

## THE INDIANA SUPREME COURT'S VOTING PATTERNS IN CRIMINAL DECISIONS

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### I. INTRODUCTION

The Indiana Supreme Court's record in criminal cases has been overwhelmingly pro-prosecution. The court favored the prosecution 76% of the time in its non-unanimous decisions.<sup>1</sup> With five justices on the court, criminal defendants have found themselves hard pressed to attain the three votes needed to succeed on appeal. Chief Justice Randall Terry Shepard and Justice Brent E. Dickson were consistent votes in favor of the prosecution. Only Justice Robert D. Rucker tended to vote in favor of the defendant. Both Justice Frank Sullivan, Jr. and Justice Theodore R. Boehm voted for the prosecution in over half of the cases; they were, however, occasional swing votes for the defendant.

This high court study focuses on the Indiana Supreme Court's divided criminal decisions,<sup>2</sup> specifically those non-unanimous criminal decisions rendered during the five years between September 1, 2001 and August 31, 2006.<sup>3</sup> These decisions are those

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<sup>1</sup> See *infra* note 26.

<sup>2</sup> The data for this study was gathered using both Westlaw and LexisNexis. A search was done in order to find all divided decisions reviewed by the Indiana Supreme Court between September 1, 2001 and August 31, 2006. Each case was read to separate the criminal decisions from the civil decisions. Only the divided criminal decisions were used to make up the case pool for this study. There were sixty-three such decisions. Each divided criminal decision was reviewed to pinpoint who the court ruled in favor of (pro-prosecution or pro-criminal defendant), who the individual justices voted in favor of, and which justice authored the opinion. All graphs and charts contained in this study are based on the data gathered from the case pool. The case pool can be found in the Appendix, *infra*.

<sup>3</sup> Many legal scholars have written that divided decisions give the most accurate insight into a justice's ideology. "A unanimous decision tells little about a court's deliberations in a case; it conceals the internal disputes, the competing arguments, the battles and the bargains that are ultimately submerged in a single opinion that is typically more compromise than conviction." Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV.

where at least one justice either dissented from the majority or separately concurred with a different line of reasoning.<sup>4</sup> There were sixty-three non-unanimous criminal decisions.<sup>5</sup>

This study begins by examining the importance of reviewing judicial decisions, followed by a statistical review<sup>6</sup> of the Indiana Supreme Court's non-unanimous criminal decisions in order to determine: (1) the court's overall voting patterns in favor of the

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1163, 1167 (1994) (footnote omitted). "By contrast, a divided decision invites a look into a court's 'inner sanctum.'" *Id.*; see also Adam D. Feldman, *Romer Party Plus One: Managing Public Law in Colorado, 2000-2004*, 68 ALB. L. REV. 445, 458 (2005) ("The frequency of issuing separate opinions is an important indicator because it is evidence that a judge had such an interest in the case that a separate writing was necessary beyond merely subscribing to the majority view or that of another separate opinion.").

<sup>4</sup> The total number of votes, however, is treated here as being sixty-six in as much as some cases resulted in distinct divisions on more than one major issue. While the court had a single disposition in each such case, the justices actually took different positions on the different issues presented.

<sup>5</sup> *Lee v. State*, 849 N.E.2d 602 (Ind. 2006); *State v. Spillers*, 847 N.E.2d 949 (Ind. 2006); *Sellmer v. State*, 842 N.E.2d 358 (Ind. 2006); *Kellems v. State*, 842 N.E.2d 352 (Ind. 2006); *Myers v. State*, 839 N.E.2d 1154 (Ind. 2005); *Frye v. State*, 837 N.E.2d 1012 (Ind. 2005); *Pruitt v. State*, 834 N.E.2d 90 (Ind. 2005); *Matheney v. State*, 833 N.E.2d 454 (Ind. 2005); *Baird v. State*, 833 N.E.2d 28 (Ind. 2005); *Haltom v. State*, 832 N.E.2d 969 (Ind. 2005); *Baird v. State*, 831 N.E.2d 109 (Ind. 2005); *Cotto v. State*, 829 N.E.2d 520 (Ind. 2005); *Sowers v. State*, 829 N.E.2d 18 (Ind. 2005); *Corcoran v. State*, 827 N.E.2d 542 (Ind. 2005); *Lambert v. State*, 825 N.E.2d 1261 (Ind. 2005); *Houser v. State*, 823 N.E.2d 693 (Ind. 2005); *Halsema v. State*, 823 N.E.2d 668 (Ind. 2005); *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005); *Laux v. State*, 821 N.E.2d 816 (Ind. 2005); *Corcoran v. State*, 820 N.E.2d 655 (Ind. 2005); *Holmes v. State*, 820 N.E.2d 136 (Ind. 2005); *Helsley v. State*, 809 N.E.2d 292 (Ind. 2004); *Stroud v. State*, 809 N.E.2d 274 (Ind. 2004); *State v. Barker*, 809 N.E.2d 312 (Ind. 2004); *State v. Ben-Yisrayl*, 809 N.E.2d 309 (Ind. 2004); *Ritchie v. State*, 809 N.E.2d 258 (Ind. 2004); *Williams v. State*, 808 N.E.2d 652 (Ind. 2004); *Edington v. State*, 806 N.E.2d 310 (Ind. 2004); *Thompson v. State*, 804 N.E.2d 1146 (Ind. 2004); *Dumas v. State*, 803 N.E.2d 1113 (Ind. 2004); *State v. Bulington*, 802 N.E.2d 435 (Ind. 2004); *Finger v. State*, 799 N.E.2d 528 (Ind. 2003); *Springer v. State*, 798 N.E.2d 431 (Ind. 2003); *Thomas v. State*, 797 N.E.2d 752 (Ind. 2003); *Leone v. State*, 797 N.E.2d 743 (Ind. 2003); *State v. Dugan*, 793 N.E.2d 1034 (Ind. 2003); *Williams v. State*, 793 N.E.2d 1019 (Ind. 2003); *Miller v. State*, 790 N.E.2d 437 (Ind. 2003); *Hopkins v. State*, 782 N.E.2d 988 (Ind. 2003); *Azania v. State*, 778 N.E.2d 1253 (Ind. 2002); *French v. State*, 778 N.E.2d 816 (Ind. 2002); *Corcoran v. State*, 774 N.E.2d 495 (Ind. 2002); *Vestal v. State*, 773 N.E.2d 805 (Ind. 2002); *Bostick v. State*, 773 N.E.2d 266 (Ind. 2002); *Highbaugh v. State*, 773 N.E.2d 247 (Ind. 2002); *Guyton v. State*, 771 N.E.2d 1141 (Ind. 2002); *Smith v. State*, 770 N.E.2d 818 (Ind. 2002); *Healthscript, Inc. v. State*, 770 N.E.2d 810 (Ind. 2002); *Miller v. State*, 770 N.E.2d 763 (Ind. 2002); *Brown v. State*, 770 N.E.2d 275 (Ind. 2002); *Abney v. State*, 766 N.E.2d 1175 (Ind. 2002); *Saylor v. State*, 765 N.E.2d 535 (Ind. 2002); *Bellamy v. State*, 765 N.E.2d 520 (Ind. 2002); *Robertson v. State*, 765 N.E.2d 138 (Ind. 2002); *State v. Gerschoffer*, 763 N.E.2d 960 (Ind. 2002); *Griffin v. State*, 763 N.E.2d 450 (Ind. 2002); *Davidson v. State*, 763 N.E.2d 441 (Ind. 2002); *Hernandez v. State*, 761 N.E.2d 845 (Ind. 2002); *Dunlap v. State*, 761 N.E.2d 837 (Ind. 2002); *Spivey v. State*, 761 N.E.2d 831 (Ind. 2002); *Love v. State*, 761 N.E.2d 806 (Ind. 2002); *Jiosa v. State*, 755 N.E.2d 605 (Ind. 2001).

<sup>6</sup> "Judicial viewpoints are often made evident by an author's language, but statistics serve as an invaluable addition to any attempt to illuminate distinct patterns of behavior." Feldman, *supra* note 3, at 458.

prosecution;<sup>7</sup> (2) the court's overall voting patterns in favor of the defendant; and (3) the specific breakdown of the court's voting patterns over issues involving search and seizure, fair trial,<sup>8</sup> and the death penalty.<sup>9</sup> The study then shifts to focus on the voting patterns of the individual justices. The apparent ideological leanings of the justices gleaned from the voting patterns are compared in order to determine where each justice falls on the court's pro-prosecution/pro-defendant spectrum. Finally, this study concludes with some reflections on the voting patterns on the court and the implications for practitioners arguing before the Indiana Supreme Court.

## II. UNDERSTANDING THE JUDICIAL PROCESS<sup>10</sup>

Lawyers are "operators of the toll bridge[s] across which anyone in search of justice [must] . . . pass."<sup>11</sup>

In all criminal appeals, each of the justices on the court must decide whether to vote in favor of the prosecution or the criminal defendant. Arguing the validity of the issue in question will only get a practitioner so far at the appellate level. One should understand the true underlying ideologies of the appellate justices in order to stand a better chance at being granted a reversal, vacation, dismissal, or affirmance on appeal. High court studies give practitioners an opportunity to understand the ideological stances of the justices on a particular court. Additionally, high court studies allow practitioners to enter an appellate court knowing which of the justices can be swayed over the issue being argued and which of the justices cannot. Surely, the conclusion

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<sup>7</sup> Votes that are cast in favor of the prosecution support law and order because the judge is siding with the government over the individual.

<sup>8</sup> The issues deemed to be fair trial issues are those that raise a procedural or substantive due process question which could have deprived the defendant of his or her constitutional rights of due process under the Fourteenth Amendment.

<sup>9</sup> The issues deemed to be death penalty decisions are those where the defendant potentially faces the death penalty as a result of the sentencing verdict.

<sup>10</sup> "The purpose [of conducting a high court study] is to discern possible jurisprudential, ideological, sociological, or other patterns and common threads in the court's state constitutional decisions, as well as in the opinions and voting records of the court's individual members." Vincent Martin Bonventre, *Editor's Foreword*, 60 ALB. L. REV. 1511, 1512-13 (1997). Oliver Wendell Holmes wrote, "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics." Oliver Wendell Holmes, Assoc. Justice, U.S. Supreme Court, *The Path of the Law*, Address at Boston University School of Law (Jan. 8, 1897), in 110 HARV. L. REV. 991, 1001 (1897).

<sup>11</sup> Jane Bryant Quinn, *Cut-Rate Lawyers*, NEWSWEEK, Oct. 9, 1978, at 88.

cannot be drawn that the validity of an issue will never play a role in a justice's line of reasoning for voting in favor of the prosecution or the criminal defendant. However, the combination of having a strong understanding of the issue, the knowledge of which justices can be swayed, and the knowledge of how to present the issue at-hand to each justice, aids practitioners to zealously represent<sup>12</sup> their clients.

In *The Nature of the Judicial Process*, Benjamin N. Cardozo wrote, “[w]e cannot transcend the limitations of the ego . . . .”<sup>13</sup> Additionally, Oliver Wendell Holmes advocated that judges “pretend” how they develop a conclusion or vote a certain way based on putting forth objective factors in the writings of opinions such as analogies to other case law, the facts of the case at-hand, the legislative histories, the precedent of other case law, as well as other texts written on the topic.<sup>14</sup> Ultimately, whether it is conscious or unconscious, judges use their own personal ideologies, morals, values, faith, education, and life experiences to decide how to vote over a particular issue. Once the brief has been filed, and the oral argument has been presented, the judges must decide whether to vote in favor of the prosecution or the criminal defendant. Judges frequently shine a proverbial bright light in society's eyes by writing opinions that appear on their face to have been reasoned and decided based on objective criteria. The objective criteria contained in court opinions are, however, merely the means to an end sought by the judge. Often, judges do not write why they truly made a decision because the actual factors are extremely subjective, or the judges convince themselves that they are being completely objective.

C. Herman Pritchett, one of the foremost scholars of judicial process, wrote that judges “are deeply troubled by the implications of their roles as social engineers. Some of the concerns of the judges

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<sup>12</sup> The commitment of zealous representation obligates the lawyer “to use every means within the law in support of his client's case.” T. Leigh Anenson, *Creating Conflicts of Interest: Litigation as Interference with the Attorney-Client Relationship*, 43 AM. BUS. L.J. 173, 199 (2006) (internal quotation marks omitted).

<sup>13</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 12 (1921).

Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth. Let some intelligent layman ask him to explain: he will not go very far before taking refuge in the excuse that the language of craftsmen is unintelligible to those untutored in the craft. Such an excuse may cover with a semblance of respectability an otherwise ignominious retreat. It will hardly serve to still the pricks of curiosity and conscience.

*Id.* at 9.

<sup>14</sup> Holmes, *supra* note 10, at 1000.

no doubt stems from the realists' success in demonstrating not only that judges have a wide range of discretion, but also that subconscious forces struggling within a judge's own psyche play a major part in shaping judicial decisions."<sup>15</sup>

In *Courts, Judges, & Politics: An Introduction to the Judicial Process*, Pritchett, together with Walter Murphy, articulates that one of the underlying purposes for writing the book was to "encourage students" to take the time and effort to study judicial decisions.<sup>16</sup> Pritchett, like other judicial scholars, believes that by studying the "work of judges" a common voting trend can be pinpointed and a "central set of politically relevant ideas and values that give order and coherence to the work of judges" can be derived.<sup>17</sup> The most effective way to shed light upon a judge's voting trend is by studying divided decisions. "Any justice who believes that the opinion writing is taking an undesirable path is free to write a separate opinion, concurring or dissenting, or join with another justice in so doing."<sup>18</sup> Judicial conferences are like a war, one must choose their battles wisely by only confronting the opposing side over issues worthy of gaining ground because only so many battles can be fought before the loss of a foothold on another issue becomes certain. Judges will only divide on issues in which the individual justices have strong beliefs over—whether those beliefs are objective or subjective in merit. Studying the statistics of a judge's voting patterns in divided decisions sheds light upon the judge's true ideologies and beliefs because the judge felt that the issue was important enough not to conform with the majority when the outcome of the decision would be unscathed by the dissent or concurrence.<sup>19</sup>

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<sup>15</sup> WALTER F. MURPHY & C. HERMAN PRITCHETT, *COURTS, JUDGES, & POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS* 7 (1986).

<sup>16</sup> *Id.* at 8.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 555. A dissenting opinion tends to be more honest and open in expressing the judges reasoning for being in disagreement with the majority opinion. Unlike a majority opinion that is given weight and authority within the judicial realm, a dissenting opinion is not officially given precedent and can be written more subjectively. *Id.* Often, one or more justice does not agree with the reasoning given in a majority opinion and decide to write a concurring opinion to express their reasoning for reaching the same result as the rest of the majority. HENRY J. ABRAHAM, *THE JUDICIAL PROCESS: COURTS AT HOME: II – THE SUPREME COURT* 225–26 (1998). Judges only dissent when they strongly disagree with the majority opinion, and are free to write why the outcome of the case should have been different. *Id.* at 225.

<sup>19</sup> See also CARDOZO, *supra* note 13, at 12 (focusing on why and how judges come to their final decision in favor of law and order or the individual as well as what factors the judge

## III. VOTING PATTERNS ON THE INDIANA SUPREME COURT

“A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”<sup>20</sup>

The Indiana Supreme Court is starkly pro-prosecution. The court ruled in favor of the prosecution most frequently in cases involving the death penalty. On the other hand, the court was most lenient on the defendant when reviewing issues of search and seizure. Of the sixty-three total non-unanimous cases for the five years, 76% were decided in favor of the prosecution,<sup>21</sup> stated otherwise, only 24% favored the defendant.<sup>22</sup>

In decisions involving the death penalty the court was in favor of

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actually considers when deciding a case).

<sup>20</sup> C. EVAN HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928).

<sup>21</sup> *Lee v. State*, 849 N.E.2d 602 (Ind. 2006); *State v. Spillers*, 847 N.E.2d 949 (Ind. 2006); *Kellems v. State*, 842 N.E.2d 352 (Ind. 2006); *Myers v. State*, 839 N.E.2d 1154 (Ind. 2005); *Pruitt v. State*, 834 N.E.2d 90 (Ind. 2005); *Matheney v. State*, 833 N.E.2d 454 (Ind. 2005); *Baird v. State*, 833 N.E.2d 28 (Ind. 2005); *Haltom v. State*, 832 N.E.2d 969 (Ind. 2005); *Baird v. State*, 831 N.E.2d 109 (Ind. 2005); *Corcoran v. State*, 827 N.E.2d 542 (Ind. 2005); *Lambert v. State*, 825 N.E.2d 1261 (Ind. 2005); *Houser v. State*, 823 N.E.2d 693 (Ind. 2005); *Laux v. State*, 821 N.E.2d 816 (Ind. 2005); *Corcoran v. State*, 820 N.E.2d 655 (Ind. 2005); *Holmes v. State*, 820 N.E.2d 136 (Ind. 2005); *State v. Barker*, 809 N.E.2d 312 (Ind. 2004); *State v. Ben-Yisrayl*, 809 N.E.2d 309 (Ind. 2004); *Helsley v. State*, 809 N.E.2d 292 (Ind. 2004); *Ritchie v. State*, 809 N.E.2d 258 (Ind. 2004); *Williams v. State*, 808 N.E.2d 652 (Ind. 2004); *Edington v. State*, 806 N.E.2d 310 (Ind. 2004); *Thompson v. State*, 804 N.E.2d 1146 (Ind. 2004); *Dumas v. State*, 803 N.E.2d 1113 (Ind. 2004); *Finger v. State*, 799 N.E.2d 528 (Ind. 2003); *Springer v. State*, 798 N.E.2d 431 (Ind. 2003); *Thomas v. State*, 797 N.E.2d 752 (Ind. 2003); *Leone v. State*, 797 N.E.2d 743 (Ind. 2003); *State v. Dugan*, 793 N.E.2d 1034 (Ind. 2003); *Williams v. State*, 793 N.E.2d 1019 (Ind. 2003); *Miller v. State*, 790 N.E.2d 437 (Ind. 2003); *Hopkins v. State*, 782 N.E.2d 988 (Ind. 2003); *French v. State*, 778 N.E.2d 816 (Ind. 2002); *Corcoran v. State*, 774 N.E.2d 495 (Ind. 2002); *Vestal v. State*, 773 N.E.2d 805 (Ind. 2002); *Bostick v. State*, 773 N.E.2d 266 (Ind. 2002); *Highbaugh v. State*, 773 N.E.2d 247 (Ind. 2002); *Guyton v. State*, 771 N.E.2d 1141 (Ind. 2002); *Brown v. State*, 770 N.E.2d 275 (Ind. 2002); *Saylor v. State*, 765 N.E.2d 535 (Ind. 2002); *Bellamy v. State*, 765 N.E.2d 520 (Ind. 2002); *Robertson v. State*, 765 N.E.2d 138 (Ind. 2002); *Griffin v. State*, 763 N.E.2d 450 (Ind. 2002); *Davidson v. State*, 763 N.E.2d 441 (Ind. 2002); *Hernandez v. State*, 761 N.E.2d 845 (Ind. 2002); *Spivey v. State*, 761 N.E.2d 831 (Ind. 2002); *Dunlap v. State*, 761 N.E.2d 837 (Ind. 2002); *Love v. State*, 761 N.E.2d 806 (Ind. 2002).

<sup>22</sup> *Sellmer v. State*, 842 N.E.2d 358 (Ind. 2006); *Frye v. State*, 837 N.E.2d 1012 (Ind. 2005); *Cotto v. State*, 829 N.E.2d 520 (Ind. 2005); *Sowders v. State*, 829 N.E.2d 18 (Ind. 2005); *Halsema v. State*, 823 N.E.2d 668 (Ind. 2005); *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005); *Laux*, 821 N.E.2d 816; *Stroud v. State*, 809 N.E.2d 274 (Ind. 2004); *State v. Bulington*, 802 N.E.2d 435 (Ind. 2004); *Azania v. State*, 778 N.E.2d 1253 (Ind. 2002); *Healthscript, Inc. v. State*, 770 N.E.2d 810 (Ind. 2002); *Smith v. State*, 770 N.E.2d 818 (Ind. 2002); *Miller v. State*, 770 N.E.2d 763 (Ind. 2002); *Abney v. State*, 766 N.E.2d 1175 (Ind. 2002); *State v. Gerschoffer*, 763 N.E.2d 960 (Ind. 2002); *Jiosa v. State*, 755 N.E.2d 605 (Ind. 2001).

the prosecution 88%,<sup>23</sup> and in favor of the defendant 12%.<sup>24</sup> Additionally, in decisions involving search and seizure the court was in favor of the prosecution 56%,<sup>25</sup> and in favor of the defendant 44%.<sup>26</sup> Further, in decisions involving fair trial the court was in favor of the prosecution 75%,<sup>27</sup> and in favor of the defendant 25%.<sup>28</sup>

Clearly, then, the criminal defendant is at a distinct disadvantage in most criminal cases. The Indiana Supreme Court's law and order stance, in favor of the prosecution, has made it difficult for the criminal defendant to succeed on appeal, except perhaps in cases involving search and seizure.

#### IV. INDIVIDUAL JUSTICES: REVIEW OF CRIMINAL DECISIONS

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of "the total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where choices shall fall.

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<sup>23</sup> *Matheney*, 833 N.E.2d 454; *Baird*, 833 N.E.2d 28; *Baird*, 831 N.E.2d 109; *Corcoran*, 827 N.E.2d 542; *Lambert*, 825 N.E.2d 1261; *Corcoran*, 820 N.E.2d 655; *Holmes*, 820 N.E.2d 136; *Barker*, 809 N.E.2d 312; *Ben-Yisrayl*, 809 N.E.2d 309; *Ritchie*, 809 N.E.2d 258; *Williams*, 808 N.E.2d 652; *Williams*, 793 N.E.2d 1019; *Corcoran*, 774 N.E.2d 495; *Saylor*, 765 N.E.2d 535.

<sup>24</sup> *Stroud*, 809 N.E.2d 274; *Azania*, 778 N.E.2d 1253.

<sup>25</sup> *Lee*, 849 N.E.2d 602; *Spillers*, 847 N.E.2d 949; *Kellems*, 842 N.E.2d 352; *Myers*, 839 N.E.2d 1154; *Finger*, 799 N.E.2d 528.

<sup>26</sup> *Sellmer*, 842 N.E.2d 358; *Halsema*, 823 N.E.2d 668; *Bulington*, 802 N.E.2d 435; *Gerschoffer*, 763 N.E.2d 960.

<sup>27</sup> *Haltom v. State*, 832 N.E.2d 969 (Ind. 2005); *Houser v. State*, 823 N.E.2d 693 (Ind. 2005); *Helsley v. State*, 809 N.E.2d 292 (Ind. 2004); *Edington v. State*, 806 N.E.2d 310 (Ind. 2004); *Thompson v. State*, 804 N.E.2d 1146 (Ind. 2004); *Dumas v. State*, 803 N.E.2d 1113 (Ind. 2004); *Springer v. State*, 798 N.E.2d 431 (Ind. 2003); *Thomas v. State*, 797 N.E.2d 752 (Ind. 2003); *Leone v. State*, 797 N.E.2d 743 (Ind. 2003); *Miller*, 790 N.E.2d 437; *Hopkins v. State*, 782 N.E.2d 988 (Ind. 2003); *French v. State*, 778 N.E.2d 816 (Ind. 2002); *Bostick v. State*, 773 N.E.2d 266 (Ind. 2002); *Highbaugh v. State*, 773 N.E.2d 247 (Ind. 2002); *Brown v. State*, 770 N.E.2d 275 (Ind. 2002); *Bellamy v. State*, 765 N.E.2d 520 (Ind. 2002); *Griffin v. State*, 763 N.E.2d 450 (Ind. 2002); *Davidson v. State*, 763 N.E.2d 441 (Ind. 2002); *Hernandez v. State*, 761 N.E.2d 845 (2002); *Dunlap v. State*, 761 N.E.2d 837 (Ind. 2002); *Love v. State*, 761 N.E.2d 806 (Ind. 2002).

<sup>28</sup> *Frye v. State*, 837 N.E.2d 1012 (Ind. 2005); *Cotto v. State*, 829 N.E.2d 520 (Ind. 2005); *Sowers v. State*, 829 N.E.2d 18 (Ind. 2005); *Smith v. State*, 770 N.E.2d 818 (Ind. 2002); *Miller v. State*, 770 N.E.2d 763 (Ind. 2002); *Abney v. State*, 766 N.E.2d 1175 (Ind. 2002); *Jiosa v. State*, 755 N.E.2d 605 (Ind. 2001).

In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.<sup>29</sup>

The justices on the Indiana Supreme Court can be divided into three groups. Shepard and Dickson fell on the far right of the court's ideological spectrum, which was apparent through their voting patterns in favor of the prosecution. Sullivan and Boehm were the swing votes on the court and fell somewhere between the middle and right of the court's ideological spectrum, ultimately favoring the prosecution. Rucker was the lone advocate for the defendant. Rucker's ideology placed him on the left side of the spectrum favoring the defendant. He voted in favor of the defendant 58% of the time, and was by far the most pro-defendant justice on the court.<sup>30</sup>

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<sup>29</sup> CARDOZO, *supra* note 13, at 12–13 (footnote omitted). Cardozo described judicial process best when he wrote:

What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? . . . At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into the strange compound which is brewed daily in the cauldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life. There, before us, is the brew. Not a judge on the bench but has had a hand in the making. The elements have not come together by chance. *Some* principle, however unavowed and inarticulate and subconscious, has regulated the infusion. It may not have been the same principle for all judge at any time, nor the same principle for any judge at all times. But a choice there has been, not a submission to the decree of Fate; and the considerations and motives determining the choice, even if often obscure, do not utterly resist analysis. . . . [T]here will be need to distinguish between the conscious and the subconscious. . . . More subtle are the forces so far beneath the surface that they cannot reasonably be classified as other than subconscious. It is often through these subconscious forces that judges are kept consistent with themselves, and inconsistent with one another.

*Id.* at 10–12.

<sup>30</sup> *Lee*, 849 N.E.2d 602; *Sellmer*, 842 N.E.2d 358; *Kellems v. State*, 842 N.E.2d 352 (Ind. 2006); *Myers v. State*, 839 N.E.2d 1154 (Ind. 2005); *Frye*, 837 N.E.2d 1012; *Pruitt v. State*, 834 N.E.2d 90 (Ind. 2005); *Baird v. State*, 833 N.E.2d 28 (Ind. 2005); *Cotto*, 829 N.E.2d 520; *Sowers*, 829 N.E.2d 18; *Corcoran v. State*, 827 N.E.2d 542 (Ind. 2005); *Lambert v. State*, 825 N.E.2d 1261 (Ind. 2005); *Houser*, 823 N.E.2d 693; *Halsema*, 823 N.E.2d 668; *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005); *Laux v. State*, 821 N.E.2d 816 (Ind. 2005); *Corcoran v. State*, 820 N.E.2d 655 (Ind. 2005); *Holmes v. State*, 820 N.E.2d 136 (Ind. 2005); *Stroud v. State*, 809 N.E.2d 274 (Ind. 2004); *Ritchie v. State*, 809 N.E.2d 258 (Ind. 2004); *Burlington*, 802 N.E.2d 435; *Finger v. State*, 799 N.E.2d 528 (Ind. 2003); *Springer*, 798 N.E.2d 431; *State v. Dugan*, 793 N.E.2d 1034 (Ind. 2003); *Williams v. State*, 793 N.E.2d 1019 (Ind. 2003); *Azania v. State*, 778 N.E.2d 1253 (Ind. 2002); *French*, 778 N.E.2d 816; *Corcoran v. State*, 774 N.E.2d 495 (Ind.



*A. Chief Justice Randall Terry Shepard*

Governor Robert D. Orr appointed Chief Justice Randall Terry Shepard to the Indiana Supreme Court on September 6, 1985.<sup>31</sup> The fact that Shepard generally voted in favor of the prosecution was the most likely reason Governor Orr, a Republican governor, appointed Shepard to the court.<sup>32</sup> Out of the five justices on the Indiana Supreme Court, Shepard cast the highest percentage of votes in favor of the prosecution. Additionally, Shepard cast the highest percentage of majority or concurring votes. However, the fact that Shepard cast the highest percentage of majority or concurring votes is not surprising. The court was largely in favor of the prosecution. It is not a coincidence that Shepard cast a large percentage of his votes for the majority, or in concurrence of the majority decision, since most of the majority decisions shared Shepard's underlying ideology in favor of the prosecution.

Shepard voted in favor of the prosecution in 83% of his total votes.<sup>33</sup> For example, in *Sellmer v. State*, Shepard wrote the

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2002); *Healthscript, Inc. v. State*, 770 N.E.2d 810 (Ind. 2002); *Smith v. State*, 770 N.E.2d 818 (Ind. 2002); *Miller*, 770 N.E.2d 763; *Abney*, 766 N.E.2d 1175; *Bellamy v. State*, 765 N.E.2d 520 (Ind. 2002); *Robertson*, 765 N.E.2d 138; *Gerschoffer*, 763 N.E.2d 960; *Spivey v. State*, 761 N.E.2d 831 (Ind. 2002); *Love v. State*, 761 N.E.2d 806 (Ind. 2002); *Jiosa*, 755 N.E.2d 605.

<sup>31</sup> Indiana Courts, Indiana Supreme Court, <http://www.in.gov/judiciary/supreme> (last visited May 15, 2007) [hereinafter Indiana Supreme Court].

<sup>32</sup> See *Library Fact Files: List of Indiana Governors*, INDIANAPOLIS STAR, <http://www2.indystar.com/library/factfiles/history/indiana/governors.html> (last visited May 15, 2007) [hereinafter Indiana Governors].

<sup>33</sup> *Lee*, 849 N.E.2d 602; *State v. Spillers*, 847 N.E.2d 949 (Ind. 2006); *Sellmer*, 842 N.E.2d 358; *Kellems*, 842 N.E.2d 352; *Myers*, 839 N.E.2d 1154; *Pruitt*, 834 N.E.2d 90; *Matheney v. State*, 833 N.E.2d 454 (Ind. 2005); *Baird*, 833 N.E.2d 28; *Baird v. State*, 831 N.E.2d 109 (Ind. 2005); *Corcoran*, 827 N.E.2d 542; *Lambert*, 825 N.E.2d 1261; *Houser*, 823 N.E.2d 693; *Halsema*, 823 N.E.2d 668; *Corcoran v. State*, 820 N.E.2d 655 (Ind. 2005); *Holmes*, 820 N.E.2d 136; *State v. Barker*, 809 N.E.2d 312 (Ind. 2004); *State v. Ben-Yisrayl*, 809 N.E.2d 309 (Ind. 2004); *Helsley v. State*, 809 N.E.2d 292 (Ind. 2004); *Ritchie*, 809 N.E.2d 258; *Williams v. State*, 808 N.E.2d 652 (Ind. 2004); *Edington v. State*, 806 N.E.2d 310 (Ind. 2004); *Thompson v. State*, 804 N.E.2d 1146 (Ind. 2004); *Dumas v. State*, 803 N.E.2d 1113 (Ind. 2004); *State v. Bulington*, 802 N.E.2d 435 (Ind. 2004); *Finger*, 799 N.E.2d 528; *Springer*, 798 N.E.2d 431; *Thomas v. State*, 797 N.E.2d 752 (Ind. 2003); *Leone v. State*, 797 N.E.2d 743 (Ind. 2003); *Dugan*, 793 N.E.2d 1034; *Williams*, 793 N.E.2d 1019; *Miller v. State*, 790 N.E.2d 437 (Ind. 2003); *Hopkins v. State*, 782 N.E.2d 988 (Ind. 2003); *Azania*, 778 N.E.2d 1253; *French*, 778 N.E.2d 816; *Corcoran*, 774 N.E.2d 495; *Bostick v. State*, 773 N.E.2d 266 (Ind. 2002); *Vestal v. State*, 773 N.E.2d 805 (Ind. 2002); *Highbaugh v. State*, 773 N.E.2d 247 (Ind. 2002); *Guyton v. State*, 771 N.E.2d 1141 (Ind. 2002); *Smith*, 770 N.E.2d 818; *Brown v. State*, 770 N.E.2d 275 (Ind. 2002); *Saylor v. State*, 765 N.E.2d 535 (Ind. 2002); *Bellamy v. State*, 765 N.E.2d 520 (Ind. 2002); *Robertson*, 765 N.E.2d 138; *Griffin v. State*, 763 N.E.2d 450 (Ind. 2002); *Davidson v. State*, 763 N.E.2d 441 (Ind. 2002); *Hernandez v. State*, 761 N.E.2d 845 (Ind. 2002); *Dunlap v. State*, 761 N.E.2d 837 (Ind. 2002); *Spivey v. State*, 761 N.E.2d 831 (Ind. 2002); *Love*, 761 N.E.2d 806; *Jiosa*, 755 N.E.2d 605.

dissenting opinion in favor of the prosecution.<sup>34</sup> The case was decided by a three-to-two vote margin with Dickson joining Shepard's dissenting opinion.<sup>35</sup> In *Sellmer*, Shepard voted to uphold the legality of a search conducted by a police officer after the officer asked the defendant multiple times if he could search her until she finally agreed.<sup>36</sup> The majority ruled that the search was illegal because the officer coerced the defendant into allowing him to search her for drugs.<sup>37</sup> In decisions involving search and seizure, Shepard voted in favor of the prosecution 89%,<sup>38</sup> with a mere 11%<sup>39</sup> of his votes cast in favor of the defendant. When confronted with issues of fair trial, Shepard voted in favor of the prosecution 79%.<sup>40</sup> On issues involving the death penalty Shepard voted in favor of the prosecution 94%.<sup>41</sup>

Additionally, Shepard cast either a majority or concurring vote 89% of the time, or in fifty-eight of his total votes.<sup>42</sup> Shepard authored nineteen majority opinions, the largest amount among the justices.<sup>43</sup> Of Shepard's seven dissenting votes, Shepard authored five of them.<sup>44</sup>

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<sup>34</sup> 842 N.E.2d at 366 (Shepard, J., dissenting).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 363 (majority opinion)

<sup>38</sup> *Lee*, 849 N.E.2d 602; *Spillers*, 847 N.E.2d 949; *Kellems*, 842 N.E.2d 352; *Sellmer*, 842 N.E.2d 358; *Myers*, 839 N.E.2d 1154; *Halsema*, 823 N.E.2d 668; *Bulington*, 802 N.E.2d 435; *Finger*, 799 N.E.2d 528.

<sup>39</sup> *State v. Gerschoffer*, 763 N.E.2d 960 (Ind. 2002).

<sup>40</sup> *Frye v. State*, 837 N.E.2d 1012 (Ind. 2005); *Houser v. State*, 823 N.E.2d 693 (Ind. 2005); *Helsley v. State*, 809 N.E.2d 292 (Ind. 2004); *Edington v. State*, 806 N.E.2d 310 (Ind. 2004); *Thompson v. State*, 804 N.E.2d 1146 (Ind. 2004); *Dumas v. State*, 803 N.E.2d 1113 (Ind. 2004); *Springer v. State*, 798 N.E.2d 431 (Ind. 2003); *Thomas v. State*, 797 N.E.2d 752 (Ind. 2003); *Leone v. State*, 797 N.E.2d 743 (Ind. 2003); *Hopkins v. State*, 782 N.E.2d 988 (Ind. 2003); *French v. State*, 778 N.E.2d 816 (Ind. 2002); *Bostick v. State*, 773 N.E.2d 266 (Ind. 2002); *Highbaugh v. State*, 773 N.E.2d 247 (Ind. 2002); *Smith v. State*, 770 N.E.2d 818 (Ind. 2002); *Bellamy v. State*, 765 N.E.2d 520 (Ind. 2002); *Griffin v. State*, 763 N.E.2d 450 (Ind. 2002); *Davidson v. State*, 763 N.E.2d 441 (Ind. 2002); *Hernandez v. State*, 761 N.E.2d 845 (Ind. 2002); *Dunlap v. State*, 761 N.E.2d 837 (Ind. 2002); *Love v. State*, 761 N.E.2d 806 (Ind. 2002); *Jiosa v. State*, 755 N.E.2d 605 (Ind. 2001).

<sup>41</sup> *Matheney v. State*, 833 N.E.2d 454 (Ind. 2005); *Baird v. State*, 833 N.E.2d 28 (Ind. 2005); *Baird v. State*, 831 N.E.2d 109 (Ind. 2005); *Corcoran v. State*, 827 N.E.2d 542 (Ind. 2005); *Lambert v. State*, 825 N.E.2d 1261 (Ind. 2005); *Corcoran v. State*, 820 N.E.2d 655 (Ind. 2005); *Holmes v. State*, 820 N.E.2d 136 (Ind. 2005); *State v. Barker*, 809 N.E.2d 312 (Ind. 2004); *State v. Ben-Yisrayl*, 809 N.E.2d 309 (Ind. 2004); *Ritchie v. State*, 809 N.E.2d 258 (Ind. 2004); *Williams v. State*, 808 N.E.2d 652 (Ind. 2004); *Williams v. State*, 793 N.E.2d 1019 (Ind. 2003); *Azania v. State*, 778 N.E.2d 1253 (Ind. 2002); *Corcoran v. State*, 774 N.E.2d 495 (Ind. 2002); *Saylor v. State*, 765 N.E.2d 535 (Ind. 2002).

<sup>42</sup> See *infra* Appendix.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

*B. Justice Brent E. Dickson*

Governor Robert D. Orr appointed Justice Brent E. Dickson to the Indiana Supreme Court on January 4, 1986.<sup>45</sup> Dickson voted in favor of the prosecution 80%,<sup>46</sup> with 20% of his votes being cast in favor of the defendant.<sup>47</sup> For example, in both *Frye v. State* and *Smylie v. State*, Dickson was the sole dissenter in favor of the prosecution.<sup>48</sup> In *Frye*, Dickson refused to vote in favor of reducing the defendant's sentence from forty years to twenty-five years because Dickson felt that the defendant's prior criminal acts amounted to the defendant being classified and sentenced as a habitual offender.<sup>49</sup> The defendant had a criminal record, including burglary and battery, but his last violent offence occurred more than five years prior to the current charge of burglary.<sup>50</sup> As with Shepard, the large amount of Dickson's votes in favor of the prosecution is no surprise because Justice Dickson was appointed to

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<sup>45</sup> Indiana Supreme Court, *supra* note 31.

<sup>46</sup> *Lee v. State*, 849 N.E.2d 602 (Ind. 2006); *State v. Spillers*, 847 N.E.2d 949 (Ind. 2006); *Sellmer v. State*, 842 N.E.2d 358 (Ind. 2006); *Kellems v. State*, 842 N.E.2d 352 (Ind. 2006); *Myers v. State*, 839 N.E.2d 1154 (Ind. 2005); *Frye v. State*, 837 N.E.2d 1012 (Ind. 2005); *Pruitt v. State*, 834 N.E.2d 90 (Ind. 2005); *Matheney*, 833 N.E.2d 454; *Baird*, 833 N.E.2d 28; *Haltom v. State*, 832 N.E.2d 969 (Ind. 2005); *Baird*, 831 N.E.2d 109; *Cotto v. State*, 829 N.E.2d 520 (Ind. 2005); *Corcoran*, 827 N.E.2d 542; *Lambert*, 825 N.E.2d 1261; *Houser v. State*, 823 N.E.2d 693 (Ind. 2005); *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005); *Halsema v. State*, 823 N.E.2d 668 (Ind. 2005); *Laux v. State*, 821 N.E.2d 816 (Ind. 2005); *Corcoran*, 820 N.E.2d 655; *Holmes*, 820 N.E.2d 136; *Barker*, 809 N.E.2d 312; *Ben-Yisrayl*, 809 N.E.2d 309; *Helsley v. State*, 809 N.E.2d 292 (Ind. 2004); *Ritchie*, 809 N.E.2d 258; *Williams*, 808 N.E.2d 652; *Edington v. State*, 806 N.E.2d 310 (Ind. 2004); *Thompson v. State*, 804 N.E.2d 1146 (Ind. 2004); *Dumas v. State*, 803 N.E.2d 1113 (Ind. 2004); *Finger v. State*, 799 N.E.2d 528 (Ind. 2003); *Thomas v. State*, 797 N.E.2d 752 (Ind. 2003); *Leone v. State*, 797 N.E.2d 743 (Ind. 2003); *Williams*, 793 N.E.2d 1019; *Miller v. State*, 790 N.E.2d 437 (Ind. 2003); *Hopkins v. State*, 782 N.E.2d 988 (Ind. 2003); *Azania*, 778 N.E.2d 1253; *French v. State*, 778 N.E.2d 816 (Ind. 2002); *Corcoran*, 774 N.E.2d 495; *Vestal v. State*, 773 N.E.2d 805 (Ind. 2002); *Bostick v. State*, 773 N.E.2d 266 (Ind. 2002); *Highbaugh v. State*, 773 N.E.2d 247 (Ind. 2002); *Guyton v. State*, 771 N.E.2d 1141 (Ind. 2002); *Brown v. State*, 770 N.E.2d 275 (Ind. 2002); *Saylor*, 765 N.E.2d 535; *Bellamy v. State*, 765 N.E.2d 520 (Ind. 2002); *Robertson v. State*, 765 N.E.2d 138 (Ind. 2002); *State v. Gerschoffer*, 763 N.E.2d 960 (Ind. 2002); *Griffin v. State*, 763 N.E.2d 450 (Ind. 2002); *Davidson v. State*, 763 N.E.2d 441 (Ind. 2002); *Dunlap v. State*, 761 N.E.2d 837 (Ind. 2002); *Spivey v. State*, 761 N.E.2d 831 (Ind. 2002); *Love v. State*, 761 N.E.2d 806 (Ind. 2002).

<sup>47</sup> *Sowers v. State*, 829 N.E.2d 18 (Ind. 2005); *Laux*, 821 N.E.2d 816; *Stroud v. State*, 809 N.E.2d 274 (Ind. 2004); *State v. Bulington*, 802 N.E.2d 435 (Ind. 2004); *Springer v. State*, 798 N.E.2d 431 (Ind. 2003); *State v. Dugan*, 793 N.E.2d 1034 (Ind. 2003); *Smith v. State*, 770 N.E.2d 818 (Ind. 2002); *Healthscript, Inc. v. State*, 770 N.E.2d 810 (Ind. 2002); *Miller v. State*, 770 N.E.2d 763 (Ind. 2002); *Abney v. State*, 766 N.E.2d 1175 (Ind. 2002); *Hernandez v. State*, 761 N.E.2d 845 (Ind. 2002); *Love*, 761 N.E.2d 806; *Jiosa v. State*, 755 N.E.2d 605 (Ind. 2001).

<sup>48</sup> *Frye*, 837 N.E.2d 1012; *Smylie*, 823 N.E.2d 679.

<sup>49</sup> *Frye*, 837 N.E.2d at 1015–16 (Dickson, J., dissenting).

<sup>50</sup> *Id.* at 1014 (majority opinion).

the court by Governor Orr, a Republican.<sup>51</sup>

When confronted with issues of search and seizure, Dickson voted in favor of the prosecution 89%,<sup>52</sup> with just 11% of his votes being cast in favor of the defendant.<sup>53</sup> In decisions involving fair trial issues Dickson voted in favor of the prosecution 71%.<sup>54</sup> Dickson voted in favor of the prosecution in cases which involved the death penalty 94%,<sup>55</sup> with a mere 6% of his votes cast in favor of the defendant.<sup>56</sup>

Dickson cast either a majority or concurring vote in 82%, or in fifty-four of his total votes,<sup>57</sup> of which he authored twelve majority votes.<sup>58</sup> Dickson dissented in 11%, or in eleven of his total votes.<sup>59</sup> Of those eleven dissenting votes, Dickson authored seven of them.<sup>60</sup>

### C. Justice Frank Sullivan, Jr.

Governor Evan Bayh appointed Justice Frank Sullivan, Jr. to the Indiana Supreme Court on November 1, 1993.<sup>61</sup> Based on Sullivan's voting patterns in favor of the prosecution it was

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<sup>51</sup> Indiana Governors, *supra* note 32.

<sup>52</sup> Lee v. State, 849 N.E.2d 602 (Ind. 2006); State v. Spillers, 847 N.E.2d 949 (Ind. 2006); Sellmer v. State, 842 N.E.2d 358 (Ind. 2006); Kellems v. State, 842 N.E.2d 352 (Ind. 2006); Myers v. State, 839 N.E.2d 1154 (Ind. 2005); Halsema v. State, 823 N.E.2d 668 (Ind. 2005); Finger v. State, 799 N.E.2d 528 (Ind. 2003); State v. Gerschoffer, 763 N.E.2d 960 (Ind. 2002).

<sup>53</sup> State v. Bulington, 802 N.E.2d 435 (Ind. 2004).

<sup>54</sup> Frye, 837 N.E.2d 1012; Haltom v. State, 832 N.E.2d 969 (Ind. 2005); Cotto v. State, 829 N.E.2d 520 (Ind. 2005); Houser v. State, 823 N.E.2d 693 (Ind. 2005); Helsley v. State, 809 N.E.2d 292 (Ind. 2004); Edington v. State, 806 N.E.2d 310 (Ind. 2004); Thompson v. State, 804 N.E.2d 1146 (Ind. 2004); Dumas v. State, 803 N.E.2d 1113 (Ind. 2004); Thomas v. State, 797 N.E.2d 752 (Ind. 2003); Leone v. State, 797 N.E.2d 743 (Ind. 2003); Miller v. State, 790 N.E.2d 437 (Ind. 2003); Hopkins v. State, 782 N.E.2d 988 (Ind. 2003); French v. State, 778 N.E.2d 816 (Ind. 2002); Bostick v. State, 773 N.E.2d 266 (Ind. 2002); Highbaugh v. State, 773 N.E.2d 247 (Ind. 2002); Brown v. State, 770 N.E.2d 275 (Ind. 2002); Bellamy v. State, 765 N.E.2d 520 (Ind. 2002); Griffin v. State, 763 N.E.2d 450 (Ind. 2002); Davidson v. State, 763 N.E.2d 441 (Ind. 2002); Dunlap v. State, 761 N.E.2d 837 (Ind. 2002); Love v. State, 761 N.E.2d 806 (Ind. 2002).

<sup>55</sup> Matheney v. State, 833 N.E.2d 454 (Ind. 2005); Baird v. State, 833 N.E.2d 28 (Ind. 2005); Baird v. State, 831 N.E.2d 109 (Ind. 2005); Corcoran v. State, 827 N.E.2d 542 (Ind. 2005); Lambert v. State, 825 N.E.2d 1261 (Ind. 2005); Corcoran v. State, 820 N.E.2d 655 (Ind. 2005); Holmes v. State, 820 N.E.2d 136 (Ind. 2005); State v. Barker, 809 N.E.2d 312 (Ind. 2004); State v. Ben-Yisrayl, 809 N.E.2d 309 (Ind. 2004); Ritchie v. State, 809 N.E.2d 258 (Ind. 2004); Williams v. State, 808 N.E.2d 652 (Ind. 2004); Williams v. State, 793 N.E.2d 1019 (Ind. 2003); Azania v. State, 778 N.E.2d 1253 (Ind. 2002); Corcoran v. State, 774 N.E.2d 495 (Ind. 2002); Saylor v. State, 765 N.E.2d 535 (Ind. 2002).

<sup>56</sup> Stroud v. State, 809 N.E.2d 274 (Ind. 2004).

<sup>57</sup> See *infra* Appendix.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Indiana Supreme Court, *supra* note 31.

somewhat surprising that Governor Bayh, a Democratic governor, appointed Sullivan to the court because traditionally a democratic ideology would lead the justice to vote in favor of the defendant.<sup>62</sup> Sullivan voted 64% in favor of the prosecution out of his total votes.<sup>63</sup> However, Sullivan was a clear swing vote on the court. On certain issues Sullivan voted more heavily in favor of the prosecution than others. For example, in *Leone v. State*, Sullivan was the sole dissenter in favor of the defendant.<sup>64</sup> While in *Abney v. State*, he was the sole dissenter in favor of the prosecution.<sup>65</sup>

When confronted with search and seizure issues, Sullivan voted in favor of the defendant 56%.<sup>66</sup> On the other hand, in decisions involving the death penalty Sullivan voted in favor of the prosecution in 75% of his votes,<sup>67</sup> while only voting in favor of the defendant 25% of the time.<sup>68</sup> In decisions where a fair trial was at issue, Sullivan voted in favor of the prosecution 64%<sup>69</sup> and in favor

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<sup>62</sup> See Indiana Governors, *supra* note 32.

<sup>63</sup> *Lee v. State*, 849 N.E.2d 602 (Ind. 2006); *State v. Spillers*, 847 N.E.2d 949 (Ind. 2006); *Kellems v. State*, 842 N.E.2d 352 (Ind. 2006); *Pruitt v. State*, 834 N.E.2d 90 (Ind. 2005); *Matheney v. State*, 833 N.E.2d 454 (Ind. 2005); *Baird v. State*, 833 N.E.2d 28 (Ind. 2005); *Haltom v. State*, 832 N.E.2d 969 (Ind. 2005); *Baird v. State*, 831 N.E.2d 109 (Ind. 2005); *Corcoran v. State*, 827 N.E.2d 542 (Ind. 2005); *Lambert v. State*, 825 N.E.2d 1261 (Ind. 2005); *Houser v. State*, 823 N.E.2d 693 (Ind. 2005); *Laux v. State*, 821 N.E.2d 816 (Ind. 2005); *Corcoran v. State*, 820 N.E.2d 655 (Ind. 2005); *State v. Barker*, 809 N.E.2d 312 (Ind. 2004); *State v. Ben-Yisrayl*, 809 N.E.2d 309 (Ind. 2004); *Helsley v. State*, 809 N.E.2d 292 (Ind. 2004); *Ritchie v. State*, 809 N.E.2d 258 (Ind. 2004); *Williams v. State*, 808 N.E.2d 652 (Ind. 2004); *Edington v. State*, 806 N.E.2d 310 (Ind. 2004); *Thompson v. State*, 804 N.E.2d 1146 (Ind. 2004); *Dumas v. State*, 803 N.E.2d 1113 (Ind. 2004); *Finger v. State*, 799 N.E.2d 528 (Ind. 2003); *Springer v. State*, 798 N.E.2d 431 (Ind. 2003); *Thomas v. State*, 797 N.E.2d 752 (Ind. 2003); *State v. Dugan*, 793 N.E.2d 1034 (Ind. 2003); *Williams v. State*, 793 N.E.2d 1019 (Ind. 2003); *Miller v. State*, 790 N.E.2d 437 (Ind. 2003); *Hopkins v. State*, 782 N.E.2d 988 (Ind. 2003); *Corcoran v. State*, 774 N.E.2d 495 (Ind. 2002); *Vestal v. State*, 773 N.E.2d 805 (Ind. 2002); *Highbaugh v. State*, 773 N.E.2d 247 (Ind. 2002); *Guyton v. State*, 771 N.E.2d 1141 (Ind. 2002); *Brown v. State*, 770 N.E.2d 275 (Ind. 2002); *Abney v. State*, 766 N.E.2d 1175 (Ind. 2002); *Bellamy v. State*, 765 N.E.2d 520 (Ind. 2002); *Robertson v. State*, 765 N.E.2d 138 (Ind. 2002); *Griffin v. State*, 763 N.E.2d 450 (Ind. 2002); *Davidson v. State*, 763 N.E.2d 441 (Ind. 2002); *Love v. State*, 761 N.E.2d 806 (Ind. 2002); *Jiosa v. State*, 755 N.E.2d 605 (Ind. 2001).

<sup>64</sup> 797 N.E.2d 743, 750–52 (Ind. 2003).

<sup>65</sup> 766 N.E.2d at 1178–79.

<sup>66</sup> *Sellmer v. State*, 842 N.E.2d 358 (Ind. 2006); *Myers v. State*, 839 N.E.2d 1154 (Ind. 2005); *Halsema v. State*, 823 N.E.2d 668 (Ind. 2005); *State v. Bulington*, 802 N.E.2d 435 (Ind. 2004); *State v. Gerschoffer*, 763 N.E.2d 960 (Ind. 2002).

<sup>67</sup> *Matheney*, 833 N.E.2d 454; *Baird v. State*, 833 N.E.2d 28 (Ind. 2005); *Baird*, 831 N.E.2d 109; *Corcoran*, 827 N.E.2d 542; *Lambert*, 825 N.E.2d 1261; *Corcoran*, 820 N.E.2d 655; *Ritchie*, 809 N.E.2d 258; *Barker*, 809 N.E.2d 312; *Ben-Yisrayl*, 809 N.E.2d 309; *Williams*, 808 N.E.2d 652; *Williams*, 793 N.E.2d 1019; *Corcoran*, 774 N.E.2d 495.

<sup>68</sup> *Holmes v. State*, 820 N.E.2d 136 (Ind. 2005); *Stroud v. State*, 809 N.E.2d 274 (Ind. 2004); *Azania v. State*, 778 N.E.2d 1253 (Ind. 2002); *Saylor v. State*, 765 N.E.2d 535 (Ind. 2002).

<sup>69</sup> *Haltom v. State*, 832 N.E.2d 969 (Ind. 2005); *Houser v. State*, 823 N.E.2d 693 (Ind.

of the defendant 36%.<sup>70</sup>

Sullivan cast a majority or concurring vote in 79%, or fifty-two of his total votes.<sup>71</sup> Of those fifty-two votes, Sullivan authored twelve majority opinions.<sup>72</sup> Additionally, Sullivan authored eleven of his thirteen dissenting votes.<sup>73</sup>

#### *D. Justice Theodore R. Boehm*

Governor Evan Bayh appointed Justice Theodore R. Boehm to the Indiana Supreme Court on August 7, 1996.<sup>74</sup> Along with Sullivan, Boehm was the second swing vote on the Indiana Supreme Court. Boehm was the more conservative of the two swing voters. Boehm cast 67% of his total votes in favor of the prosecution.<sup>75</sup> However,

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2005); *Helsley v. State*, 809 N.E.2d 292 (Ind. 2004); *Edington v. State*, 806 N.E.2d 310 (Ind. 2004); *Thompson v. State*, 804 N.E.2d 1146 (Ind. 2004); *Dumas v. State*, 803 N.E.2d 1113 (Ind. 2004); *Springer v. State*, 798 N.E.2d 431 (Ind. 2003); *Thomas v. State*, 797 N.E.2d 752 (Ind. 2003); *Miller v. State*, 790 N.E.2d 437 (Ind. 2003); *Hopkins v. State*, 782 N.E.2d 988 (Ind. 2003); *Highbaugh v. State*, 773 N.E.2d 247 (Ind. 2002); *Brown v. State*, 770 N.E.2d 275 (Ind. 2002); *Griffin v. State*, 763 N.E.2d 450 (Ind. 2002); *Davidson v. State*, 763 N.E.2d 441 (Ind. 2002); *Abney*, 766 N.E.2d 1175; *Bellamy v. State*, 765 N.E.2d 520 (Ind. 2002); *Love v. State*, 761 N.E.2d 806 (Ind. 2002); *Jiosa v. State*, 755 N.E.2d 605 (Ind. 2001).

<sup>70</sup> *Frye v. State*, 837 N.E.2d 1012 (Ind. 2005); *Cotto v. State*, 829 N.E.2d 520 (Ind. 2005); *Sowders v. State*, 829 N.E.2d 18 (Ind. 2005); *Leone v. State*, 797 N.E.2d 743 (Ind. 2003); *French v. State*, 778 N.E.2d 816 (Ind. 2002); *Bostick v. State*, 773 N.E.2d 266 (Ind. 2002); *Smith v. State*, 770 N.E.2d 818 (Ind. 2002); *Miller v. State*, 770 N.E.2d 763 (Ind. 2002); *Hernandez v. State*, 761 N.E.2d 845 (Ind. 2002); *Dunlap v. State*, 761 N.E.2d 837 (Ind. 2002).

<sup>71</sup> See *infra* Appendix.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Indiana Supreme Court, *supra* note 31.

<sup>75</sup> *Lee v. State*, 849 N.E.2d 602 (Ind. 2006); *State v. Spillers*, 847 N.E.2d 949 (Ind. 2006); *Kellems v. State*, 842 N.E.2d 352 (Ind. 2006); *Myers v. State*, 839 N.E.2d 1154 (Ind. 2005); *Pruitt v. State*, 834 N.E.2d 90 (Ind. 2005); *Matheney v. State*, 833 N.E.2d 454 (Ind. 2005); *Haltom v. State*, 832 N.E.2d 969 (Ind. 2005); *Baird v. State*, 831 N.E.2d 109 (Ind. 2005); *Cotto*, 829 N.E.2d 520; *Corcoran v. State*, 827 N.E.2d 542 (Ind. 2005); *Houser v. State*, 823 N.E.2d 693 (Ind. 2005); *Laux v. State*, 821 N.E.2d 816 (Ind. 2005); *Corcoran v. State*, 820 N.E.2d 655 (Ind. 2005); *Holmes v. State*, 820 N.E.2d 136 (Ind. 2005); *State v. Barker*, 809 N.E.2d 312 (Ind. 2004); *State v. Ben-Yisrayl*, 809 N.E.2d 309 (Ind. 2004); *Helsley v. State*, 809 N.E.2d 292 (Ind. 2004); *Ritchie v. State*, 809 N.E.2d 258 (Ind. 2004); *Williams v. State*, 808 N.E.2d 652 (Ind. 2004); *Edington v. State*, 806 N.E.2d 310 (Ind. 2004); *Thompson v. State*, 804 N.E.2d 1146 (Ind. 2004); *Dumas v. State*, 803 N.E.2d 1113 (Ind. 2004); *State v. Bulington*, 802 N.E.2d 435 (Ind. 2004); *Finger v. State*, 799 N.E.2d 528 (Ind. 2003); *Springer v. State*, 798 N.E.2d 431 (Ind. 2003); *Leone*, 797 N.E.2d 743; *State v. Dugan*, 793 N.E.2d 1034 (Ind. 2003); *Miller v. State*, 790 N.E.2d 437 (Ind. 2003); *Hopkins v. State*, 782 N.E.2d 988 (Ind. 2003); *French*, 778 N.E.2d 816; *Corcoran v. State*, 774 N.E.2d 495 (Ind. 2002); *Vestal v. State*, 773 N.E.2d 805 (Ind. 2002); *Guyton v. State*, 771 N.E.2d 1141 (Ind. 2002); *Smith v. State*, 770 N.E.2d 818 (Ind. 2002); *Saylor v. State*, 765 N.E.2d 535 (Ind. 2002); *Bellamy v. State*, 765 N.E.2d 520 (Ind. 2002); *Robertson v. State*, 765 N.E.2d 138 (Ind. 2002); *Davidson v. State*, 763 N.E.2d 441 (Ind. 2002); *Hernandez*, 761 N.E.2d 845; *Spivey v. State*, 761 N.E.2d 831 (Ind. 2002); *Dunlap*, 761 N.E.2d 837; *Love v. State*, 761 N.E.2d 806 (Ind. 2002).

Boehm was still substantially more in favor of the defendant than both Shepard and Dickson. For example, in *Brown v. State*, Boehm cast the only dissenting vote in favor of the defendant.<sup>76</sup>

Boehm voted rather consistently in favor of the prosecution. When confronted with search and seizure issues, Boehm voted in favor of the prosecution 67%.<sup>77</sup> Among decisions involving fair trial issues, Boehm voted in favor of the prosecution 64%.<sup>78</sup> In Boehm's votes that involved the death penalty, 69% were cast in favor of the defendant.<sup>79</sup>

Boehm cast a majority or concurring vote in fifty-four, 82% of his total votes.<sup>80</sup> Of those fifty-four votes, Boehm authored ten majority opinions.<sup>81</sup> Additionally, Boehm dissented in 18%, or eleven of his total votes,<sup>82</sup> of which Boehm authored nine of his eleven dissenting votes.<sup>83</sup>

#### *E. Justice Robert D. Rucker*

Governor Frank O'Bannon appointed Justice Robert D. Rucker to the Indiana Supreme Court on November 19, 1999.<sup>84</sup> It was not surprising that Governor O'Bannon, a Democrat, appointed Boehm to the court since Rucker tends to vote in favor of the defendant.<sup>85</sup> Rucker has voted heavily in favor of the defendant compared to the other justices on the court. Rucker was the only justice to vote in favor of the defendant more frequently than the prosecution. For example, in both *Lee v. State* and *Robertson v. State*, Rucker was the only justice to dissent in favor of the defendant.<sup>86</sup> Additionally,

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<sup>76</sup> 770 N.E.2d 275, 282–83 (Ind. 2002) (Boehm, J., dissenting).

<sup>77</sup> *Lee*, 849 N.E.2d 602; *Spillers*, 847 N.E.2d 949; *Kellems*, 842 N.E.2d 352; *Myers*, 839 N.E.2d 1154; *Burlington*, 802 N.E.2d 43; *Finger*, 799 N.E.2d 528.

<sup>78</sup> *Haltom*, 832 N.E.2d 969; *Cotto*, 829 N.E.2d 520; *Houser*, 823 N.E.2d 693; *Helsley*, 809 N.E.2d 292; *Edington*, 806 N.E.2d 310; *Thompson*, 804 N.E.2d 1146; *Dumas*, 803 N.E.2d 1113; *Springer*, 798 N.E.2d 431; *Leone*, 797 N.E.2d 743; *Miller*, 790 N.E.2d 437; *Hopkins*, 782 N.E.2d 988; *French*, 778 N.E.2d 816; *Smith*, 770 N.E.2d 818; *Davidson*, 763 N.E.2d 441; *Hernandez*, 761 N.E.2d 845; *Bellamy*, 765 N.E.2d 520; *Dunlap*, 761 N.E.2d 837; *Love*, 761 N.E.2d 806; *Jiosa v. State*, 755 N.E.2d 605 (Ind. 2001).

<sup>79</sup> *Matheney*, 833 N.E.2d 454; *Baird*, 831 N.E.2d 109; *Corcoran*, 827 N.E.2d 542; *Corcoran*, 820 N.E.2d 655; *Holmes*, 820 N.E.2d 136; *Ritchie*, 809 N.E.2d 258; *Barker*, 809 N.E.2d 312; *Ben-Yisrayl*, 809 N.E.2d 309; *Williams*, 808 N.E.2d 652; *Corcoran*, 774 N.E.2d 495; *Saylor*, 765 N.E.2d 535.

<sup>80</sup> See *infra* Appendix.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Indiana Supreme Court, *supra* note 31.

<sup>85</sup> See Indiana Governors, *supra* note 32.

<sup>86</sup> *Lee v. State*, 849 N.E.2d 602 (Ind. 2006); *Robertson v. State*, 765 N.E.2d 138 (Ind. 2002).

Rucker never dissented in favor of the prosecution.<sup>87</sup> However, even Rucker was more in favor of the prosecution than the defendant over issues that involved fair trial.<sup>88</sup>

Rucker voted in favor of the defendant in 58% of the court's criminal decisions.<sup>89</sup> In decisions involving search and seizure, Rucker voted in favor of the defendant 89%.<sup>90</sup> When confronted with fair trial issues Rucker voted in favor of the defendant 39%,<sup>91</sup> with 61% of his votes cast in favor of the prosecution.<sup>92</sup> Among decisions involving the death penalty, Rucker voted in favor of the

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<sup>87</sup> See *infra* Appendix.

<sup>88</sup> *Haltom v. State*, 832 N.E.2d 969 (Ind. 2005); *Helsley v. State*, 809 N.E.2d 292 (Ind. 2004); *Edington v. State*, 806 N.E.2d 310 (Ind. 2004); *Thompson v. State*, 804 N.E.2d 1146 (Ind. 2004); *Dumas v. State*, 803 N.E.2d 1113 (Ind. 2004); *Thomas v. State*, 797 N.E.2d 752 (Ind. 2003); *Leone v. State*, 797 N.E.2d 743 (Ind. 2003); *Miller v. State*, 790 N.E.2d 437 (Ind. 2003); *Hopkins v. State*, 782 N.E.2d 988 (Ind. 2003); *French v. State*, 778 N.E.2d 816 (Ind. 2002); *Bostick v. State*, 773 N.E.2d 266 (Ind. 2002); *Highbaugh v. State*, 773 N.E.2d 247 (Ind. 2002); *Brown v. State*, 770 N.E.2d 275 (Ind. 2002); *Griffin v. State*, 763 N.E.2d 450 (Ind. 2002); *Davidson v. State*, 763 N.E.2d 441 (Ind. 2002); *Hernandez v. State*, 761 N.E.2d 845 (Ind. 2002); *Dunlap v. State*, 761 N.E.2d 837 (Ind. 2002); *Love v. State*, 761 N.E.2d 806 (Ind. 2002).

<sup>89</sup> *Lee*, 849 N.E.2d 602; *Sellmer v. State*, 842 N.E.2d 358 (Ind. 2006); *Kellems v. State*, 842 N.E.2d 352 (Ind. 2006); *Myers v. State*, 839 N.E.2d 1154 (Ind. 2005); *Frye v. State*, 837 N.E.2d 1012 (Ind. 2005); *Pruitt v. State*, 834 N.E.2d 90 (Ind. 2005); *Baird v. State*, 833 N.E.2d 28 (Ind. 2005); *Cotto v. State*, 829 N.E.2d 520 (Ind. 2005); *Sowders v. State*, 829 N.E.2d 18 (Ind. 2005); *Corcoran v. State*, 827 N.E.2d 542 (Ind. 2005); *Lambert v. State*, 825 N.E.2d 1261 (Ind. 2005); *Houser v. State*, 823 N.E.2d 693 (Ind. 2005); *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005); *Halsema v. State*, 823 N.E.2d 668 (Ind. 2005); *Laux v. State*, 821 N.E.2d 816 (Ind. 2005); *Corcoran v. State*, 820 N.E.2d 655 (Ind. 2005); *Holmes v. State*, 820 N.E.2d 136 (Ind. 2005); *Stroud v. State*, 809 N.E.2d 274 (Ind. 2004); *Ritchie v. State*, 809 N.E.2d 258 (Ind. 2004); *State v. Bulington*, 802 N.E.2d 435 (Ind. 2004); *Finger v. State*, 799 N.E.2d 528 (Ind. 2003); *Springer v. State*, 798 N.E.2d 431 (Ind. 2003); *State v. Dugan*, 793 N.E.2d 1034 (Ind. 2003); *Williams v. State*, 793 N.E.2d 1019 (Ind. 2003); *Azania v. State*, 778 N.E.2d 1253 (Ind. 2002); *French*, 778 N.E.2d 816; *Corcoran v. State*, 774 N.E.2d 495 (Ind. 2002); *Smith v. State*, 770 N.E.2d 818 (Ind. 2002); *Healthscript, Inc. v. State*, 770 N.E.2d 810 (Ind. 2002); *Miller v. State*, 770 N.E.2d 763 (Ind. 2002); *Abney v. State*, 766 N.E.2d 1175 (Ind. 2002); *Bellamy v. State*, 765 N.E.2d 520 (Ind. 2002); *Robertson v. State*, 765 N.E.2d 138 (Ind. 2002); *State v. Gerschoffer*, 763 N.E.2d 960 (Ind. 2002); *Spivey v. State*, 761 N.E.2d 831 (Ind. 2002); *Love*, 761 N.E.2d 806; *Jiosa v. State*, 755 N.E.2d 605 (Ind. 2001).

<sup>90</sup> *Lee*, 849 N.E.2d 602; *Kellems*, 842 N.E.2d 352; *Sellmer*, 842 N.E.2d 358; *Myers*, 839 N.E.2d 1154; *Halsema*, 823 N.E.2d 668; *Bulington*, 802 N.E.2d 43; *Finger*, 799 N.E.2d 528; *Gerschoffer*, 763 N.E.2d 960.

<sup>91</sup> *Frye*, 837 N.E.2d 1012; *Cotto*, 829 N.E.2d 520; *Sowders*, 829 N.E.2d 18; *Houser*, 823 N.E.2d 693; *Springer*, 798 N.E.2d 431; *French*, 778 N.E.2d 816; *Smith*, 770 N.E.2d 818; *Miller*, 770 N.E.2d 763; *Abney*, 766 N.E.2d 1175; *Bellamy*, 765 N.E.2d 520; *Love*, 761 N.E.2d 806; *Jiosa*, 755 N.E.2d 605.

<sup>92</sup> *Haltom*, 832 N.E.2d 969; *Helsley*, 809 N.E.2d 292; *Edington*, 806 N.E.2d 310; *Thompson*, 804 N.E.2d 1146; *Dumas*, 803 N.E.2d 1113; *Thomas*, 797 N.E.2d 752; *Leone*, 797 N.E.2d 743; *Miller*, 790 N.E.2d 437; *Hopkins*, 782 N.E.2d 988; *French*, 778 N.E.2d 816; *Bostick*, 773 N.E.2d 266; *Highbaugh*, 773 N.E.2d 247; *Brown*, 770 N.E.2d 275; *Griffin*, 763 N.E.2d 450; *Davidson*, 763 N.E.2d 441; *Hernandez*, 761 N.E.2d 845; *Dunlap*, 761 N.E.2d 837; *Love*, 761 N.E.2d 806.

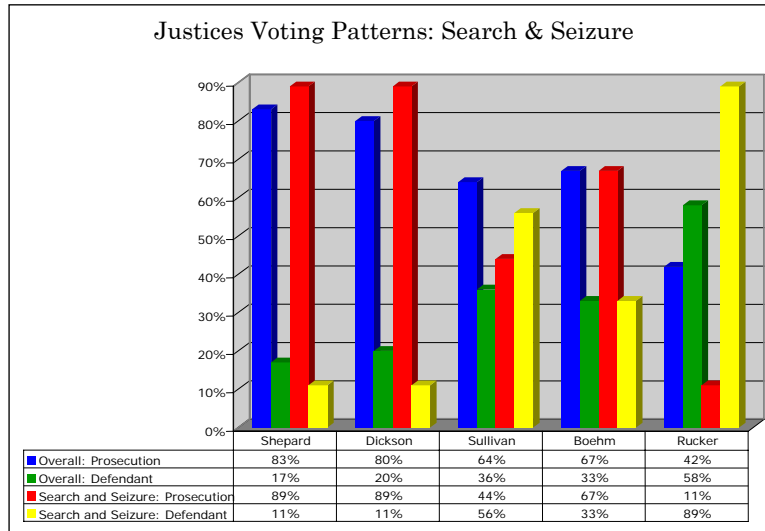


defendant 62%.<sup>93</sup>

Rucker cast a majority or concurring vote in 68%, or forty-three, of his total votes.<sup>94</sup> Of those forty-three votes, Rucker authored five majority opinions.<sup>95</sup> Additionally, Rucker dissented in 34%, or twenty-two of his total votes.<sup>96</sup> Rucker authored seventeen of his twenty-two dissenting votes.<sup>97</sup>

*F. Summary*

The data represented in the following charts summarize the individual justices' voting patterns in non-unanimous criminal decisions when confronted with issues of search and seizure, the death penalty, and fair trials, as well as the overall voting patterns of the individual justices.



**Figure 1**

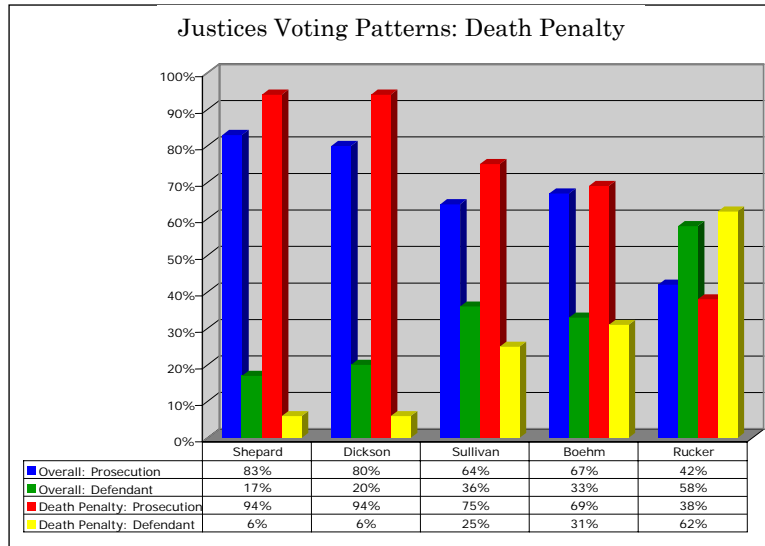
<sup>93</sup> *Baird*, 833 N.E.2d 28; *Corcoran*, 827 N.E.2d 542; *Lambert*, 825 N.E.2d 1261; *Corcoran*, 820 N.E.2d 655; *Holmes*, 820 N.E.2d 136; *Stroud*, 809 N.E.2d 274; *Ritchie*, 809 N.E.2d 258; *State v. Barker*, 809 N.E.2d 312 (Ind. 2004); *Williams*, 793 N.E.2d 1019; *Azania*, 778 N.E.2d 1253; *Corcoran*, 774 N.E.2d 495.

<sup>94</sup> *See infra* Appendix.

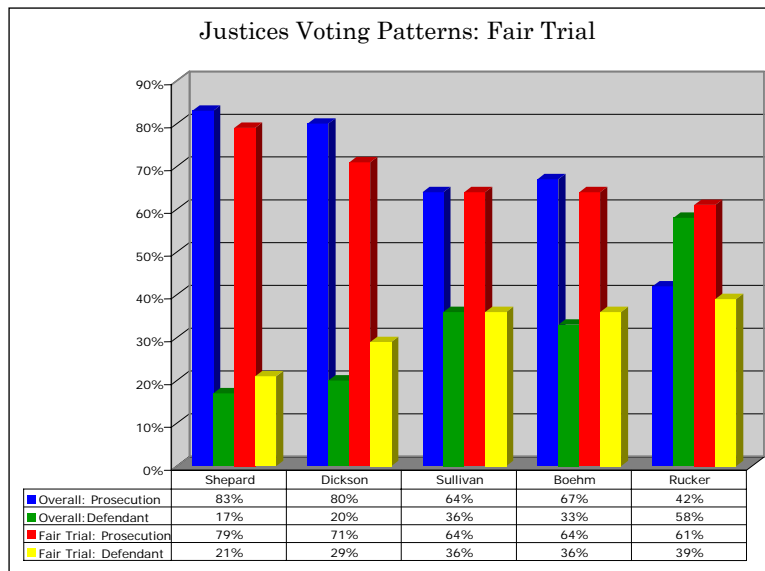
<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*



**Figure 2**



**Figure 3**

The data represented in Figure 4 depicts the patterns in which the individual justices cast their votes with the majority, concurred with the majority but with a different line of reasoning, or cast a dissenting vote in non-unanimous criminal decisions.

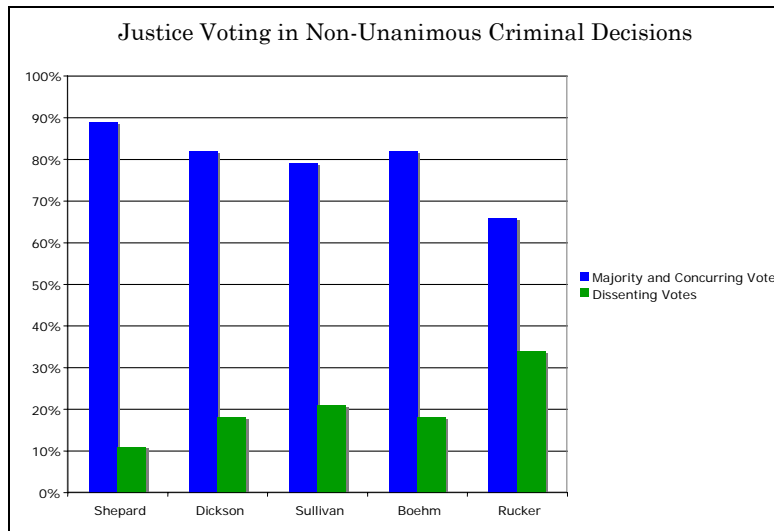


Figure 4

## V. CLASH OF IDEOLOGIES

Shepard's and Dickson's voting patterns created a strongly pro-law and order court. Over 80% of the time, Shepard and Dickson sided in favor of the prosecution.<sup>98</sup> That left defendants with an approximate 20% window to convince Shepard or Dickson to overrule or affirm in their favor.<sup>99</sup> In death penalty decisions, defendants had less than a 10% chance of convincing either Shepard or Dickson to vote in their favor.<sup>100</sup> On the other hand, the prosecution merely had to produce a modestly viable argument to get Shepard's and Dickson's votes. When confronted with an issue of fair trial, Shepard voted 79% in favor of the prosecution, while Dickson voted in favor of the prosecution 71%.<sup>101</sup> Even considering the 8% differential between Shepard's and Dickson's fair trial voting in favor of the prosecution, the defendant still had an extremely large battlefield to cross in convincing either justice to affirm or reverse.<sup>102</sup>

A defendant could generally count on Rucker's vote. Compared to the other four justices on the court, Rucker was a defendant's best friend. When Shepard and Dickson voted in favor of the

<sup>98</sup> See *supra* figs.1–3.

<sup>99</sup> *Id.*

<sup>100</sup> *Supra* fig.2.

<sup>101</sup> *Supra* fig.3.

<sup>102</sup> *Id.*

prosecution, Rucker generally voted in favor of the defendant. Overall, Rucker voted in favor of the defendant 41% more than Shepard and 38% more frequently than Dickson.<sup>103</sup> When the court reviewed issues of search and seizure, there was a 71% greater chance that Rucker would vote in favor of the defendant than both Shepard and Dickson.<sup>104</sup> However, Rucker did not favor the defendant when confronted with fair trial issues. Rucker voted in favor of the defendant 39% when the case involved an issue of fair trial.<sup>105</sup>

It is essential for practitioners in Indiana to understand the ideological differences between “moderates” Sullivan and Boehm.<sup>106</sup> With five justices on the court, and thus three votes necessary for success, defendants generally need to persuade both Sullivan and Boehm. Both have voting patterns in the middle of the court’s ideological spectrum. They both have voted in favor of the prosecution more frequently than the defendant, but neither justices’ record is overwhelmingly or inflexibly pro-prosecution.

Obviously, the prosecution always has a decided advantage in swaying the court. Added to the consistently pro-prosecution votes of Shepard and Dickson is the fact that the voting patterns of both moderates are unmistakably, even if not lopsidedly, pro-prosecution as well. The prosecution has had the greatest advantage on issues involving fair trial. Both Sullivan and Boehm voted in favor of the prosecution in decisions where a fair trial was at issue 64% of the time.<sup>107</sup> Sullivan’s and Boehm’s voting percentages over fair trial issues mirror one another. However, Sullivan and Boehm did not necessarily favor the prosecution or the defendant within the same decisions. There was only a 36% chance that either justice would side with the defendant.<sup>108</sup>

In *French v. State*, the defendant appeared at a court proceeding where the jury was present in a prison uniform.<sup>109</sup> The defendant was not informed that he could object to wearing the prison uniform.<sup>110</sup> Boehm wrote for the majority, favoring the prosecution,

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<sup>103</sup> *Supra* figs.1–3.

<sup>104</sup> *Supra* fig.1.

<sup>105</sup> *Supra* fig.3.

<sup>106</sup> A swing voter is a justice that sides with the pro-law and order justices over particular issues and sides with the pro-individual justices over other issues.

<sup>107</sup> *See supra* fig.3.

<sup>108</sup> *Id.*

<sup>109</sup> 778 N.E.2d 816, 820 (Ind. 2002).

<sup>110</sup> *Id.* at 821.

when he found there was no fundamental error because the defendant was not deprived of his right to object to the prison uniform.<sup>111</sup> Instead, the defendant merely failed to object to the prison uniform.<sup>112</sup> Sullivan wrote in dissent that there was fundamental error because little burden would be placed on the trial court to inform the defendant of his rights when compared to the prejudice imposed upon the defendant by subjecting himself to the jury already looking like a convicted criminal.<sup>113</sup>

In search and seizure decisions, Sullivan's and Boehm's ideologies differ greatly. Boehm tends to vote more along the ideological trends of law and order by voting in favor of the prosecution while Sullivan tends to fall on the opposite side of the spectrum voting in favor of the defendant. Boehm voted in favor of the prosecution 67%.<sup>114</sup> On the other hand, Sullivan favored the defendant 56%.<sup>115</sup> Regardless, out of the criminal issues reviewed by the court, the defendant's best hope at reversal lies in cases which involve search and seizure issues. If defense counsel gives a persuasive argument, Rucker will generally side with the individual. This leaves the defendant two votes shy of a reversal. Both Boehm and Shepard are the most lenient on the defendant over issues involving search and seizure.

## VI. CONCLUSION

Three main conclusions can be drawn and reiterated from the statistical data presented within this study. First, based on the data, it has been difficult for the defendant to succeed on appeal to the Indiana Supreme Court. The Indiana Supreme Court was largely in favor of the prosecution in its non-unanimous criminal decisions. More interestingly was the fact that the court had five justices, out of whom two were advocates of law and order, Shepard and Dickson, and one justice, Justice Rucker, who regularly sided with the defendant. On its face, the voting patterns of these three justices could have made for a starkly divided court. However, this was not the case at all. The two final votes were left up to two moderates, Sullivan and Boehm, who were not definite votes in favor of the prosecution or the defendant. What quickly became

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<sup>111</sup> *Id.* at 819.

<sup>112</sup> *Id.* at 821.

<sup>113</sup> *Id.* at 827–828 (Sullivan, J., dissenting).

<sup>114</sup> *See supra* fig.1.

<sup>115</sup> *See id.*

apparent was that in the vast majority of non-unanimous criminal decisions, the defendant needed both Sullivan's and Boehm's votes to succeed. Additionally, the defendant had to jump the hurdle of Sullivan's and Boehm's overall voting patterns in favor of the prosecution at 64% and 67%, respectively.<sup>116</sup> The defendant needed three votes, two of which had to be cast by judges whom the defendant had approximately a 40% chance of persuading to vote their way.

Second, the individual justices on the Indiana Supreme Court have largely adhered to the political ideology of their appointing governors to that extent that each of the five justices on the Indiana Supreme Court ended up siding with the ideological beliefs of the governor that appointed him.<sup>117</sup> Shepard and Dickson both voted largely in favor of law and order and were appointed to the Indiana Supreme Court by Governor Robert D. Orr, a Republican.<sup>118</sup> Rucker was consistent in his voting in favor of the individual and was appointed by Governor Frank O'Bannon, a Democrat.<sup>119</sup> Sullivan and Boehm, both appointed by Governor Evan Bayh, a Democrat, both voted rather moderately, but still favored the individual.<sup>120</sup>

Third, the statistical conclusions drawn from the data collected are just that—data and statistics, not opinion and not evaluation of merit. This study can not be concluded without acknowledging the fact that the judicial trends of the court and individual justices were determined through the justices' respective voting in divided criminal decisions. The author in no way intends for the statistical data to be interpreted in such a way to make one justice appear better than the rest of the pack. Voting trends bring to light the underlying ideologies of justices on particular issues. However, one justice's voting trend is in no way "better" than another justice's voting trend. Instead, this study should be used as a reference guide to practitioners when preparing arguments in front of the Indiana Supreme Court. The author leaves it to the reader to decide how to use the information depicted within the study.

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<sup>116</sup> Fig.1–3.

<sup>117</sup> Indiana Supreme Court, *supra* note 31 (showing that there are five justices on the Indiana Supreme Court).

<sup>118</sup> Indiana Governors, *supra* note 32.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

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APPENDIX<sup>121</sup>

Case	Shepard	Dickson	Sullivan	Boehm	Rucker
Lee v. State 849 N.E.2d 602 (Ind. 2006)	P	P	P	<u>P</u>	[D]
State v. Spillers 847 N.E.2d 949 (Ind. 2006)	P	(P)	P	( <u>P</u> )	<u>P</u>
Sellmer v. State 842 N.E.2d 358 (Ind. 2006)	[ <u>P</u> ]	[P]	<u>D</u>	D	D
Kellems v. State 842 N.E.2d 352 (Ind. 2006)	P	P	<u>P</u>	P	[D]
Myers v. State 839 N.E.2d 1154 (Ind. 2005)	P	<u>P</u>	[D]	P	[D]
Frye v. State 837 N.E.2d 1012 (Ind. 2005)	D	[ <u>P</u> ]	<u>D</u>	D	D
Pruitt v. State 834 N.E.2d 90 (Ind. 2005)	( <u>P</u> )	( <u>P</u> )	P	<u>P</u>	[D]
Matheney v. State 833 N.E.2d 454 (Ind. 2005)	<u>P</u>	P	P	P	( <u>P</u> )
Baird v. State 833 N.E.2d 28 (Ind. 2005)	<u>P</u>	P	P	[D]	[D]
Haltom v. State 832 N.E.2d 969 (Ind. 2005)	[D]	( <u>P</u> )	<u>P</u>	( <u>P</u> )	P
Baird v. State 831 N.E.2d 109 (Ind. 2005)	<u>P</u>	P	P	P	( <u>P</u> )
Cotto v. State 829 N.E.2d 520 (Ind. 2005)	D	[ <u>P</u> ]	D	[P]	<u>D</u>
Sowers v. State 829 N.E.2d 18 (Ind. 2005)	<u>D</u>	D	( <u>D</u> )	D	D
Corcoran v. State 827 N.E.2d 542 (Ind. 2005)	P	P	<u>P</u>	P	[D]
Lambert v. State 825 N.E.2d 1261 (Ind. 2005)	<u>P</u>	P	P	[D]	[D]
Houser v. State 823 N.E.2d 693 (Ind. 2005)	( <u>P</u> )	(P)	<u>P</u>	P	[D]
Smylie v. State 823 N.E.2d 679 (Ind. 2005)	<u>D</u>	[ <u>P</u> ]	D	D	D
Halsema v. State 823 N.E.2d 668 (Ind. 2005)	[ <u>P</u> ]	[P]	D	D	<u>D</u>
Laux v. State 821 N.E.2d 816 (Ind. 2005)	<u>D/P/P</u>	D/P/P	[ <u>P/D</u> ] P	D/P/P	D/P [D]

cont.

<sup>121</sup> The data represented in the Appendix are the sixty-three cases used in this study and each justices' voting on the particular case. The "P" represents a vote cast in favor of the prosecution. The "D" represents a vote cast in favor of the criminal defendant. The parentheses represent a vote cast in concurrence of the majority opinion. The brackets represent a vote cast in dissent of the majority opinion. The underscore represents a vote in which the justice authored the majority, concurring, or dissenting opinion.

Case	Shepard	Dickson	Sullivan	Boehm	Case
Corcoran v. State 820 N.E.2d 655 (Ind. 2005)	P	P	<u>P</u>	P	[D]
Holmes v. State 820 N.E.2d 136 (Ind. 2005)	<u>P</u>	P	[D]	P	[D]
State v. Barker 809 N.E.2d 312 (Ind. 2004)	P	<u>P</u>	(P)	(P)	(P)
State v. Ben-Yisrayl 809 N.E.2d 309 (Ind. 2004)	P	<u>P</u>	P	P	(P)
Helsley v. State 809 N.E.2d 292 (Ind. 2004)	P	<u>P</u>	P	(P)	(P)
Stroud v. State 809 N.E.2d 274 (Ind. 2004)	D	D	<u>D</u>	(D)	(D)
Ritchie v. State 809 N.E.2d 258 (Ind. 2004)	P	P	P	<u>P</u>	[D]
Williams v. State 808 N.E.2d 652 (Ind. 2004)	<u>P</u>	P	P	(P)	P
Edington v. State 806 N.E.2d 310 (Ind. 2004)	<u>P</u>	P	(P)	P	P
Thompson v. State 804 N.E.2d 1146 (Ind. 2004)	<u>P</u>	P	(P)	P	P
Dumas v. State 803 N.E.2d 1113 (Ind. 2004)	P	P	(P)	P	<u>P</u>
State v. Bulington 802 N.E.2d 435 (Ind. 2004)	[P]	D	<u>D</u>	[P]	D
Finger v. State 799 N.E.2d 528 (Ind. 2003)	P	P	P	<u>P</u>	[D]
Springer v. State 798 N.E.2d 431 (Ind. 2003)	P	[D]	<u>P</u>	P	[D]
Thomas v. State 797 N.E.2d 752 (Ind. 2003)	P	<u>P</u>	P	[D]	P
Leone v. State 797 N.E.2d 743 (Ind. 2003)	<u>P</u>	P	[D]	P	P
State v. Dugan 793 N.E.2d 1034 (Ind. 2003)	<u>P</u>	[D]	P	P	[D]
Williams v. State 793 N.E.2d 1019 (Ind. 2003)	P	P	<u>P</u>	[D]	[D]
Miller v. State 790 N.E.2d 437 (Ind. 2003)	P	<u>P</u>	(P)	P	P
Hopkins v. State 782 N.E.2d 988 (Ind. 2003)	P	P	<u>P</u>	P	(P)
Azania v. State 778 N.E.2d 1253 (Ind. 2002)	[P]	[P]	D	<u>D</u>	D
French v. State 778 N.E.2d 816 (Ind. 2002)	P	P	[D]	<u>P</u>	[D]
Corcoran v. State 774 N.E.2d 495 (Ind. 2002)	<u>P</u>	P	P	P	[D]
Vestal v. State 773 N.E.2d 805 (Ind. 2002)	P	<u>P</u>	P	(P)	P

cont.



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Case	Shepard	Dickson	Sullivan	Boehm	Case
Bostick v. State 773 N.E.2d 266 (Ind. 2002)	P	<u>P</u>	[D]	[D]	P
Highbaugh v. State 773 N.E.2d 247 (Ind. 2002)	<u>P</u>	P	P	[D]	P
Guyton v. State 771 N.E.2d 1141 (Ind. 2002)	<u>P</u>	( <u>P</u> )	P	( <u>P</u> )	P
Smith v. State 770 N.E.2d 818 (Ind. 2002)	[P]	D	D	[P]	<u>D</u>
Healthscript, Inc. v. State 770 N.E.2d 810 (Ind. 2002)	D	D	<u>D</u>	(D)	D
Miller v. State 770 N.E.2d 763 (Ind. 2002)	D	<u>D</u>	D	(D)	D
Brown v. State 770 N.E.2d 275 (Ind. 2002)	<u>P</u>	P	P	[D]	P
Abney v. State 766 N.E.2d 1175 (Ind. 2002)	D	D	[P]	<u>D</u>	D
Saylor v. State 765 N.E.2d 535 (Ind. 2002)	P	P	[D]	( <u>P</u> )	<u>P</u>
Bellamy v. State 765 N.E.2d 520 (Ind. 2002)	P	P	P	P	[D]
Robertson v. State 765 N.E.2d 138 (Ind. 2002)	P	<u>P</u>	P	P	[D]
State v. Gerschoffer 763 N.E.2d 960 (Ind. 2002)	<u>D</u>	[P]	D	D	D
Griffin v. State 763 N.E.2d 450 (Ind. 2002)	<u>P</u>	P	P	[D]	P
Davidson v. State 763 N.E.2d 441 (Ind. 2002)	(P)	P	( <u>P</u> )	<u>P</u>	P
Hernandez v. State 761 N.E.2d 845 (Ind. 2002)	P	[D]	[D]	<u>P</u>	P
Dunlap v. State 761 N.E.2d 837 (Ind. 2002)	P	<u>P</u>	[D]	P	P
Spivey v. State 761 N.E.2d 831 (Ind. 2002)	P	<u>P</u>	[D]	P	[D]
Love v. State 761 N.E.2d 806 (Ind. 2002)	P/P	(P)/[D]	<u>P/P</u>	P/P	( <u>P</u> )/[D]
Jiosa v. State 755 N.E.2d 605 (Ind. 2001)	[P]	D	[P]	<u>D</u>	D