

Judge Mathias, cont.

the management of state court records into the 21st Century.

Judge Mathias is a longtime supporter of *We the People*, a national civics education program sponsored in Indiana by the Indiana Bar Foundation. He coaches high school *We the People* teams in Indiana's 5th Congressional District and helps organize *We the People* competitions in the 3rd Congressional District.

In 2010, he received the Indiana Bar Foundation's William G. Baker Civic Education Award for his work in civics education.

Judge Mathias has been married for 36 years and is the proud father of two sons who teach at the high school level. His wife, Carlabeth, is a private practice counselor for children and families and a consultant to schools throughout Indiana.

Judge Mathias enjoys Macintosh computers, technology in general and photography. He also enjoys spending many Saturdays during the school year helping to build theatrical sets for Hamilton Southeastern High School.

Judge Bradford, cont.

Before joining the bench, he was recruited by Marion County Prosecutor Scott Newman as Chief Trial Deputy, in which capacity he managed a staff of more than 100 attorneys for two years. He also served five years as an Assistant United States Attorney for the Southern District of Indiana, where he prosecuted major felony drug cases under United States Attorney Deborah J. Daniels. He was in private legal practice from 1986 to 1991.

A native Hoosier, Judge Bradford earned a B.A. in labor relations and personnel management from Indiana University-Bloomington in 1982 and his J.D. from Indiana University School of Law-Indianapolis in 1986. He is the Court of Appeals' liaison to the Indiana Judges Criminal Instructions Committee, which provides guidance to judges on jury instructions in criminal cases, and he is a former member of both the Indiana Judges Criminal Policy Committee and the Board of Directors of the Indiana State Judicial Conference.

Judge Bradford is a Distinguished

Betcha didn't know: fast facts about the Court

- The Court hears cases in three-judge panels that rotate three times per year. Cases are never assigned to a single judge, and all cases are randomly assigned.
- Including judges serving senior terms, 135 judges have served the Court since its inception. Their photos are displayed against the north wall of the Statehouse on the fourth floor. Judge James B. Black (1838-1916) was the Court's first chief judge.
- Judge Rudolph R. Pyle III is believed to be the first judge in the court's history to have clerked for an Appeals Court judge and later be appointed to the court.
- Because the Indiana Constitution provides "an absolute right to one appeal," the Court of Appeals considers about 2,300 cases each year. In contrast, the Indiana Supreme Court decides about 100 cases per year.
- Eight women and three African Americans have served on the Court. Current Chief Judge Margret G. Robb is the Court's first female chief judge.
- The court decides most cases without holding oral argument. In 2012, for example, the court issued 2,143 majority opinions and heard 78 oral arguments.
- The court hears and decides about twice as many criminal cases as civil cases each year.
- The Court of Appeals affirmed trial court decisions in 80 percent of its cases in 2012. By case type, the affirmation rate was 86 percent of criminal cases; 88 percent of post-conviction relief petitions; and 64 percent of civil cases.

Senior Fellow of the Indianapolis Bar Association and a member of the Marion County Bar Association, Kosciusko County Bar Association, Indiana State Bar Association, American Bar Association, and the Sagamore Inn of Courts. He has taught Indiana Continuing Legal Education Foundation trial practice seminars for more than 10 years and also teaches Forensic Science and the Law at Indiana University-Purdue University Indianapolis, where he is an adjunct instructor.

Judge Bradford is well versed in contemporary technology and media issues, having served on the Judicial Technology and Automation Committee (JTAC), helping to draft the state judiciary's policies on technology and case management. From 2005 to 2007, he hosted "Off the Bench with Judge Cale Bradford," a legal commentary program on Marion County's government access network.

He frequently lectures on a wide range of legal topics and in 2012 will serve as a Vice President of the Indianapolis Bar Association and on the Indiana State Bar Association Appel-

late Practice Section Executive Committee.

Judge Bradford is a former director of the John P. Craine House in Indianapolis, a residential alternative to incarceration for women offenders with preschool-aged children. He is a former advisory board member of the Lawrence Youth Football League and has long been active at Castleton United Methodist Church.

He and his wife, Sam, a full-day kindergarten teacher, have five adult children.

Judge Crone, cont.

Court by election in 2006. He is married and has three daughters – a practicing attorney, an anesthesiologist and a doctor of psychology.



COURT OF APPEALS OF INDIANA ORAL ARGUMENT AT A GLANCE MANCHESTER UNIVERSITY

Scott v. State

CRIMINAL LAW ISSUE:

- Whether the trial court's imposition of consecutive sentences constitutes 'fundamental error.'
- Whether trial counsel was ineffective for failing to initiate an appeal of the consecutive sentences.

ORAL ARGUMENT:

Tuesday, March 12, 2013
3:30 p.m.

APPEAL FROM:

Lake Superior Court
The Honorable
Diane Ross Boswell, Judge

Case Summary

On July 29, 2006, Scott was operating a vehicle when Merrillville Police Officer Michael Gurgevich attempted to stop him, activating his lights and siren. Instead of stopping, Scott fled from Officer Gurgevich, and, in the course of his flight, Scott's vehicle spun out of control, striking and killing Kirk Mitchell. At the time, Scott's BAC was 0.18 grams per deciliter.

On Aug. 10, 2006, the State charged Scott with Count I, Class B felony operating a vehicle with a BAC of at least 0.18 g/dl causing death; Count II, Class B felony resisting law enforcement causing death; Count III, Class C felony reckless homicide; and Count IV, Class C felony criminal recklessness. On April 9, 2008,

Scott pled guilty to all counts without benefit of a plea agreement.

When the trial court advised Scott that his sentence could range from 16 to 56 years of incarceration, he indicated that he still wanted to plead guilty as charged.

On May 9, 2008, the trial court accepted Scott's pleas to Counts I and II but not for Counts III and IV, finding that Counts III and IV were subsumed into Counts I and II. The trial court sentenced Scott to 15 years of incarceration each for Counts I and II, the sentences to be served consecutively, and with five years of Count II suspended to the Lake County Community Corrections Forensic Diversion Program.

The trial court found Scott's youth and remorse to be mitigating. The

trial court found, as aggravating circumstances, Scott's prior criminal history and that fact that he was on probation at the time of the current offenses. The trial court also noted that Scott's "prior history was ... primarily related to drugs and alcohol and driving," Appellant's App. p. 179.

The trial court advised Scott that he could appeal his sentence, had 30 days in which to file a notice of appeal or motion to correct error, and that it would appoint an attorney if he could not afford one. Scott did not appeal his sentence.

On Sept. 19, 2011, Scott filed a petition for post-conviction relief, which, while not a substitute for direct appeal, is a vehicle for some types of

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Appellant's Attorney

Scott King has extensive experience since 1976 in a wide array of criminal cases. He has served as a Deputy Prosecuting Attorney and Assistant United States Attorney and Public Defender handling investigations, trials, appeals, and post-conviction proceedings.

He entered private practice in 1984 and continued until 1996 when he was elected Mayor of Gary, Indiana. After leaving office in 2006, he returned to the practice of law in northwest Indiana.

Mr. King is admitted to the State Bars of Indiana and Maryland; the Federal District Court Bars of Northern Indiana and Northern Illinois; the United States Circuit Court of Appeals for the Seventh Circuit and the United States Supreme Court. He is a member of the American Bar Association, Criminal Justice Section, and the National Association of Criminal Defense Attorneys.

Mr. King received his Bachelor of Arts from Concordia University in 1973, his Juris Doctorate from Valparaiso University School of Law 1976, and his Doctor of Laws from Concordia University (Honorary) in 1996.

Since June 2011, he has been a partner in the law firm of Woodward, Buls, Blaskovich & King LLP.

Appellee's Attorney

Aaron J. Spolarich was born and raised in Northwest Indiana prior to attending Wabash College, from which he graduated in 2008 with degrees in English and Psychology.

In 2011, Mr. Spolarich received his J.D. from the Indiana University Maurer School of Law in Bloomington, where he was an executive competition coordinator for the school's moot court program and was elected to the Order of Barristers. After law school, Mr. Spolarich served as a law clerk for Indiana Solicitor General Thomas M. Fisher, Jr. before becoming a Deputy Attorney General in the Criminal Appeals Division of the Office of the Indiana Attorney General in October of 2011.

Mr. Spolarich's research on Kurt Vonnegut, Jr. was recently cited in Charles J. Shield's biography of the author, titled *And so it goes: Kurt Vonnegut, a Life*.

He lives in Indianapolis.

Science and the Courts

In the very first Sherlock Holmes story, "A Study in Scarlet," Holmes claims to have discovered a unique reagent for identifying hemoglobin. "Why, man, it is the most practical medico-legal discovery for years," he exclaims to Dr. Watson. "Don't you see that it gives us an infallible test for blood stains?"

To which a modern judge might ask, "Says who?"

It's a natural question. Most science advances only after replication and review by the broader scientific community. Courts are properly cautious, then, about the use of novel scientific methods in both criminal and civil cases.

Judge Cale J. Bradford of the Court of Appeals of Indiana, who teaches Forensic Science and the Law at IUPUI, said courts must consider two threshold issues about scientific evidence. First, is the evidence relevant enough to help prove or disprove an issue in the case? Second, is it sufficiently reliable under Indiana Rule of Evidence 702?

The first impactful analysis of whether and when to accept scientific evidence in federal courts came in *Frye v. United States*, a 1923 case decided by the District of Columbia Circuit. *Frye* essentially said that scientific evidence should only be admitted if it's generally accepted by the relevant scientific community (e.g., physics by physicists, chemistry by chemists, etc.).

But just as science isn't static, nei-

ther are courts. *Frye* was succeeded in 1975 by Federal Evidence Rule 702, which has in turn been interpreted by two U.S. Supreme Court cases known as *Daubert* and *Kumho Tire*.

In short, *Daubert* outlined four criteria for determining the reliability of a given scientific method (including testing, peer review, and error rates), while *Kumho* extended the standards for expert opinion testimony to non-scientific expert testimony as well.

But those cases don't automatically apply to state courts. As the Indiana Supreme Court held in *Turner v. State*, a 2011 case, *Daubert* is "instructive" but not binding on Indiana courts.

Not that Indiana ignores federal guidance. Judge Bradford said Indiana evidence rules closely model federal rules, including the trial judge's role as gatekeeper for the admission of expert testimony.

Judges aren't the only ones who grapple with scientific complexities. Trial attorneys have to coax understandable testimony from expert witnesses, and lay juries have to weigh that evidence – perhaps influenced by media depictions of scientific certainty.

"There are varied opinions on whether the 'CSI' factor is real or perceived," said Judge Bradford, who presided at more than 250 jury trials as judge of Marion Superior Court. As a practical solution, he said, lawyers and judges in "expert" cases should exercise special care during jury selection, direct and cross-examination, and jury instructions to properly educate and inform jurors about expert testimony.

cause the imposition of consecutive sentences in his case constitutes fundamental error and his trial counsel was ineffective for failing to initiate an appeal challenging the consecutive sentences. At the heart of both claims is Scott's assertion that the consecutive sentences imposed for his two convictions are illegal.

The State counters that Scott may not advance his fundamental error claim in a post-conviction proceeding because he could have brought it on direct appeal but did not. The State also contends that the imposition of consecutive sentences in this case was proper in any event.

Case Summary, cont.

attacks on criminal convictions. Scott alleged that he received ineffective assistance of trial counsel (likely the most common type of claim advanced in a post-conviction proceeding) and that the imposition of consecutive sentences for Counts I and II constituted fundamental error.

On March 5, 2012, the post-conviction court granted the State partial summary judgment. On July 27, 2012, the post-conviction court denied Scott's PCR petition in full. Scott now appeals this denial.

Scott contends that he should have received post-conviction relief be-

Today's Panel of Judges

*The Honorable
Terry A. Crone
(St. Joseph County)*

Terry A. Crone was appointed to the Court of Appeals on March 8, 2004 by Gov. Joseph E. Kernan.

Judge Crone was raised in South Bend. He graduated *cum laude* from DePauw University with a double major in political science and history in 1974 and graduated from Notre Dame Law School in 1977.

Judge Crone practiced law for nine years, concentrating in areas of civil practice, and served as the St. Joseph County Attorney from 1981 to 1986. In 1986, he was appointed Magistrate of the St. Joseph Circuit Court, where he served until his appointment as Judge of the St. Joseph Circuit Court in 1989.

Judge Crone is a past President of the St. Joseph County Bar Association and a former member of the Board of Managers of the Indiana Judges Association, the Supreme Court Committee on Character and Fitness, and the Alternative Dispute Resolution Committee of the Indiana Judicial Conference.

Judge Crone is a past Chair of the Appellate Practice Section of the Indiana State Bar Association and is a member of the St. Joseph County, Indianapolis, Marion County, Indiana State and American Bar Associations, the American Judicature Society, and the Phi Delta Phi Honorary Legal Society.

Judge Crone is a frequent speaker at legal education programs. He helped found a program in South Bend to familiarize minority high school students with the law and related fields and was a founding member of the South Bend Commission on the Status of African-American Males and the St. Joseph County Coalition Against Drugs.

As Circuit Court judge, he also initiated the first Spanish-speaking program for public defenders in St. Joseph County.

Judge Crone was retained on the

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*The Honorable
Paul D. Mathias
(Allen County)*

Paul D. Mathias is a fifth-generation Hoosier who deeply believes that Indiana is a special place to live. He is honored to serve on the Court of Appeals, where he strives daily to reflect and protect Hoosier values within the law.

Judge Mathias practiced law in Fort Wayne, concentrating in construction law, personal injury, and appellate practice. He was appointed Referee of the Allen County Small Claims Court in 1985 and served as Judge of the Allen Superior Court from 1989-2000 when he was appointed to the Court of Appeals. In 2002, he was retained by election to the court.

Judge Mathias's professional achievements are rooted in a strong educational foundation. He attended the public schools in Fort Wayne, where he was a National Merit Finalist and scholarship recipient. In 1976 Judge Mathias graduated *cum laude* from Harvard University with a bachelor's degree in General Studies, concentrating in Government. He earned his law degree in 1979 from Indiana University School of Law-Bloomington, where he was a member of the Sherman Minton Moot Court Team and the *Order of Barristers*.

Judge Mathias was an officer of the Indiana Judges Association from 1993-1999 and its president from 1997-1999. He is deeply honored to be one of only 92 Hoosiers to receive the Centennial Service Award from the Indiana State Bar Association, and he was named a Sagamore of the Wabash by two governors.

Judge Mathias is keenly interested in the intersection of law and technology and often consults and speaks on tech topics to attorneys and judges. As a member of the Judicial Technology and Automation Committee, he helped select the Odyssey Case Management System that brought

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*The Honorable
Cale J. Bradford
(Marion County)*

Cale J. Bradford has broad experience in both the state and federal legal systems, including service as a Marion County deputy prosecutor, a public defender, a federal prosecutor, a trial court judge and an appellate court judge. In addition, he has six years' experience in private legal practice.

He was appointed to the Court of Appeals of Indiana by Gov. Mitch Daniels and took his seat on Aug. 1, 2007. In that time, he has participated in more than 2,000 appellate decisions and more than 80 oral arguments. He has written more than 700 majority decisions, including 145 published opinions. Judge Bradford also led a successful effort to encourage the mediation of legal disputes pending before the Court of Appeals, and greatly contributed to creation of the Judicial Retention website that helps voters make informed decisions about Appellate Judges standing for retention election.

Before joining the Appeals Court, he served the people of Marion County for more than 10 years as Judge of the Marion Superior Court, including seven years in the criminal division and three in the civil division. Twice, his colleagues elected him as presiding judge of the Court.

During that tenure, Judge Bradford led two major initiatives that addressed critical criminal justice issues facing Marion County. He chaired the Marion County Criminal Justice Planning Council, which recommended improved responses to jail overcrowding, staffing and budgets. Those efforts led to the end of 30 years of federal oversight of the Marion County Jail and to security improvements at the county's Juvenile Detention Center. He also led implementation of the Annie E. Casey Foundation Juvenile Detention Alternative Initiative, which resulted in a comprehensive yet responsible reduction of juvenile pretrial incarceration in Marion County that is now a statewide model.

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