

Belated appeals and *Blakely* (or is it *Apprendi*?) retroactivity

In *Gutermuth v. State* and its companion cases,¹ the Indiana Supreme Court disposed of several cases that all asked the same question: Does the United States Supreme Court's 2004 holding in *Blakely v. Washington* apply to "belated appeals" of sentences imposed before *Blakely* was announced? The Court said no, based on: (1) its determination that "belated appeals" are neither on "direct review" nor cases that are "not yet final" under federal principles of retroactivity; (2) its 2005 holding in *Smylie v. State* that *Blakely*, and not its predecessor, *Apprendi v. New Jersey*, was a new rule of criminal procedure; and (3) its assumption that *Blakely* does not apply to cases on collateral review. This article discusses these issues and suggests that the Court's analysis in *Gutermuth* and its companions may ultimately be incorrect.

I. The mechanics of the *Gutermuth* cases

A. What is a 'belated appeal'?

In addition to an ordinary direct appeal, Indiana's post-conviction rules provide two ways to challenge the validity of a criminal conviction or sentence: (1) a petition for post-conviction relief and (2) a belated appeal.² But, the two operate in different fashions. Petitions for post-conviction relief are "special, quasi-civil remedies whereby a party can present an error which, for various reasons, was not available or known at the time of the original trial or appeal."³ They are "not a substitute for direct appeal but rather a process for raising issues unknown or not available at trial."⁴ Instead, they constitute a "collateral challenge" of a conviction or sentence.⁵

by the Court of Appeals. They may raise issues known and available at trial; they just do so late. Post-Conviction Rule 2 permits the late filing of a notice of appeal "where the failure to file a timely notice of appeal is not the fault of the individual; and the individual is diligent in requesting permission to file a belated notice of appeal."⁶ When a petition to file a belated notice of appeal is granted by a trial court, the case moves directly to the Court of Appeals and the notice of appeal is "treated for all purposes as if filed within the prescribed period."⁷

B. The set-up in *Gutermuth* and its companions

In *Gutermuth* and its companions, the defendants entered into "open" plea agreements, *i.e.*, the defendants pleaded guilty, but left it to the trial court to determine the sentence.⁸ At sentencing, however, none of the defendants was informed of his right to appeal the sentence imposed.⁹ Years later, after the Indiana Supreme Court held that sentencing challenges had to be raised on a direct appeal instead of in a petition for post-conviction relief,¹⁰ each was granted permission to file a belated appeal to challenge his sentence.¹¹

Between the time of each defendant's original sentencing and the time of their belated appeals, there was a significant change in the way the nation's courts understood constitutional limits on sentencing procedures. In 2000, the United States Supreme Court decided *Apprendi v. New Jersey* and held that any fact, other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."¹² In its 2004 opinion in *Blakely v. Washington*, which invalidated the state of Washington's sentencing

procedures, the Court reiterated that the "statutory maximum" is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.¹³

In 2005, the Indiana Supreme Court decided *Smylie v. State* and held that Indiana's sentencing procedures were unconstitutional under *Blakely*.¹⁴ Before *Smylie*, Indiana's sentencing laws established a presumptive sentence for each class of felony and misdemeanor, and the trial judge could not impose a sentence above the presumptive without first finding the existence of an aggravating circumstance.¹⁵ In other words, the presumptive was the "statutory maximum," and sentences were being unconstitutionally increased from the presumptive based upon facts found by the judge, not just those reflected in the jury verdict or admitted by the defendant.¹⁶ After *Smylie*, the legislature amended Indiana's sentencing scheme to remedy its constitutional infirmities.¹⁷ But, the unconstitutional system was in place at the time the defendants were sentenced in *Gutermuth* and its companions. Now, in their belated appeals, those defendants wanted to challenge their sentences under *Blakely*.

C. Principles of retroactivity at work in *Gutermuth*

In *Smylie*, the Indiana Supreme Court held that *Blakely* established a "new rule" of criminal procedure that, under the United States Supreme Court's holding in *Griffith v. Kentucky*, applied to those cases "pending on direct review" or "not yet final."¹⁸ A case is "final," *Griffith* said, when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."¹⁹

McTurnan & Turner
Indianapolis, Ind.
mlimrick@mtlitigation.com

Belated appeals, on the other hand, initiate the review of a conviction or sentence

This led to the question in *Gutermuth* and its companions: If a belated appeal is treated as filed within the prescribed period “for all purposes,” and a new rule is announced between the time of sentencing and the belated appeal, does the new rule apply? Or, in the words of *Griffith*, does allowing a belated appeal mean that the case remained “pending on direct review,” or was “not yet final,” when the new rule was announced?²⁰ In *Gutermuth* and its companions, the Indiana Supreme Court said no.

D. The holding in *Gutermuth*

The Indiana Supreme Court in *Gutermuth* assumed that whether a case is on “direct review” or “final” for retroactivity purposes is an issue of federal law.²¹ But the Court saw no federal equivalent to Indiana’s belated appeal procedure.²² So, the Court undertook to fit the belated appeal procedure appropriately into the federal retroactivity equation.

The Court turned first to the issue of when a case is pending on direct review. Post-Conviction Rule 2(1) states that a belated notice of appeal is “treated for all purposes as if filed within the prescribed period.” In *Fosha v. State*, the Court held that this language allowed the defendant to assert a claim under the Court’s “new rule” of state Double Jeopardy analysis from *Richardson v. State* – even though *Richardson* was announced after the defendant initiated his belated appeal.²³ In that case, the Court held: “[O]ur rule that precludes retroactive application of new criminal rules to collateral proceedings does not apply to direct appeals brought pursuant to Post-Conviction Rule 2.”²⁴ *Gutermuth* argued that the principles announced in *Fosha* should apply to his *Blakely* challenge.²⁵ But the

Court in *Gutermuth* decided to scrap *Fosha* altogether.

Although *Gutermuth* presented a slightly different timeline – and involved the application of a new *federal*, rather than state, rule of criminal procedure – the Court chose to overrule *Fosha*.²⁶ “[R]egardless of whether initiated before or after a new rule of criminal procedure is announced,” the Court held, belated appeals “do not constitute ‘direct review’ for purposes of *Griffith*. To the extent *Fosha* holds otherwise, it is overruled.”²⁷

Essentially, the Court reexamined the meaning of the “as if filed within the prescribed period” language from Post-Conviction Rule 2(1) and adopted the reason-

ing that, if *Gutermuth*’s appeal had been “filed within the prescribed period,” *Blakely* would not yet have been decided and therefore not an issue available to *Gutermuth*.²⁸ “A belated appeal,” the Court said, “is treated as though it was filed within the time period for a timely appeal but is subject to the law that would have governed a *timely appeal*.”²⁹

The Court then turned to the issue of “finality.” Some panels of the Indiana Court of Appeals had taken the position that a case on belated appeal was “not yet final” under *Griffith* because the availability of appeal had not been exhausted, nor had the time for a petition for certiorari elapsed.³⁰ But the Court in *Gutermuth* adopted the

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view that “finality,” as that term was used in *Griffith*, is achieved “when the time for filing a timely direct appeal has expired.”³¹ The Court acknowledged the arbitrariness of drawing the line at that point, but concluded that arbitrariness was inevitable wherever the line fell.³² And, the Court concluded, treating belated appeals in the same manner as timely direct appeals would create a situation where cases would “remain perpetually ‘not yet final’ for purposes of *Griffith*.”³³

In sum, while belated appeals are not “collateral” review in the ordinary sense, *Gutermuth* treated them as such for purposes of federal retroactivity analysis. In *Gutermuth* and its companion cases, this meant the “new rule” from *Blakely* did not apply.

II. Unanswered questions of *Blakely* retroactivity, and their relevance to Indiana’s belated appeals

The remainder of this article will examine the concepts underlying the Indiana Supreme Court’s decision in *Gutermuth*, which all relate to the “three steps” of federal retroactivity analysis.³⁴ As explained by the United States Supreme Court, retroactivity analysis starts first with a determination of “when the defendant’s conviction became final.”³⁵ Second, the court must determine if a rule is actually “new.”³⁶ In other words, the court “must ascertain the ‘legal landscape as it then existed,’ and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule.”³⁷ Third, “if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity [in collateral challenges].”³⁸

The Indiana Supreme Court’s analysis in *Gutermuth* was based on a patchwork of answers to these three questions. First, the Court determined in *Gutermuth* that a conviction belatedly appealed is neither “pending on direct review” nor “not yet final.”³⁹ Second, the Court drew from *Smylie* its holding that *Blakely*, not its predecessor *Apprendi*, announced a “new rule” of criminal procedure.⁴⁰ Finally, the Court assumed without analysis that *Blakely* does not apply to cases on collateral review.

A. Is a conviction final if it is subject to a belated appeal?

1. There is a federal equivalent to Indiana’s belated appeal procedure

The first basis of the result in *Gutermuth* was the Court’s determination that a belated appeal is neither “pending on direct review”

nor “not yet final.” The Court reached that result based, in part, on its conclusion that “there is no procedure in federal courts similar to the belated appeal allowed in this state and several others.”⁴¹ But that is not quite correct.

In fact, two weeks after *Gutermuth*, the Seventh Circuit Court of Appeals employed a remarkably similar procedure, allowing a defendant the opportunity to pursue a petition for certiorari more than a year after the time to do so had expired.⁴² In *United States v. Price*, the defendant lost the appeal of his conviction on Aug. 15, 2005,⁴³ and, after a limited remand, the appeal of his sentence on Nov. 22, 2005.⁴⁴ Price then filed a motion in the District Court, pursuant to 28 U.S.C. §2255, seeking relief from his criminal judgment.⁴⁵ In that motion, Price argued his appointed counsel was ineffective for failing to file a timely petition for writ of certiorari.⁴⁶ The District Court, however, stayed consideration of the §2255 motion so that Price could ask the Seventh Circuit “to recall its mandate in the direct criminal appeal and to appoint counsel to file a petition for a writ of certiorari.”⁴⁷

In a chambers opinion, Judge Ripple granted the motion, citing the fact that Price believed his counsel was preparing a certiorari petition only to find out later that his counsel had not done so.⁴⁸ Judge Ripple cited the United States Supreme Court’s 1979 *per curiam* ruling in *Wilkins v. United States*. It is the language of *Wilkins* that casts doubt on the conclusion in *Gutermuth* that a case is “‘final’ for purposes of retroactivity when the time for filing a timely direct appeal has expired.”⁴⁹

In *Wilkins*, the Court addressed this question: “What remedy is available for petitioner when court-appointed attorney

failed and refused to file timely a petition for writ of certiorari in defiance of the petitioner's written request that same be done?"⁵⁰ The Court held that one remedy was a motion to the Court of Appeals "for the appointment of counsel to assist [the defendant] in seeking review [by the Supreme Court]."⁵¹ The Court explained that the Court of Appeals "then could have vacated its judgment affirming the convictions and entered a new one, so that this petitioner, with the assistance of counsel, could file a timely petition for certiorari."⁵² The Court in *Wilkins* closed its order with similar language: "[T]he judgment of the Court of Appeals is vacated, and the case is remanded to the Court of Appeals for further proceedings, including the reentry of its judgment affirming the petitioner's convictions and, if appropriate,

appointment of counsel to assist the petitioner in seeking *timely review of that judgment in this Court.*"⁵³

Thus, while *Gutermuth* assumed that a conviction is "final" when the defendant fails to prosecute his appeal timely, *Wilkins* and *Price* support the notion that "timeliness" is restored – *i.e.*, "the time for a petition for certiorari [has not] elapsed"⁵⁴ – if a defendant is granted permission to continue his "direct criminal appeal"⁵⁵ as a remedy for the failures of counsel.

2. Policy considerations

Independent of the question whether convictions on belated appeal are "final" under *Griffith* is the question whether they ought to be treated as such. And, in fact, it does not appear that the United States Supreme Court has had to

address the issue of retroactivity when a belated petition for certiorari is allowed under *Wilkins*. This is where the policies behind the U.S. Supreme Court's plurality opinion in *Teague v. Lane* come into play, as it was *Teague* that produced the distinction between direct and collateral review important for purposes of retroactivity.

In *Teague*, the Court had to decide whether, and if so under what circumstances, a defendant may request application of a new rule in his petition for a writ of habeas corpus. The Court held that, ordinarily, new rules "will not be applicable to those cases which have become final before the new rules are announced."⁵⁶ It also stated, "Application of constitutional rules not in existence at the time a

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conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.”⁵⁷ Similarly, in applying *Teague* to Indiana’s belated appeal procedure, the Indiana Supreme Court explained in *Gutermuth*: “The parties to a belated appeal should not receive a different result because new law has been handed down that would not have been available if a timely appeal had been taken.”⁵⁸

But, the United States Supreme Court has also made clear that *Teague* involved much broader principles. At its root, the holding in *Teague* was based “on the view that retroactivity questions in habeas corpus proceedings must take account of the nature and function of the writ [of habeas corpus], which we described as

‘a collateral remedy ... not designed as a substitute for direct review.’”⁵⁹ In other words, *Teague* (and the use of habeas corpus generally) is about the proper scope of federal review of state-court convictions – *i.e.*, “not ... as a substitute for appeal, nor as a device for reviewing the merits of guilt determinations at criminal trials,” but “to guard against extreme malfunctions in the state criminal justice systems.”⁶⁰ As a result, the issue in *Gutermuth* should have been whether these considerations apply in the context of a belated appeal. Arguably, they do not.

First, while the State has an interest in finality of convictions, it has also enacted a specific procedure – the belated appeal – to keep convictions open when, through no fault of the defendant, an appeal was not taken. In other words, the

State has already balanced the interests in finality, and opted against it under these circumstances. Second, there is a significant disconnect between the notion that applying a new rule in a belated appeal “reward[s]” delay, as *Gutermuth* said, and the notion that the defendant was sentenced in violation of his constitutional rights in the first instance. Indeed, the “reward” if there is one, is that one’s constitutional rights are upheld, albeit late. Finally, to the extent there is an inevitable arbitrariness in deciding who ought to benefit from the announcement of a new rule, Post-Conviction Rule 2 has made drawing that line easy. Those who did not file a timely notice of appeal by their own fault – or who were not diligent in pursuing a belated appeal – do not get the benefit because they will be denied permission to file a belated appeal and will not be able to assert the claim on collateral review.

It is on this last point – especially the “diligence” requirement – that the Court could have crafted a rule in *Gutermuth* more appropriate than the “timeliness” bar it announced.⁶¹ A simple hypothetical demonstrates this point. Take, for example, defendant Smith. Assume Smith’s notice of appeal was due to be filed on June 23, 2004 – one day before *Blakely* was announced. Through no fault of Smith, his notice of appeal was not filed. A month later, Smith discovered this error and immediately sought permission to file a belated notice of appeal. Smith clearly met the requirements of Post-Conviction Rule 2, and his belated appeal was granted.

Under the rule announced in *Gutermuth*, Smith would not be able to assert a *Blakely* challenge on appeal because his case was “final” on June 23, 2004 – the day his notice of appeal was due but not

filed. But, any defendant in Indiana who timely filed his notice of appeal before June 23, and whose case was still pending, would be able to assert a *Blakely* challenge; the same would be true for any defendant who timely filed his notice of appeal after June 23. In fact, had Smith timely filed his notice of appeal, he would have been merely waiting for the trial court to complete the record and transcript on the day he actually filed his petition for belated appeal; his brief would not be due for some time. Under these circumstances, the stated concern in *Gutermuth* – that “[t]he parties to a belated appeal should not receive a different result because new law has been handed down” – is completely turned on its head.

Gutermuth and two of its companions presented arguably significant delays between the time of sentencing and the petition to pursue a belated appeal – eight years (*Gutermuth*),⁶² nine years (*Boyle*)⁶³ and 14 years (*Moshenek*).⁶⁴ But what of the more mundane situation presented in the hypothetical defendant Smith’s case? Here, a rule focused more on what “diligence” ought to mean under Post-Conviction Rule 2 might better have served the policies embodied in both the post-conviction rules and constitutional rights at stake.

B. Is *Blakely* even a ‘new rule’?

The second premise to *Gutermuth* and its companions is the Indiana Supreme Court’s holding in *Smylie* that *Blakely*’s holding was a “new rule.” This issue is particularly important in *Rogers v. State*, which the Court decided along with *Gutermuth*. The guilty plea and sentence in *Rogers* took place in 2002 – two years after *Apprendi* was decided, and two years before *Blakely*.⁶⁵ If *Apprendi* was a “new rule” that *Blakely*

simply applied in a different context, then *Rogers* should have been able to raise the *Apprendi* issue in his belated appeal. But, because of *Smylie*, *Rogers* was unable to challenge the constitutionality of his sentence.

In *Graham v. Collins*, the United States Supreme Court stated: “A holding constitutes a ‘new rule’ ... if it ‘breaks new ground,’ ‘imposes a new obligation on the States or the Federal Government,’ or was not ‘dictated by precedent existing at the time the defendant’s conviction became final.’”⁶⁶ The Indiana Supreme Court held in *Smylie* that *Blakely* was a “new rule” because it “went beyond *Apprendi* by defining the term ‘statutory maximum.’”⁶⁷ The Court went on to state that *Blakely* “radically reshaped our understanding of a critical element of criminal procedure, and ran contrary to established precedent.”⁶⁸ But the evidence supporting that conclusion is scarce.

Initially, the explanation of “statutory maximum” in *Blakely* differed little from its explanation

in *Apprendi*. In *Blakely*, the Court stated that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”⁶⁹ Compare that to *Apprendi*’s formulation: “[T]he relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?”⁷⁰ Indeed, both the majority and dissenting opinions in *Blakely* acknowledged that its result was compelled by *Apprendi*.⁷¹ And, as late as this past term, the United States Supreme Court has described *Blakely* as “[a]pplying” the “rule of *Apprendi*.”⁷²

That is not to say *Apprendi* was the “new rule” for purposes of all of the cases thereafter applying its mandate. The notable exception in this regard is *Ring v. Arizona*, which in 2002 applied the rule from *Apprendi* in capital cases and held that “a sentencing judge, sitting

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without a jury, [may not] find an aggravating circumstance necessary for imposition of the death penalty.”⁷³ But *Ring* had to overrule a prior case on point, *Walton v. Arizona*,⁷⁴ and “the explicit overruling of an earlier holding no doubt creates a new rule.”⁷⁵ So far, the United States Supreme Court has not decided whether *Blakely* “broke new ground,” or was simply the application of a generalized standard announced in *Apprendi*.⁷⁶

One method of determining whether a rule is “new” is to consider “whether a state court considering [a defendant’s] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [the defendant] seeks was required by the Constitution.”⁷⁷ This method is applied in terms of “reasonable jurists.”⁷⁸ The Indiana Supreme Court in *Smylie* essentially assumed the application of this method rendered *Blakely* a new rule; but, was there a basis to do so?

The Court in *Smylie* cited no Indiana state court opinions addressing a pre-*Blakely*, *Apprendi*

claim in the non-capital sentencing context. Rather, the Court cited the Seventh Circuit’s opinion in *Simpson v. United States*, which dealt with the different question of whether the Federal Sentencing Guidelines (a nonstatutory sentencing scheme) were subject to the same rule that *Apprendi* and *Blakely* applied to statutory sentencing schemes.⁷⁹ The reasonable conclusion, then, is that the Court said *Blakely* “radically reshaped” its understanding of *Apprendi* because Indiana state courts had not faced the *Apprendi* question in the first instance. And a review of published Indiana appellate opinions bears that out.

Before *Blakely*, the Indiana Supreme Court was presented an *Apprendi* issue in the non-capital sentencing context once, and it resolved the appeal without addressing the issue.⁸⁰ Similarly, before *Blakely*, the Indiana Court of Appeals faced *Apprendi* only three times in the non-capital context. In one case, the Court of Appeals did not address the issue (which raised the prior-conviction exception to

Apprendi).⁸¹ In another, *Apprendi* was raised only as tangential support in a Double Jeopardy argument.⁸² That leaves the Court of Appeals’ 2001 opinion in *Parker v. State* as the only case before *Blakely* where a non-capital defendant in Indiana challenged a sentencing enhancement (for use of a firearm) based on *Apprendi*. In that case, the court held that *Apprendi* was not violated because the jury’s verdict necessarily reflected that a firearm was used in the commission of Parker’s crime.⁸³ Thus, although the Indiana Supreme Court stated in *Smylie* that *Blakely* radically reshaped the judiciary’s understanding of *Apprendi* in the non-capital context, the data reveal that there was no understanding at all because the issue was never addressed.

By contrast, before *Smylie*, the Indiana Supreme Court had significant experience in applying the rule from *Apprendi* in the capital sentencing context. *Ring v. Arizona* stated the *Apprendi* rule in the following terms: “If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.”⁸⁴ After *Ring*, the Indiana Supreme Court clearly understood that “statutory aggravators in Indiana’s Death Penalty law are the functional equivalent of elements of a crime, and must be found by a jury beyond a reasonable doubt.”⁸⁵ And the procedure used to increase the sentence permitted by only the jury’s verdict in a capital case (a judge’s finding of aggravating factors) was essentially the same procedure used to increase the sentence imposed in non-capital cases from the presumptive.⁸⁶

Thus, although it is clear that no court before *Blakely* had reason

to consider *Apprendi's* effect on Indiana's non-capital sentencing scheme, that does not necessarily mean that "reasonable jurists" in Indiana (had they been given the opportunity) would not have concluded that the rule in *Apprendi* rendered that scheme unconstitutional.

C. Should the rule from *Blakely* (or *Apprendi*) requiring proof beyond a reasonable doubt apply to all cases?

Finally, there is the issue whether the rule from *Apprendi* or *Blakely* – regardless of which is "new" for retroactivity purposes – meets one of the exceptions in *Teague* and ought to apply retroactively to cases on collateral review. The Indiana Supreme Court's opinion in *Gutermuth* assumes the non-retroactivity of *Blakely* to collateral challenges, but no Indiana court has actually addressed the issue.

Initially, there are basically two rules of criminal procedure from the *Apprendi* line of cases. The first encompasses the defendant's Sixth Amendment right to a jury trial of all facts necessary to impose the maximum possible sentence. The United States Supreme Court held in *Schriro v. Summerlin* that this rule (as applied in *Ring v. Arizona*) does not apply retroactively to cases on collateral review.⁸⁷ The Court, however, has not yet determined what to do with the other rule from *Apprendi*, *i.e.*, the Due Process requirement that all facts necessary to impose the maximum possible sentence be proven beyond a reasonable doubt. And there certainly are strong arguments why that rule should apply retroactively to cases on collateral review.⁸⁸

To start, a new rule of criminal procedure applies to cases on collateral review if it is a "watershed rule[] of criminal procedure' implicating the fundamental fairness and

accuracy of the criminal proceeding."⁸⁹ In *Whorton v. Bockting*, the U.S. Supreme Court stated, "In order to qualify as a watershed, a new rule must meet two requirements."⁹⁰ "First," the Court said, "the rule must be necessary to prevent an impermissibly large risk of

an inaccurate conviction. Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding."⁹¹ The Court has associated this standard with its ruling in *Gideon v. Wainwright*, "the only

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case that [the Court has] identified as qualifying under this exception.”⁹² If ever another rule would qualify under this standard, requiring what had previously been considered mere “aggravating circumstances” to be proven beyond a reasonable doubt, as if elements of the crime, fits.

The key to understanding why the “beyond a reasonable doubt” rule in *Apprendi* might apply to cases on collateral review is the Supreme Court’s explanation in *Summerlin* why the jury-trial rule did not. In *Summerlin*, the Court stated that the jury-trial right was no doubt “fundamental to our system of criminal procedure.”⁹³ But that was not the imperative question; neither was “whether the Framers believed that juries are more accurate factfinders than judges ... [nor] whether juries actually *are* more accurate factfinders than judges.”⁹⁴

Rather, the Court explained, “the question is whether judicial factfinding so *seriously* diminishe[s] accuracy that there is an impermis-

sibly large risk of punishing conduct the law does not reach.”⁹⁵ In *Summerlin*, the Court concluded that “[t]he evidence is simply too equivocal to support that conclusion.”⁹⁶ Therefore, the jury-trial rule from *Apprendi* (as applied in *Ring*) did not apply to cases on collateral review.

The reasonable-doubt standard, on the other hand, has received significantly different treatment by the Court. For example, in *In re Winship*, the United States Supreme Court stated:

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – that bedrock “axiomatic and elementary” principle whose “enforcement lies at the foundation of the administration of our criminal law.”⁹⁷


In its 2006 opinion in *Staton v. State*, the Indiana Supreme Court agreed that *Apprendi* “recently reaffirmed” this view.⁹⁸

With *Winship* in mind, the accuracy of convictions rendered in Indiana before *Smylie* could easily be considered “seriously diminished” because of a disregard for this “bedrock” principle. That is because Indiana’s former sentencing scheme had *no standard* by which judges were required to find the existence of aggravating circumstances. Instead, it was simply “within the discretion of the trial court to determine whether a presumptive sentence [would] be increased because of aggravating circumstances.”⁹⁹ The result was that defendants in Indiana were convicted and sentenced based upon “the functional equivalent of an element of a greater offense”¹⁰⁰ for which the State had no cognizable burden of proof. Under these circumstances, one could certainly argue that the reasonable-doubt rule from *Apprendi* or *Blakely* ought to apply retroactively to *Gutermuth* and its companions.

In sum, the issues discussed in this article have moved largely under the radar in Indiana. But the United States Supreme Court has demonstrated an interest in resolving at least some of them in the near future. For example, the issue of *Blakely*’s retroactivity was argued this past term in the United States Supreme Court in *Burton v. Stewart*. The Court, however, disposed of that case on an unrelated issue in a *per curiam* ruling.¹⁰¹ It is also possible that the Indiana Supreme Court may reconsider the issues it either assumed or decided in *Gutermuth*. In the meantime, it will be important for defense counsel to continue raising – and preserving – these issues until their ultimate resolution. ☞

1. *Gutermuth v. State*, No. 10S01-0608-CR-306, 2007 Ind. LEXIS 469 (Ind. June 20, 2007); *Rogers v. State*, 71S03-0706-CR-242, 2007 Ind. LEXIS 470 (Ind. June 20, 2007); *Moshenek v. State*, No. 42S04-0706-PC-244, 2007 Ind. LEXIS 465 (Ind. June 20, 2007); *Boyle v. State*, 49S04-0706-CR-243, 2007 Ind. LEXIS 466 (Ind. June 20, 2007).

2. Ind. P-C.R. 1, 2.
3. *Lowery v. State*, 640 N.E.2d 1031, 1036 (Ind. 1994).
4. *Collins v. State*, 817 N.E.2d 230, 232 (Ind. 2004).
5. Ind. P-C.R. 1; *Weatherford v. State*, 619 N.E.2d 915, 916-17 (Ind. 1993).
6. *Collins*, 817 N.E.2d at 233. Similar standards are followed to determine whether a petitioner may pursue a belated appeal when a notice of appeal was filed timely, but the appeal itself was not pursued. P-C.R. 2(3).
7. Ind. P-C.R. 2(1)(b).
8. See, e.g., *Gutermuth*, 2007 Ind. LEXIS 469, at *1-3.
9. See, e.g., *id.* at *1-2.
10. *Collins*, 817 N.E.2d at 233.
11. See, e.g., *Gutermuth*, 2007 Ind. LEXIS 469, at *6.
12. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).
13. *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004).
14. *Smylie v. State*, 823 N.E.2d 679, 685 (Ind. 2005).
15. *Id.* at 684.
16. *Id.*
17. *Gutermuth*, 2007 Ind. LEXIS 469, at *9 n.4.
18. *Smylie*, 823 N.E.2d at 687-88.
19. *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987).
20. *Gutermuth*, 2007 Ind. LEXIS 469, at *15.
21. *Id.* at *14-15.
22. *Id.* at *20.
23. *Fosha v. State*, 747 N.E.2d 549, 551-52 (Ind. 2001).
24. *Id.* at 552.
25. *Gutermuth*, 2007 Ind. LEXIS 469, at *16-17.
26. *Id.* at *16-17.
27. *Id.* at *17.
28. *Id.* at *18-19.
29. *Id.* at *15-16 (emphasis added).
30. *Id.* at *19 (citing *Baysinger v. State*, 854 N.E.2d 1211, 1214 (Ind. Ct. App. 2006); *Meadows v. State*, 853 N.E.2d 1032, 1035 (Ind. Ct. App. 2006)).
31. *Id.* at *20.
32. *Id.* at *21-22.
33. *Id.* at *20.
34. *Beard v. Banks*, 542 U.S. 406, 411 (2004).
35. *Id.*
36. *Id.*
37. *Id.* (quoting *Graham v. Collins*, 506 U.S. 461, 468 (1993)).
38. *Id.*
39. *Gutermuth*, 2007 Ind. LEXIS 469, at *22.
40. *Smylie*, 823 N.E.2d at 687.
41. *Gutermuth*, 2007 Ind. LEXIS 469, at *20.
42. *United States v. Price*, No. 03-3780, 2007 U.S. App. LEXIS 15840 (July 3, 2007) (Ripple, J., chambers opinion).
43. *United States v. Price*, 418 F.3d 771 (7th Cir. 2005).
44. *United States v. Price*, No. 03-3780, 155 Fed. Appx. 899 (Nov. 22, 2005) (unpublished).
45. *Price*, 2007 U.S. App. LEXIS 15840, at *2.
46. *Id.*
47. *Id.* at *2-3.
48. *Id.* at *4-7.
49. *Gutermuth*, 2007 Ind. LEXIS 469, at *20.
50. *Wilkins v. United States*, 441 U.S. 468, 469 (1979) (*per curiam*).
51. *Id.*
52. *Id.* (emphasis added).
53. *Id.* at 470 (emphasis added).
54. *Griffith*, 479 U.S. at 321 n.6.
55. *Price*, 2007 U.S. App. LEXIS 15840, at *2-3.
56. *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion).
57. *Id.* at 309.
58. *Gutermuth*, 2007 Ind. LEXIS 469, at *18.
59. *Wright v. West*, 505 U.S. 277, 292 (1992) (opinion of Thomas, J.) (quoting *Teague*, 489 U.S. at 306) (internal quotations omitted).
60. *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).
61. In fact, the Court discussed “diligence” at great length in *Moshenek v. State*. See, *Moshenek*, 2007 Ind. LEXIS 465.
62. *Gutermuth*, 2007 Ind. LEXIS 469, at *1-6.
63. *Boyle*, 2007 Ind. LEXIS 466, at *1-3.
64. *Moshenek*, 2007 Ind. LEXIS 465, at *1-4.
65. *Rogers*, 2007 Ind. LEXIS 470, at *1.
66. *Graham v. Collins*, 506 U.S. 461, 467 (1993) (quoting *Teague*, 489 U.S. at 301).
67. *Smylie*, 823 N.E.2d at 687.
68. *Id.*
69. *Blakely*, 542 U.S. at 303.
70. *Apprendi*, 530 U.S. at 494.
71. *Blakely*, 542 U.S. at 301 (“This case requires us to apply the rule we expressed in *Apprendi v. New Jersey*.”); *id.* at 328 (Breyer, J., dissenting) (“The Court makes clear that it means what it said in *Apprendi v. New Jersey*.”).
72. *Cunningham v. California*, 127 S. Ct. 856, 863-64 (U.S. 2007).
73. *Ring v. Arizona*, 536 U.S. 584, 609 (2002).
74. *Id.* (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)).
75. *Whorton v. Bockting*, 127 S. Ct. 1173, 1181 (U.S. 2007) (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)).
76. *Wright*, 505 U.S. at 309 (Kennedy, J., concurring in judgment) (“Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.”) (quoted by *Williams v. Taylor*, 529 U.S. 362, 382 (2002)).
77. *Saffle*, 494 U.S. at 488.
78. See, e.g., *Whorton*, 127 S. Ct. at 1181.
79. *Simpson v. United States*, 376 F.3d 679, 681 (7th Cir. 2004). The United States Supreme

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- Court did apply *Blakely* to the Federal Sentencing Guidelines in *United States v. Booker*, 543 U.S. 220 (2005).
80. *Crawford v. State*, 755 N.E.2d 565, 566, 567 (Ind. 2001).
81. *Smith v. State*, 804 N.E.2d 1246, 1252 n.6 (Ind. Ct. App. 2004), *transfer granted*, 812 N.E.2d 808 (Ind. 2004), *affirmed in part, superseded in part*, 825 N.E.2d 783 (Ind. 2005).
82. *Jaramillo v. State*, 803 N.E.2d 243, 250 (Ind. Ct. App. 2004).
83. *Parker v. State*, 754 N.E.2d 614, 619 (Ind. Ct. App. 2001).
84. *Ring*, 536 U.S. at 602.
85. *Ritchie v. State*, 809 N.E.2d 258, 265 (Ind. 2004).
86. In fact, in the March 4, 2004 oral argument in *State v. Barker* and *State v. Ben-Yisrael* – before *Blakely* was even argued – Chief Justice Shepard and Justice Sullivan’s questions to counsel indicated an understanding that there was little, if any, difference between the capital and non-capital sentencing schemes when sentences were increased beyond the length of time permitted by only the jury’s findings. See http://realvideo.ind.net:8080/ramgen/real/SupremeCourt/03042004_1030am.rm (beginning at 27:30 mark).
87. *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004).
88. Although this author disagrees with some of its conclusion that *Blakely* was a “new rule,” several arguments for *Blakely*’s application on collateral review are presented in the note, “Justice for All: Analyzing *Blakely* Retroactivity and Ensuring Just Sentences in Pre-*Blakely* Convictions,” by David E. Johnson, 66 *Ohio St. L.J.* 875 (2005).
89. *Saffle*, 494 U.S. at 495 (quoting *Teague*, 489 U.S. at 311).
90. *Whorton*, 127 S. Ct. at 1182.
91. *Id.* (citations and internal quotations omitted).
92. *Id.*
93. *Summerlin*, 542 U.S. at 358.
94. *Id.* at 355 (citations omitted) (emphasis in original).
95. *Id.* at 355-56 (internal quotations omitted) (emphasis in original).
96. *Id.* at 356.
97. *In re Winship*, 397 U.S. 358, 363 (1970) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).
98. *Staton v. State*, 853 N.E.2d 470, 474 (Ind. 2006).
99. *Widener v. State*, 659 N.E.2d 529, 533 (Ind. 1995).
100. *Apprendi*, 530 U.S. at 494 n.19.
101. See, *Burton v. Stewart*, 127 S. Ct. 793 (U.S. 2007) (*per curiam*).

Michael R. Limrick is an associate with McTurnan & Turner in Indianapolis. He is a 2001 graduate of the University of Toledo College of Law and a former clerk to Justice Theodore Boehm of the Indiana Supreme Court.