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ATTORNEY FOR APPELLANT:

**DALE W. ARNETT**  
Winchester, Indiana

ATTORNEY FOR APPELLEE:

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**NICOLE M. SCHUSTER**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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THOMAS SMITH, )

Appellant-Defendant, )

vs. )

STATE OF INDIANA, )

Appellee-Plaintiff. )

No. 38A04-1008-CR-478

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APPEAL FROM THE JAY CIRCUIT COURT  
The Honorable Brian D. Hutchison, Judge  
Cause Nos. 38C01-0809-MR-3, 38C01-1007-MI-16

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**September 1, 2011**

**OPINION ON REHEARING-NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellant-Defendant Thomas Smith was convicted of murder and sentenced to sixty years in the Department of Correction. He was subsequently found in contempt of court for failing to testify after being granted use immunity, and he was sentenced to serve an additional year in the Jay County Security Center. Smith appealed his one-year contempt sentence on Indiana Appellate Rule 7(B) grounds only. This court affirmed the sentence.

Smith filed a petition for rehearing, claiming that his one-year sentence for contempt is unconstitutional because he was never offered a jury trial. Smith acknowledges that he did not raise this issue in his direct appeal but claims that this court addresses constitutionally infirm sentences *sua sponte*. See *Easton v. State*, 258 Ind. 204, 211, 280 N.E.2d 307, 311 (1972). The State, who Smith contends recently informed him of this sentencing problem, did not respond to his petition.

In *Holly v. State*, 681 N.E.2d 1176, 1177-78 (Ind. Ct. App. 1997), this court held that any sentence in excess of six months required a jury trial or a waiver thereof. The *Holly* court, which reversed a one-year contempt sentence, remanded for resentencing for a term not to exceed six months. *Id.* at 1178. In doing so, the *Holly* court acknowledged the propriety of the contempt finding. *Id.*

Here, too, the contempt finding was justified, given Smith's refusal to testify. The sentence, however, was unconstitutionally lengthy without a jury trial or waiver, neither of which occurred. Accordingly, we grant the petition for rehearing, vacate that part of our earlier decision affirming Smith's one-year sentence for contempt, and remand to the trial

court to resentence Smith to a term not to exceed six months. In all other respects, we affirm our original decision.

BAKER, J., and MAY, J., concur.