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# Indiana Law Blog Newsletter

***Thank you for subscribing to the ILB Newsletter.*** Invite your friends and colleagues to sign up to receive this free weekly newsletter, emailed every Monday morning. The issues are intended to bridge the gap between the former **Indiana Law Blog** and its anticipated replacement (more about which will be coming later). Because it is a weekly, the **ILB Newsletter** (unlike the blog) will not be able to bring you the news *as it happens*. But it will highlight news you may have missed, and provide some depth on news you may have had questions about. Because it is a newsletter, length will be limited to what I believe the normal reader can tolerate. (BTW, feedback and suggestions are encouraged - send to ilb.newsletter@indianalawblog.com.)

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## *A look at a per curiam (short, unsigned) Supreme Court opinion*

*Miller v. State* is a 4-page (including the dissent), July 12, 2017, 4-1 per curiam opinion of the Supreme Court, involving a case where the Court of Appeals had reversed Miller's attempted murder conviction and remanded for a new trial. The Supreme Court, following a recitation of the facts, stated:

> The State seeks transfer, contending the trial court did not apply the wrong standard of proof, but if it did, the proper remedy is not a new trial, but a remand for the trial court to reconsider the case under the correct legal standard. We agree the correct remedy in these circumstances is a remand for reconsideration by the trial court.
>
> Accordingly, we grant transfer, see Indiana Appellate Rule 58(A), and reverse Miller's conviction for attempted murder. We remand this case to Judge Allen with instructions to apply the appropriate legal standard to the existing evidence. In all other respects, we summarily affirm the Court of Appeals' opinion. Ind. App. R. 58(A)(2).
>
> Rush, C.J., and David and Massa, JJ., concur.
> Slaughter, J ., concurs in part and dissents in part with separate opinion.

There was no oral argument, the Court, voting 3-1 (J.Rucker had retired and J.Goff has not yet replaced him) simply granted the State's petition for transfer and remanded the case to the trial court "with instructions to apply the appropriate legal standard to the existing evidence."

Justice Slaughter wrote separately, concurring in part and dissenting in part:

> I agree that Miller's attempted-murder conviction must be reversed because the trial court's written findings recited the wrong legal standard. As the Court holds, the correct standard is not Whether Miller attempted to commit murder "knowingly or intentionally", but whether he had a "specific intent to kill". Where I part company with my colleagues is in the chosen remedy. The Court orders a remand to the trial court to consider the existing evidence under the correct standard. But I question whether that remedy will be adequate. Specifically, I fear a mere remand to the same trial judge instructing him to apply the correct standard will be insufficient to redress the underlying harm from using the wrong standard. In my View, Miller should receive a new trial. The erroneous *mens rea* standard should not be dismissed as a slip of the tongue (or pen) in the court's written findings because it first appeared in the State's charging information and thus tainted the entire proceeding. Had this been a jury trial, the clear remedy would be to order a new trial. Although this case was tried to the bench, I believe a new trial also is warranted here. I share the Court of Appeals' concern that the trial judge, on remand, "may have a difficult, if not impossible, task of distancing himself from the evidence already considered and in considering the case entirely anew". ***Miller v. State***, 72 N.E.3d 502, 518 (Ind. Ct. App. 2017). In light of our grant of transfer, I would summarily affirm the Court of Appeals' thoughtful opinion in its entirety, including its remand for a new trial.

Appellant Miller petitioned for a rehearing. In addition, the Marion County Public Defender Agency (MCPDA) submitted an amicus brief on behalf of Appellant. [Here is the case docket.]

The MCPDA amicus brief's argument summary:

> This Court has long held trial judges to a high standard, but this case lowers that bar, sanctioning a significant and pervasive misstatement of the law at a bench trial not with a new trial but simply a remand to change a few words in a written order. This type of error permeates a proceeding, and this Court should order a remedy proportionate to the error and its effect on the ultimate fairness of the proceeding.
>
> This case creates significant concerns for the state's criminal defense bar, litigants, and the public's perception of the state's judicial system. Although relatively few cases involve the significant type of legal error at issue in this case, the impact of this Court's opinion is far-reaching because of What it now

requires of defense counsel and What it says to litigants and the public about the expectations of Indiana's judicial system.

From Issue II of the brief: Although this "Court certainly can and occasionally does address issues in short, per curiam opinions, [these] are usually straightforward issues involving the application of settled law to the facts …" :

> In contrast to all of these examples, this per curiam opinion addresses a significant issue of broad applicability—creating new law on an issue of first impression rather than applying well-settled law to a common scenario. The per curiam opinion takes a position opposite Judge Barnes' thoughtful, unanimous opinion. The analysis is limited to a single sentence, Without citation to legal authority: "We agree the correct remedy in these circumstances is a remand for reconsideration by the trial court."
>
> The Appellate Rules offer criteria for the Court of Appeals to consider in deciding Whether to issue a published/precedential opinion or a memorandum, noncitable decision. Ind. App. R. 65(A). No analogous rule addresses criteria for issuing per curiam opinions. A treatise on appellate practice suggests a "full opinion" be issued in any one of the following circumstances:
>
> > (a) In deciding the appeal the court enunciates a new rule of law or modifies an existing rule.
> > (b) In deciding the appeal the court resolves a conflict or apparent conflict of authority between its own panels or between subordinate courts.
> > (c) The court is not unanimous in the disposition.
> > (d) The decision is of substantial public interest.
>
> Daniel J. Meador et al., *Appellate Courts: Structures, Functions, Processes, and Personnel* 508 (1994) (quoting Carrington, Meador, & Rosenberg, Justice on Appeal 31-35 (1976)). Here, three of the criteria—a, c, and d—are demonstrably present unlike most per curiam opinions that include none of the four.
>
> Rehearing is appropriate for the reasons argued by Mr. Miller and addressed in Part I of this brief. This case also offers an opportunity for additional consideration of the distinction between per curiam and other opinions consistent with this Court's long history of transparency, which is much appreciated by the bar and broader public.

On Sept. 28th the Supreme Court issued a one-line order denying Appellant's petition for rehearing. The vote was 3-2 for denial, with Goff, J. now a member of the Court and voting, alongside David and Massa, J.J., to deny rehearing, and with Slaughter, J., now was now joined by Rush, C.J. , voting to grant rehearing.

### *Some statistics on per curiam opinions*

Here, from the Supreme Court's 2016-17 Annual Report, p.19, is the most recent breakdown of majority opinions by author and type. Note that the per curiam opinions are labeled as "By the Court." Eight of twenty-nine criminal transfer petitions (32%) were decided via per curiam opinions.

**Majority Opinions by Author and Type**

A breakdown of the number of majority opinions authored by each justice for each case type heard by the Supreme Court.

| | Rush, C.J. | Rucker, J. | David, J. | Massa, J. | Slaughter, J. | By the Court | Total |
|---|---|---|---|---|---|---|---|
| Civil Transfer | 7 | 3 | 4 | 4 | 4 | 2 | **24** |
| Civil Rehearing | - | - | - | - | - | 1 | **1** |
| Criminal Direct Appeal | 1 | 1 | 1 | 1 | - | - | **4** |
| Criminal Transfer | 5 | 5 | 6 | 4 | 1 | 8 | **29** |
| Attorney Discipline | - | - | - | - | - | 11 | **11** |
| Judicial Discipline | - | - | - | - | - | 3 | **3** |
| Original Action | - | - | - | - | - | 1 | **1** |
| **Total** | **13** | **9** | **11** | **9** | **5** | **26** | **73** |

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### *Update on: An issue with the 2017 Supreme Court decision in Underwood v. Bunger*

Last week's issue examined questions posed by a 5-page LSA staff memo distributed to the members of the Indiana Code Revision Commission on Sept. 25 that began:

> In *Underwood v. Bunger*, 70 NE 3d 338 (Ind. 2017), the Indiana Supreme Court relied upon a statutory change made as part of the 2002 recodification of Title 32 as evidence of the legislature's intent to make a substantive change to that statute. While the change may have been substantive, the court's opinion is contrary to other Supreme Court precedent (from at least two

> previous cases), which holds that statutory changes made as part of a recodification should be construed to make no substantive change, even when the plain language of the statute would otherwise suggest a significant substantive change.

The memo concluded with the request: "Staff would like to ask for guidance from the Commission on how to proceed with this issue."

At the time of last week's publication of the *ILB Newsletter*, minutes of the Code Revision Commision had not yet been posted. The Sept. 25th minutes are now available, and as to this issue, report:

> 10. Discussion of Court Case Involving a Recodified Section of IC 32 (Property Law): Mr. Andrew Hedges, Attorney, Office of Bill Drafting and Research, Legislative Services Agency. Mr. Hedges explained a case (*Underwood v. Bunger*, 70 NE 3d 338 (Ind. 2017)) that involved a change made in a provision in IC 32 as part of a recodification project.
>
> The members talked about recodification projects and the use of savings clauses. The members discussed issues regarding substantive versus technical legislation. The Commission decided to have a member of the Commission discuss the issue with the Indiana Supreme Court and to have the staff talk to the Indiana State Bar Association.

Further, the *ILB Newsletter* noted last week that the Code Revision Commission does not appear to archive the video of its meetings (see eg 2016). But *au contraire*, the video of last month's (Sept. 25, 2017) Commission meeting now is available. You may review the Commission discussion of this memo yourself, beginning at 2:17 hours and lasting until 2:30 when the meeting ends.

The *ILB Newsletter's* summary of the discussion. Mr. Hedges discussed the *Underwood* decision, a probate case, and the 2002 recodification of Title 34. He said the Supreme Court relied on the statutory change (the removal of "manifestly" in the applicable section) as evidence of legislative intent to make a substantive change. However, he continued, the 2002 recodification includes a savings clause (IC 32-16-1-5*), and past Supreme Court decisions considering codifications say the saving clause controls.

Julie McDonald, an Education Attorney with the Indiana Courts, and their designee to the Commission, said she would bring the matter to the attention of the Court.

A legislative member of the Commission suggested the matter also be taken to the Probate Section of the State Bar, to see whether they agreed with the substantive change the Court had made.

However, Senator Young said that was not the issue, the issue was with the Court's interpretation of how a recodification was to be considered, not whether or not it was a good substantive change.

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*From IC 32-16-1-5: "[I]f the literal meaning of the recodification act of the 2002 regular session of the general assembly (including a literal application of an erroneous change to an internal reference) would result in a substantive change in the prior property law, the difference shall be construed as a typographical, spelling, or other clerical error..."

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## *What if language disappears from the Indiana Code?*

This year two subsections of IC 4-35-7-12 were found to have "disappeared" from the Indiana Code. The missing provisions concerned the distribution of certain Indiana horse racing commission funds.

If statutory language is omitted from the Indiana Code, but the language was not in fact repealed by the General Assembly, the language remains the law. But that was not what occurred here. As explained in a memo of the Code Revision Commission:

> Missing provisions. IC 4-35 governs gambling games at racetracks. IC 4-35-7-12 requires that a person licensed under that article provide support for the Indiana horse racing industry on a monthly basis by distributing for horse racing purses and horsemen's associations percentages of the adjusted gross receipts from wagering at each casino operated by the licensee. It also directs the allocation of the amounts among the various breeds of horses. The section was last amended by the SEA 441-2015 trailer bill, SEA 23-2016 [P.L.122-2016], to resolve a four way conflict between versions of the section amended in the 2015 legislative session. The conflict resolution, however, inadvertently omitted from IC 4-35-7-12 two provisions concerning the distribution of money for standardbred purposes. The amendment made in this SECTION restores the missing provisions to IC 4-35-7-12 in subsection (f)(2)(C) and (f)(2)(D) effective upon passage.

Four different versions of IC 4-35-7-12 appeared in the 2015 edition of the Indiana Code. To illustrate, here (from 2015) is the beginning of the fourth, Version d:

> **IC 4-35-7-12 Version d**
> **Mandatory support for the horse racing industry; allocation among breeds; regulatory oversight**

> *Note: This version of section amended by P.L.256-2015, SEC.9. See also preceding versions of this section amended by P.L.181-2015, SEC.6, P.L.213-2015, SEC.52, and P.L.255-2015, SEC.40.*
> Sec. 12. (a) The Indiana horse racing commission shall enforce the requirements of this section. * * *

In 2016 the LSA Staff prepared a bill to resolve the conflicts between the four versions, and it became law. So now there is only one version of the section, but, as this year's memo reports, it "inadvertently omitted from IC 4-35-7-12 two provisions concerning the distribution of money for standardbred purposes."

**Another way language may "disappear" from the Indiana Code**

In 2011 the General Assembly mistakenly repealed all of the "The Family and Social Services Administration, [which] manages Medicaid and other major programs for Indiana's poor, elderly and disabled." The *Fort Wayne Journal Gazette's* Niki Kelly had a long story on it, dated July 9, 2011, but the story is no longer available online. She concluded:

> In the case of the FSSA mix-up, the point of Senate Bill 331 was to repeal a provision already in law that would have automatically eliminated FSSA – called a sunset. The sunset language was set for June 30. The bill that repealed the sunset provision went into effect July 1.
>
> So technically, FSSA was eliminated minutes before the bill went into effect to save it.

Misunderstanding of sunset law requirements were the cause of a brohaha in December of 2016 that led to this story in the *Indianapolis Business Journal* that began:

> Indiana could be without an energy code for up to two years after the Pence administration decided against extending the current one—a move that critics say could have negative results for Hoosiers' energy bills and lead to a "slumlord's dream" scenario.

It is entirely possible that there are other laws on the statute books that have "sunsetted" but no one has noticed. For example, as the *ILB* reported in 2011 in connection with the FSSA incident:

> Four years ago, at the end of 2007, the very same laws expired and apparently no one noticed! There was no statutory basis for the FSSA for months, until the laws were restored, retroactively, by actions of the 2008 General Assembly.

The *ILB* asked in 2011:

> Why did these repealers exist in the first place?
>
> Years ago, the General Assembly decided that agency laws should be reviewed every 7 years, and that the laws would automatically expire ("Sunset"), unless affirmative action was taken to renew them for another 7 years. The 7 years has been altered by the General Assembly for some agencies to lesser periods, often because the decision has been delayed from year to year.

Sometimes those alterations have compounded the confusion.

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## *Oral arguments before the Indiana Supreme Court this week of October 8, 2017*

**Thursday, Oct. 12th:**

- 9:00 AM - ***Shelly Phipps v. State of Indiana*** (28S05-1707-CR-00499) (Greene) The State charged Shelly Phipps with invasion of privacy, alleging she violated a protective order by communicating with a protected person. After trial in the Greene Superior Court, a jury convicted her as charged. A majority of the Court of Appeals reversed, concluding the State failed to present sufficient evidence to support the conviction. *Phipps v. State*, 77 N.E.3d 180 (Ind. Ct. App. 2017), *vacated*. The Court has granted transfer and assumed jurisdiction over the appeal.
- 9:45 AM - ***Brian Paquette v. State of Indiana*** (63S04-1709-CR-00570) (Pike) While fleeing police, Brian Paquette drove into two other vehicles, killing three people. The State charged him with multiple crimes, including three counts of resisting law enforcement by fleeing in a vehicle causing death. The Pike Circuit Court accepted Paquette's guilty plea and sentenced him to sixteen years on each count, to be served consecutively. The Court of Appeals reversed two of the convictions, with the majority concluding only one conviction was proper because Paquette engaged in only one act of resisting. *Paquette v. State*, 79 N.E.3d 932 (Ind. Ct. App. 2017), *vacated*. The Supreme Court has granted transfer and has assumed jurisdiction over the appeal.
- 10:30 AM - ***Darryl L. Calvin v. State of Indiana*** (02A03-1701-CR-00093) (Allen) After a jury trial in Allen Superior Court, Calvin was convicted of Level 4 felony burglary. The jury also found Calvin guilty of being a habitual offender based on his prior unrelated felony convictions in Illinois. Calvin appealed, contending the State did not establish that at least one of his prior unrelated felonies "is not a Level 6 felony or a Class D felony" as required by Indiana Code section 35-50-2-8(b). The Court of Appeals rejected Calvin's argument and affirmed. *Calvin v. State*, 80

N.E.3d 226 (Ind. Ct. App. 2017), *vacated*. The Court has granted transfer and assumed jurisdiction over the appeal.

The briefs and lower court opinions may be accessed via the links above. Webcasts of the Supreme Court's oral arguments are available here.

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## *Recommended this week*

- *Press F4 to repeat your last action in Office*.
- *Pew: Automation in Everyday Life*. "Many Americans expect a number of professions to be dominated by machines within their lifetimes – but relatively few expect their own jobs or professions to be impacted"
- *Create a virtual home button on iPhone or iPad*. Learn how you can create a "virtual" Home button on your iPhone and/or iPad so that you may continue to use the device, even if your physical Home button no longer functions.
- *"The Never-Ending Battle Against Sport's Hidden Foe*" - 10-8-17 *NYT Sports*: "By the thousands, high schools, colleges and professional teams have followed Colgate University's path with aggressive, almost obsessive, steps to prevent MRSA outbreaks. And yet, the battle is not won. It has become a never-ending fight against a hidden foe that resists conventional antibiotics. And in the sports world, where the bacteria can flourish in crowded gyms and locker rooms, and amid frequent skin-to-skin contact on the playing field, there is not even a scoreboard to definitively keep track of who is winning.

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