appears at first blush the sentence imposed was manifestly

---

23. *Schiro v. State*, 451 N.E.2d 1047, 1058 (Ind. 1983).

24. *Judy v. State*, 416 N.E.2d 95, 108 (Ind. 1981) (quoting *Proffitt v. Florida*, 428 U.S. 242, 259–60 (1976)).

25. 469 N.E.2d 1, 9 (Ind. Ct. App. 1984).

26. *Id.* at 4.

27. *Id.*

28. *Id.* at 9.

unreasonable.<sup>29</sup>

A fair amount of time passed before the Indiana Supreme Court revised a sentence. At the very beginning of 1986, it decided *Fointno v. State*.<sup>30</sup> Fointno abducted a woman and her child in a shopping center parking lot and held them for two hours for various compelled acts of sex.<sup>31</sup> The prosecutor charged seven separate offenses, and the trial court imposed a sentence of 104 years, roughly twice the sentence for murder.<sup>32</sup> Citing the absence of any physical injury, the court reduced the sentence to 80 years, hardly a dramatic revision, over dissenters who called this “usurping” the prerogative of the trial judge.<sup>33</sup>

While revision of prison sentences continued to be extraordinarily rare, the supreme court subsequently altered sentences in capital cases, citing its authority to review and revise. In the 1989 case of *Martinez Chavez v. State*, a jury had recommended the death penalty for one of two co-perpetrators and recommended against death for the other.<sup>34</sup> The trial judge sentenced both to death.<sup>35</sup> Reversing the penalty imposed on Martinez Chavez, the supreme court invoked Section 4 to revise the sentence, saying again that in a capital case its own rules on revision “stand more as guideposts for our appellate review than as immovable pillars supporting a sentence decision.”<sup>36</sup> In ordering a term of years, the court highlighted the importance of a jury’s recommendation and used the touchstone of appropriateness in a slightly different way: “Because reasonable people could differ on the appropriateness of the death penalty for Martinez Chavez, the trial court should not have overridden the jury’s recommendation.”<sup>37</sup>

Moving farther into new territory, a few months later the supreme court exercised its revising authority in a case in which a trial court, acting upon a plea of guilty, imposed the death penalty, *Cooper v. State*.<sup>38</sup> Cooper’s case drew international attention because she had been so young when she and several friends murdered an elderly woman in the woman’s own home.<sup>39</sup> Focusing on the fact that Cooper’s penalty for a crime committed at the age of

---

29. *Id.* at 8 (emphasis added).

30. 487 N.E.2d 140 (Ind. 1986).

31. *Id.* at 143.

32. *Id.* at 147.

33. *Id.* at 149; *id.* (Givan, C.J., dissenting).

34. 534 N.E.2d 731, 732 (Ind. 1989).

35. *Id.* at 732.

36. *Id.* at 733 (quoting *Spranger v. State*, 498 N.E.2d 931, 947 n.2 (Ind. 1986)).

37. *Id.* at 735.

38. 540 N.E.2d 1216, 1217 (Ind. 1989).

39. *Id.* at 1217 n.1.

fifteen had provoked the legislature to alter the state's capital punishment scheme so as to limit death eligibility to perpetrators who were at least sixteen at the time of the crime, the court said it would be unreasonable for Cooper to be the only person so executed.<sup>40</sup> It ordered a term of years.<sup>41</sup>

Still, these decisions in capital cases did not lead to very different appellate outcomes in noncapital cases. In *Hardebeck v. State*, for example, the court of appeals declared a sentence of 240 years was not “manifestly unreasonable.”<sup>42</sup> Cases like *Hardebeck* illustrated the near impossibility of obtaining sentence relief on appeal.

The supreme court made successive rule amendments in subsequent years, each of them successively less hostile to appellate review. First, effective March 1, 1997, concluding that the definition that lay at the heart of the sentencing rules—“no reasonable person could find such sentence appropriate”—was altogether too draconian, the court repealed the definition, leaving only the two-word manifestly unreasonable standard.<sup>43</sup> This led one observer to judge that softening the standard of review had “the potential for tremendous impact in criminal appeals.”<sup>44</sup> A year later, it seemed apparent that this potential had not yet “come to fruition.”<sup>45</sup>

Second, effective January 1, 2003, the court altogether abandoned the manifestly unreasonable standard and restated the standard of review from a positive formulation that had the structure of a prohibition to one that read like an authorization to act: “The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.”<sup>46</sup> The supreme court later characterized these amendments as “modest steps to provide more realistic appeal of sentencing issues.”<sup>47</sup> This objective was not universally applauded, of course, as one court of appeals judge declared that the reviewing courts should be

---

40. *Id.* at 1219–20.

41. *Id.* at 1221.

42. 656 N.E.2d 486, 490–91 (Ind. Ct. App. 1995).

43. Order Amending Rules of Appellate Procedure—Rules 15, 16, and 17, in INDIANA CASES: CASES DECIDED IN THE SUPREME COURT AND COURT OF APPEALS: REPORTED IN THE NORTHEASTERN REPORTER, SECOND SERIES, VOLUMES 672–74, at lxxviii (1997) (effective Mar. 1, 1997) (current version of the appellate standard of review is found at IND. R. APP. P. 7(b) (2000) (amended July 19, 2002, effective Jan. 1, 2003)).

44. James J. Ammeen, Jr., *Developments in Appellate Practice in 1996*, 30 IND. L. REV. 1165, 1172 (1997).

45. Michael A. Wilkins & A. Richard M. Blaiklock, *Indiana Appellate Procedure in 1997*, 31 IND. L. REV. 669, 683–84 (1998).

46. IND. R. APP. P. 7(b).

47. *Serino v. State*, 798 N.E.2d 852, 856 (Ind. 2003) (revising 385-year sentence for child molesting to 90 years).

“maintaining [their] focus on the statutory parameters of sentencing established by our legislature, rather than second-guessing the trial court.”<sup>48</sup> Those who were keeping careful watch concluded that, though the supreme court granted sentencing relief several times a year, “the Indiana Court of Appeals used its authority to do so more sparingly.”<sup>49</sup>

#### IV. A FEW PRISONERS WIN RELIEF, AND PROSECUTORS GAIN A TOOL

Through the end of this decade, prisoners who win sentencing relief are still few and far between, but revision orders are no longer unheard of. A few cases selected from the field of child sex crimes illustrates the current practice.

In *Prickett v. State*,<sup>50</sup> the supreme court found that the trial court’s enhancement of Prickett’s sentences for child molesting convictions was inappropriate because it resulted from giving too much weight to several of the aggravating factors the trial judge had cited.<sup>51</sup> The court noted that none of Prickett’s prior offenses bore any relation to the crimes with which he was currently charged; that the record was insufficient to support the conclusion that he used force; and that, in light of these two factors, his having been on probation at the time of the offense did not, by itself, warrant the enhancement.<sup>52</sup> Instead, it remanded and ordered Prickett’s sentence reduced to the presumptive term of thirty years.<sup>53</sup>

In *Smith v. State*, the supreme court reviewed convictions on four counts of Class A child molesting, each with presumptive sentences of thirty years ordered to be served consecutively.<sup>54</sup> In its review, the court noted that Smith’s prior offenses had occurred ten years before the instant crimes, and it gave greater weight to his poor mental health than the trial court had.<sup>55</sup> The supreme court directed that two of the counts should run consecutively and that the remaining two should run concurrently to those two, effectively reducing the sentence from 120 years to 60 years.<sup>56</sup>

---

48. *Bennett v. State*, 787 N.E.2d 938, 953 (Ind. Ct. App. 2003) (Vaidik, J., concurring in part and dissenting in part).

49. Jon Laramore, *Indiana Constitutional Developments: Laches, Sentences, and Privacy*, 39 IND. L. REV. 847, 856 (2006).

50. 856 N.E.2d 1203 (Ind. 2006).

51. Prickett was convicted of Class A felony child molesting, for which he was sentenced to forty years after the presumptive sentence of thirty years was enhanced, and Class C felony child molesting, for which he was sentenced to eight years after the enhancement of a four-year presumptive sentence. *Id.* at 1205–06.

52. *Id.* at 1209.

53. *Id.* at 1210–11.

54. 889 N.E.2d 261, 262 (Ind. 2008).

55. *Id.* at 264.

56. *Id.* For analogous cases, *Smith* cited:

In *Schapker v. State*, the court of appeals found that Schapker's guilty plea was entitled to mitigating weight, but it endorsed the trial court's conclusion that committing the offense in the presence of other children was an aggravating circumstance, as was the extremely young age of the victim.<sup>57</sup> The court acknowledged Schapker's lack of a prior criminal record, but it nevertheless concluded that the aggravators outweighed the mitigators and declined to revise his twelve-year sentence.<sup>58</sup>

In *Hosler v. State*,<sup>59</sup> the court of appeals struck the victim's age as an aggravator because her age was an element of the crime.<sup>60</sup> Nevertheless, it concluded that the trial court's imposition of an enhanced three-year sentence after Hosler pled guilty to battery was appropriate because of his criminal history and his position of trust in relation to the victim.<sup>61</sup>

In *Smith v. State*, the court of appeals reviewed a sixty-four-year sentence for three counts related to Smith's sexual conduct with a thirteen-year-old girl and her teenage friend (class A child molesting, class B sexual misconduct, class C sexual misconduct).<sup>62</sup> The court concluded that, in light of Smith's lack of criminal history,<sup>63</sup> a maximum sentence on the class A felony was not

---

*Estes v. State*, 827 N.E.2d 27 (Ind. 2005) (per curiam) (267-year sentence for convictions on fifteen counts of child molesting and related charges involving two victims revised to 120 years (consecutive standard 30-year terms on four counts, remaining terms concurrent)); *Serino v. State*, 798 N.E.2d 852 (Ind. 2003) (385-year sentence for conviction on 26 counts of child molesting and related charges involving one victim revised to 90 years (consecutive standard 30-year terms on three counts, remaining terms concurrent)); *Ortiz v. State*, 766 N.E.2d 370 (Ind. 2002) (60-year sentence for conviction on three counts of child molesting involving one victim revised to 30 years (standard 30-year term on one count, remaining terms concurrent; additional 30-year habitual offender enhancement affirmed)); *Walker v. State*, 747 N.E.2d 536 (Ind. 2001) (80-year sentence for two counts of child molesting involving one victim revised to 40 years (enhanced 40-year term on one count, remaining term concurrent)).

*Id.* at 264–65.

57. No. 55A05-0606-CR-338, slip op. at 6–8, 861 N.E.2d 390 (Ind. Ct. App. Feb. 9, 2007) (unpublished table decision).

58. *Id.* at 8.

59. No. 35A02-0604-CR-358, slip op. at 8, 856 N.E.2d 790 (Ind. Ct. App. Oct. 27, 2006) (unpublished table decision).

60. *Id.* at 3. Under IND. CODE § 35-42-1(a)(2)(B) (2000), battery is a Class D felony where the victim is less than fourteen years old and the perpetrator is at least eighteen. In this case, the victim was eleven years old at the time of the offense. *Hosler*, slip op. at 2.

61. *Id.* at 10.

62. No. 43A03-0607-CR-297, slip op. at 2, 863 N.E.2d 922 (Ind. Ct. App. March. 26, 2007) (unpublished table decision).

63. During sentencing, the trial judge mentioned that he had presided over a similar trial in which Smith was acquitted and stated:

appropriate, and thus, the court revised his sentence to forty-four years.<sup>64</sup>

This, of course, happens regularly in the federal system, where appellate courts increase sentences imposed by district courts. In fact, the United States government may appeal a sentence where it was imposed in violation of law, was imposed due to an incorrect application of the Federal Sentencing Guidelines, is less than the Guidelines-specified minimum, or was imposed for an offense without such guidelines and is plainly unreasonable.<sup>65</sup> A defendant may only appeal an upward departure from the Federal Sentencing Guidelines, and the government may only appeal a downward departure.<sup>66</sup> Similarly, a federal appellate court cannot enter an increase of imprisonment absent a government appeal or cross-appeal.<sup>67</sup>

#### V. THE MEANING OF THIS STORY

While it has always been difficult to persuade appellate courts to reduce a criminal sentence, prisoners who have filed such appeals during the past five or six years have experienced an environment decidedly more open than it had been at any time since the 1970 constitutional amendment was adopted. Still, prosecutors were prohibitive favorites in these encounters, and, moreover, they won a potentially valuable doctrinal point in 2009. The supreme court held in *McCullough v. State* that when a prisoner initiates a sentencing appeal, the prosecution is entitled to argue for a more severe sentence, citing the same 1907 British act from the reign of Edward VII that began the whole enterprise.<sup>68</sup> A minority of the court argued against conditioning the state's opportunity to seek a higher sentence on the defendant having sought a reduction, saying defense counsel should not be forced to choose between requesting sentence reduction and risking sentence enhancement.<sup>69</sup>

---

[I]t is beyond me, Mr. Smith, how I could ever find that you have led a law abiding life and have no history of delinquency or criminal activity. I don't buy that. But let's say that you do have no history of criminal activity, I think given the aggravating factors that I mentioned, it is so insignificant in the total scheme of things that I wouldn't give it any weight anyway.

*Smith*, slip op. at 13.

64. *Id.* at 16. This was not the minimum sentence. The court stated: "[W]e do not perceive that the nature of the offenses and the character of the offender here suggest maximum and consecutive sentences. However, these same considerations do not suggest a minimal sentence." *Id.*

65. 18 U.S.C. § 3742(b) (2006).

66. *United States v. Soltero-Lopez*, 11 F.3d 18, 19 (1st Cir. 1993).

67. *Greenlaw v. United States*, 128 S. Ct. 2559, 2562 (2008).

68. 900 N.E.2d 745, 748 (Ind. 2009) (citing Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, § 4(3)).

69. *Id.* at 751–53 (Boehm, J., concurring). The changes in the British system along these lines made a substantial difference in the number of prisoners who chose to appeal. When Parliament briefly suspended the Court of Appeal's power to increase sentences, the number of sentencing appeals nearly doubled. Thomas, *supra* note 11, at 223.

The forty-year evolution of sentencing review reflects a substantial change from a regime in which the appellate courts took cognizance only of procedural error to one in which the appellate review is part of the sentencing process. This is especially true with sentences of death and life without parole.<sup>70</sup>

While this alteration has led to additional relief from excessive sentences (it hardly could have led to less relief), there are multiple factors that still restrain the possibility of any significant further expansion in the number of prevailing claimants. First, the absence of any global substantive framework (like the federal Guidelines) makes it difficult for courts on appeal to perceive when a given sentence deviates from the system-wide norm. Second, it seems likely that if we knew what the system's norm was for a variety of dispositions, we would find that the number of outliers warranting revision will always be small. Put another way, trial courts get it right approximately 90% of the time on all criminal law issues, and it is unlikely that sentencing is much different than the collection of other potential errors on which reversal is often sought, such as search and seizure, jury instructions, and the like. Third, the peculiar responsibility trial judges bear in their own communities for sentencing will always lead appellate judges to exercise considerable deference and restraint in review of sentencing decisions.

Indiana's appellate courts recognize these restraints and operate with reasonable effectiveness within them. In any system of criminal justice that sentences felons by the tens of thousands each year, there are bound to be some whose penalty warrants modification. Indiana's use of the British idea of "review and revise"<sup>71</sup> attempts to identify those few and afford them relief.

---

70. *Cooper v. State*, 540 N.E.2d 1216, 1218 (Ind. 1989) ("[Indiana Supreme Court] review of capital cases under article 7 is part and parcel of the sentencing process."); *Brown v. State*, 783 N.E.2d 1121, 1126–27 (Ind. 2003) (quoting the same sentence from *Cooper* in the context of a life without parole case).

71. IND. CONST. art. VII, § 4.