

INDIANA CONSTITUTIONAL DEVELOPMENTS: DEBTORS, PLACEMENTS, AND THE CASTLE DOCTRINE

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There was no single blockbuster Indiana constitutional decision during the survey period, but Indiana's appellate courts made significant new law in the areas of debtors' rights and separation of powers.¹ The Indiana Supreme Court also received attention for a decision that declined to enforce (and to constitutionalize) what became known as the "castle doctrine," allowing individuals to forcibly keep police out of their dwellings.² The courts also incrementally advanced development of Indiana's unique constitutional jurisprudence governing search and seizure, "multiple punishments" double jeopardy, the state *ex post facto* clause, and in other areas.³

I. DEBTORS' RIGHTS—ARTICLE 1, SECTION 22

The obscure debtors' protections in article 1, section 22 were the basis for two important decisions during the survey period. That provision states that "[t]he privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale, for the payment of any debt or liability hereafter contracted: and there shall be no imprisonment for debt, except in case of fraud."⁴ As required by this statute, the Indiana General Assembly has enacted statutes exempting certain income from seizure (such as garnishment) for debt.⁵

The Indiana Supreme Court applied this provision in *Branham v. Varble*,⁶ in which a trial court ordered two debtors who were unrepresented by counsel to make payments on judgments against them despite the fact that they had no non-exempt income.⁷ When the unrepresented judgment debtors failed to pay, the trial court ordered a \$50 payment although the defendants' income was only \$100 in earned income and disability benefits that were exempt from garnishment.⁸ The court also ordered the non-disabled judgment debtor to apply for five jobs per week and submit proof of the applications to the plaintiffs' attorney.⁹

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1. *See infra* Parts I & II.

2. *See infra* Part III.

3. *See infra* Parts VII, X-XI.

4. IND. CONST. art. 1, § 22.

5. *See, e.g.*, IND. CODE § 24-4.5-5-105 (2011).

6. 952 N.E.2d 744 (Ind. 2011). The Indiana Supreme Court decided a second case between the same parties on the same day. *Branham v. Varble*, 953 N.E.2d 95 (Ind. 2011). The second case applied the same legal principles and is not discussed separately in this Article.

7. *Branham*, 952 N.E.2d at 745. The judgment debtors obtained counsel on appeal.

8. *Id.* at 746.

9. *Id.*

The court unanimously reversed almost the entire order.¹⁰ The court's analysis showed that the judgment debtors had no non-exempt income from which an order to make payment could be made—but the unrepresented judgment debtors did not raise that issue before the trial court, an omission that ordinarily would waive the issue for appeal.¹¹ The Indiana Supreme Court did not find waiver in this case, which arose from a small claims proceeding where parties often are unrepresented.¹² “The facts of this case suggest why holding unrepresented litigants to account on appeal for affirmatively pleading particular exemptions may often prove too harsh.”¹³ The court reviewed the evidence showing the judgment debtors' lack of income and noted that “Mr. Branham testified that after paying all their modest expenses there is no money left over at the end of the month.”¹⁴ The court also reviewed the evidence proving that the judgment debtors had no non-exempt income.¹⁵

The court stated that the small claims judge had the duty to determine that the judgment debtors had sufficient income that was subject to garnishment or otherwise not exempt.¹⁶ The court emphasized that

a judicial officer hearing small claims is not charged with identifying and applying the entire gamut of exemptions. [But t]he two involved here—the general wage exemption and the SSI exemption—are the stuff of everyday life in collections work. We cannot say on appeal that they are lost through failure of formal pleading.¹⁷

The court also reversed the order requiring one of the judgment debtors to apply for five jobs per week and report his applications to the plaintiffs' counsel.¹⁸ The court found no basis in statutory or other law for such an order.¹⁹ The court affirmed only the portion of the trial court's order scheduling further proceedings.²⁰

This decision represents a significant step in furthering protections for debtors—requiring small claims judges to ensure that their orders to make payments do not run afoul of at least the basis exemption laws enacted under article 1, section 22. Written by Chief Justice Shepard for a unanimous court, the decision represents another effort by the Indiana Supreme Court to supervise the lower courts and ensure that they are acting fairly and providing basic

10. *Id.* at 749.

11. *Id.* at 747-48.

12. *Id.* at 747.

13. *Id.*

14. *Id.*

15. *Id.* at 747-48.

16. *Id.* at 748.

17. *Id.*

18. *Id.* at 749.

19. *Id.*

20. *Id.*

constitutional protections.²¹

The Indiana Court of Appeals also applied the debtors' exemptions in *Carter v. Grace Whitney Properties*,²² which it decided before *Branham*. As in *Branham*, the defendant owed a debt to the plaintiff, and the plaintiff went to small claims court to obtain payment.²³ The small claims court made a "personal order of garnishment" against Carter, the judgment debtor.²⁴ That order required Carter to pay a certain portion of her wages each pay period to satisfy the judgment, and it made no reference to the exemptions enacted pursuant to article 1, section 22.²⁵ When Carter failed to pay, the creditor sought a contempt remedy, and Carter was ordered to jail for thirty days for contempt despite telling the court she was disabled and had no money.²⁶

The court of appeals reversed.²⁷ It ruled that contempt was not a proper remedy for failure to pay in this case, where Carter testified that she was disabled and had no money to pay the judgment.²⁸ It held that article 1, section 22 provides that money judgments are not enforceable by contempt (except child support) and that the trial court's order that Carter be jailed for contempt violated this constitutional provision.²⁹ The court did find some basis for the "personal order of garnishment," but held that no such order could be applied in the circumstances of this case.³⁰ Noting the creditor's abusive use of court process to require Carter to come to court multiple times despite her lack of resources to pay the judgment, the court of appeals also ruled that the creditor could not require Carter to return to court unless the creditor had evidence that Carter's circumstances had changed.³¹

Taken together, these cases send a strong message that the protections the framers created in article 1, section 22 remain vital in the current era. In both cases, the appellate courts did not hesitate to instruct small claims courts—which handle hundreds of thousands of debt collection cases annually,³² often involving debtors without lawyers—to follow the law and to apply legislatively created provisions that protect debtors, even when the debtors are not fully aware of those provisions.

21. See, e.g., *Litchfield v. State*, 824 N.E.2d 356 (Ind. 2005) (instructing courts on applying article 1, section 11); *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994) (instructing courts on applying article 1, section 23).

22. 939 N.E.2d 630 (Ind. Ct. App. 2010).

23. *Id.* at 632.

24. *Id.*

25. *Id.* at 633.

26. *Id.*

27. *Id.* at 638.

28. *Id.* at 635.

29. *Id.* at 635-36.

30. *Id.* at 636-37.

31. *Id.* at 637.

32. 2010 small claim caseload statistics may be found at www.in.gov/judiciary/admin/files/courtmgmt-stats-2010-v1-trialcourts-filed_county.pdf.

II. SEPARATION OF POWERS: *A.B. v. STATE*

The Indiana Supreme Court addressed significant separation of powers issues arising from legislation restructuring the way in which foster care is financed and administered. The case, *A.B. v. State*,³³ arose from the St. Joseph County Juvenile Court.³⁴ The juvenile court determined that A.B. had committed an offense that would have been a crime if committed by an adult and placed him in secure detention because he escaped from a prior placement.³⁵ The court's probation department recommended that A.B. be placed in a program at Canyon State Academy in Arizona.³⁶ The probation department stated that the placement would allow A.B. to complete his education and acquire skills useful in the job market and that A.B.'s family could videoconference with him and be flown to Arizona to visit him at no expense to the family.³⁷ Canyon State reported a success rate of eighty-eight percent.³⁸

The Indiana Department of Child Services (DCS) objected to the placement and recommended instead four placements in Indiana, all of which were more expensive than Canyon State.³⁹ DCS did not present evidence at the placement hearing.⁴⁰ A.B.'s family supported the Canyon State placement.⁴¹ DCS believed the great distance would hinder reunification between A.B. and his family, but the probation department's goal was for A.B. (who was almost eighteen years old) to live independently.⁴²

While DCS generally is responsible for paying for placements of juveniles such as A.B., under statutory amendments enacted in 2009 DCS does not have to pay "if the placement is not recommended or approved by the director [of DCS] or the director's designee."⁴³ Therefore, because DCS objected to A.B.'s Canyon State placement, the statute said that DCS did not have to pay, and the responsibility for payment fell on the county.⁴⁴

The juvenile court approved A.B.'s placement at Canyon State and, in the same order, found that the statutes relieving DCS from paying for the placement were unconstitutional violations of separation of powers. The juvenile court ruled

33. 949 N.E.2d 1204 (Ind. 2011), *reh'g denied*, 2011 Ind. LEXIS 994 (Nov. 1, 2011).

34. *Id.* at 1208. By statute, the St. Joseph County Probate Court is the juvenile court for St. Joseph County. IND. CODE § 33-31-1-10 (2011), *repealed by* Ind. Pub. L. No. 201-2011, § 115. For simplicity's sake, this Article refers to it as the juvenile court.

35. *A.B.*, 949 N.E.2d at 1208.

36. *Id.*

37. *Id.* at 1209.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 1210.

42. *Id.*

43. *Id.* at 1212 (quoting IND. CODE § 31-40-1-2(f) (2011)).

44. *Id.*

that the statutes unconstitutionally infringed upon the judicial power to make decisions concerning placement of children within their jurisdiction, including out-of-state placements.⁴⁵

Because the juvenile court found statutes unconstitutional, the appeal went directly to the Indiana Supreme Court.⁴⁶ In summary, the court's opinion holds that the relevant statutes do not violate separation of powers principles because they do not restrict a judge's authority to place a juvenile in the most appropriate setting—they only dictate the financial consequences, that is, which level of government pays for that placement.⁴⁷ “[T]he statutes in question do not limit a judge's power to place a child where the judge determines is in the child's best interest. Rather, the statutes deal with how the state, through DCS, funds each child's placement.”⁴⁸ The court elaborated, however, that the cost-shifting mechanism in the statutes “comes dangerously close to stifling the inherent empowerment our juvenile courts have always enjoyed in making decision in the best interest of juveniles.”⁴⁹ “To the extent that DCS can veto a juvenile court's out of state placement determination by withholding funds, DCS is moving very close to usurping the judiciary's authority when it comes to dealing with the lives of children.”⁵⁰ Despite this critical language, the court found no separation of powers violation in the statutes at issue.⁵¹

The court went further, however, when it reviewed the juvenile court's decision specific to A.B. The court rejected DCS's argument that “the 2009 amendment gives it absolute ‘control over when the state will pay for out-of-state placements.’”⁵² The court concluded that the statute precludes the juvenile court from overruling DCS's decision but does not insulate DCS's decision from all appellate review.⁵³ The Indiana Constitution gives plenary appellate review to the Indiana Supreme Court, it stated, and it determined that it would give appropriate deference to the DCS director's decision if appellate courts reviewed DCS's decisions to disapprove placements using the well-known standard of review for administrative decisions in the Administrative Orders and Procedures Act (AOPA).⁵⁴ The court did not rule that the entire AOPA procedure applies to DCS's decisions on placements, only that the standard of review in AOPA is appropriate to review DCS's decisions.⁵⁵ That standard allows judicial relief when it is determined that an administrative decision is “(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to

45. *Id.* at 1210-11.

46. IND. APP. R. 4(A)(1)(b).

47. *A.B.*, 949 N.E.2d at 1212.

48. *Id.* at 1212-13.

49. *Id.* at 1213.

50. *Id.*

51. *Id.* at 1213-14.

52. *Id.* at 1215 (citation omitted).

53. *Id.*

54. *Id.* at 1215-17.

55. *Id.* at 1216-17.

constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.”⁵⁶

The Indiana Supreme Court then went on to rule that DCS’s decision vetoing the Canyon State placement was arbitrary and capricious.⁵⁷ The supreme court reviewed the juvenile court’s findings that Canyon State was the least expensive program; that it provided a warranty and after-care that no DCS-recommended program provided; that it had an eighty-eight percent success rate (higher than the DCS-recommended placements); and that the child’s parent, the child’s custodian, the child’s probation officer, and the child’s attorney all approved of the Canyon State placement.⁵⁸ The supreme court concluded that DCS’s decision was arbitrary and capricious because Canyon State was the most cost-effective placement and that DCS’s apparent rationale—keeping A.B. in Indiana—was not critical to the plan created for A.B. by the court’s probation department.⁵⁹

Additionally, the supreme court concluded that DCS’s arbitrary and capricious conduct could not be the basis for shifting placement costs away from DCS to the county: “DCS cannot be the final arbitrator of all placement decisions. Because we conclude that DCS’s failure to approve [Canyon State] was arbitrary and capricious, we agree with the trial court’s determination that DCS is responsible for the payment.”⁶⁰ While the statute makes no provision for shifting costs back to DCS if its disapproval is reversed on appeal, the supreme court made it clear that requiring DCS to pay despite its disapproval would be the consequence of a DCS decision that is reversed on appellate review.⁶¹

All five justices concurred in the court’s opinion.⁶² Justices Dickson and Sullivan filed dueling concurrences on how the single-subject requirement in article 4, section 19 should be applied.⁶³ The court ruled that there was no single-subject violation when the [g]eneral [a]ssembly included the provision giving the DCS director authority to veto foster placements, finding that the provision involved the same subject matter as the state budget, where it was included.⁶⁴

Justice Dickson wrote to “emphasize that the [c]ourt’s *de novo* application of Indiana’s Single-Subject Clause reflects the purposes and intentions of its framers and ratifiers.”⁶⁵ He traced the history of the original constitutional language in the debates of the 1850 constitutional convention, described early cases applying

56. *Id.* at 1217 (quoting IND. CODE § 4-21.5-5-14 (2011)).

57. *Id.* at 1219.

58. *Id.*

59. *Id.*

60. *Id.* at 1220.

61. *Id.*

62. *Id.* at 1220-21.

63. *Id.* at 1221 (Dickson, J., concurring); *id.* at 1225 (Sullivan, J., concurring in part).

64. *Id.* at 1211-12 (majority opinion).

65. *Id.* at 1221 (Dickson, J., concurring).

the provision, and addressed the 1974 amendment to the provision.⁶⁶ He described prior cases in which “this [c]ourt may have appeared reluctant to enforce Section 19’s limitations on the exercise of power by the legislature,” but advocated strong enforcement of the section, noting that “prior cases reflecting the possible lack of vigorous enforcement of Section 19 does not preclude this [c]ourt from discharging our constitutional responsibilities to uphold and enforce the Indiana Constitution, especially in light of the reaffirmation of the single-subject requirement in 1974 by Indiana’s General Assembly and Hoosier voters.”⁶⁷ He advocated a *de novo* approach to single subject matter analysis, determining not whether the legislative judgment was reasonable but rather whether the subject matters are in fact properly connected.⁶⁸

Justice Sullivan, perhaps the justice most deferential to the legislative branch, wrote in opposition to Justice Dickson’s concurrence. He advocated a “deferential standard of reasonableness” when applying article 4, section 19, stating that standard had been in place for 145 years.⁶⁹ Because this “reasonableness” test had been in place so long, he wrote, the voters in 1974 believed they were ratifying it when they approved the amended language for article 4, section 19.⁷⁰ He also argued that the “reasonableness” standard of review was in keeping with theories of judicial review prevalent when the original language was enacted and that it was in keeping with the standards the court applied in other instances of judicial review of legislative actions.⁷¹

III. *BARNES V. STATE*: THE “CASTLE DOCTRINE”

The Indiana Supreme Court case that received the most publicity during the survey period was *Barnes v. State*,⁷² which implicated search and seizure under article 1, section 11. Mary Barnes called 911 to report domestic violence by her husband, Richard Barnes.⁷³ Police responded, found Richard in the parking lot of their apartment building, and began questioning him.⁷⁴ Richard told officers they were not needed, raising his voice in a manner prompting warnings from officers.⁷⁵ Mary joined Richard and the officers in the parking lot, then retreated into the apartment.⁷⁶ When officers sought to enter the apartment to question Mary, Richard physically blocked their way and slammed one officer into a

66. *Id.* at 1221-23.

67. *Id.* at 1224.

68. *Id.* at 1225.

69. *Id.* at 1226 (Sullivan, J., concurring in part).

70. *Id.* at 1227.

71. *Id.* at 1228-29.

72. 946 N.E.2d 572, *aff’d on reh’g*, 953 N.E.2d 473 (Ind. 2011).

73. *Id.* at 574.

74. *Id.*

75. *Id.*

76. *Id.*

wall.⁷⁷ In the ensuing struggle, Richard was shot with a taser, and his adverse reaction required hospitalization.⁷⁸

Richard was convicted of battery on a police officer, resisting law enforcement, and disorderly conduct.⁷⁹ On appeal, he challenged the trial court's refusal to instruct the jury as follows: "When an arrest is attempted by means of a forceful and unlawful entry into a citizen's home, such entry represents the use of excessive force, and cannot be considered peaceable. Therefore, a citizen has the right to reasonably resist the unlawful entry."⁸⁰

The Indiana Supreme Court ruled that the trial court's refusal to give the instruction was correct and that "public policy disfavors" recognizing a common law right to forcibly resist unlawful police entry into one's home.⁸¹ The court noted that most states have abandoned this doctrine, and it cited several policy reasons supporting its decision.⁸² First, because there are several exceptions to the warrant requirement, it is difficult for a citizen to know when police entry is unlawful.⁸³ Second, because of upgrades to police equipment and armament, the likelihood of violence and injury (or worse) arising from forcible resistance is high.⁸⁴ Third, citizens have other remedies for unlawful police entry including civil litigation, police disciplinary proceedings, and the exclusionary rule.⁸⁵

Justices Rucker and Dickson dissented.⁸⁶ Neither disagreed with the outcome in this case (that police had a right to enter Barnes's home to prevent potential harm to Mary Barnes), but both objected to the broad language of the majority opinion.⁸⁷ Justice Dickson stated that "the wholesale abrogation of the historic right of a person to reasonably resist unlawful police entry into his dwelling is unwarranted and unnecessarily broad",⁸⁸ he favored "a more narrow approach" deeming resistance unreasonable when it would interfere with investigating a report of domestic violence.⁸⁹ Justice Rucker deemed the majority's erosion of Fourth Amendment rights "breathtaking," stating that this case could have been properly addressed without the broad language in the majority opinion.⁹⁰

The court's statement that "[w]e believe however that a right to resist an unlawful police entry into a home is against public policy and is incompatible

77. *Id.*

78. *Id.*

79. *Id.* at 574-75.

80. *Id.* at 575 n.1.

81. *Id.* at 575.

82. *See id.* at 576.

83. *Id.*

84. *Id.* at 575-76 (citing Model Penal Code and Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 330 (1942)).

85. *Id.* at 576.

86. *Id.* at 579 (Dickson, J., dissenting); *id.* (Rucker, J., dissenting).

87. *Id.* (Dickson, J., dissenting).

88. *Id.*

89. *Id.*

90. *Id.* at 580 (Rucker, J., dissenting).

with modern Fourth Amendment jurisprudence” drew public outcry, including legislative attention.⁹¹ Both parties sought rehearing: Barnes to change the outcome; the State to tone down the court’s broad statements rejecting the so-called “castle doctrine.”⁹²

In the court’s rehearing opinion, it did not alter its decision but elaborated on the original opinion. The court noted that no one—including Richard Barnes—argued that police were acting unlawfully when they tried to enter his residence to investigate Mary Barnes’s safety.⁹³ The court bolstered its earlier decision by citing Indiana Code section 35-42-2-1(a)(1)(B), which makes it a misdemeanor to commit battery on a law enforcement officer while the officer is engaged in executing his official duties.⁹⁴

The court adopted argument by the Attorney General, who argued that, while a citizen has a right to reasonably resist unlawful entry, that right “does not include battery or other violent acts against law enforcement.”⁹⁵ The court also adopted the Attorney General’s assertion that encounters between law enforcement officers and suspected criminals must be judged on their individual facts and maintained its position “that the Castle Doctrine is not a defense to the crime of battery or other violent acts on a police officer.”⁹⁶ The court explicitly left open the door for the General Assembly to create additional statutory defenses that would apply in cases like this one.⁹⁷

This case appears in a review of state constitutional law because of what it did not do. It did not adopt the prior decisions of the Indiana Court of Appeals that gave additional vitality to the Castle Doctrine. Indeed, the Indiana Supreme Court did not address it as a constitutional matter. As Justice David wrote in the rehearing opinion: “the ruling is statutory and not constitutional.”⁹⁸ The supreme court ruled that there is no special right to resist police action that applies to an individual’s home. Rather, balancing various factors, the court ruled that a citizen may not forcibly resist law enforcement efforts to enter the citizen’s home, no matter whether the law enforcement actions are well-founded in law.

91. *Id.* at 576 (majority opinion); see also Maureen Hayden, *Lawmakers Ponder Specifics of Right to Resist Police Entry Bill*, TERRE HAUTE TRIB. STAR, Nov. 10, 2011, http://tribstar.com/indiana_news/x811209097/Lawmakers-ponder-specifics-of-right-to-resist-police-entry-bill.

92. *Barnes v. State*, 953 N.E.2d 473, 474 (Ind. 2011).

93. *Id.*

94. *Id.* (citing IND. CODE § 35-42-2-1 (2011)).

95. *Id.*

96. *Id.*

97. *Id.* at 474-75. Justice Rucker again dissented, arguing that the court should more fully explore the tension between Indiana Code section 35-42-2-1(a)(1)(B), which makes it a crime to commit battery on a law enforcement officer engaged in his official duties, and Indiana Code section 35-41-3-2(b), which allows a person to use reasonable force if the person reasonably believes that the force is necessary to prevent or terminate another person’s unlawful entry of or attack on the person’s dwelling. *Id.* at 475 (Rucker, J., dissenting).

98. *Id.* (majority opinion).

IV. EDUCATION—ARTICLE 7

In *Save Our School: Elmhurst High School v. Fort Wayne Community Schools*,⁹⁹ a group of parents sought court intervention to enjoin the budget-driven closure of a high school. The parents' group argued that if the school closed, their children would be required to attend schools that provided inferior educations.¹⁰⁰ The court of appeals rejected the parents' argument based on the education clause in the Indiana Constitution.¹⁰¹ The court's decision was based on the Indiana Supreme Court's recent decision in *Bonner ex rel. Bonner v. Daniels*.¹⁰² That decision held that the Indiana Constitution does not impose an affirmative duty to achieve any particular standard of educational quality.¹⁰³ In other words, the Indiana Constitution does not guarantee an excellent or even a good education, so the parents in this case have no claim against the school board based on their assertion that their children would receive an inferior education at the schools to which they would be transferred.¹⁰⁴ The court also rejected the parents' claim under the Equal Privileges and Immunities Clause, article 1, section 23, because their children had no constitutional right to an adequate public education; the supreme court had rejected a similar article 1, section 23 argument in *Bonner*.¹⁰⁵

V. PREFERENCE TO RELIGIOUS SOCIETIES—ARTICLE 1, SECTION 4

A criminal defendant sought to invalidate a provision enhancing penalties for burglary when the offense was committed against a church in *Burke v. State*.¹⁰⁶ A provision of the Indiana Code enhances burglary from a Class C felony to a Class B felony when the structure burgled is used for religious worship.¹⁰⁷ Burke argued that the statute violated the federal Establishment Clause and article 1, section 4 of the Indiana Constitution, which states that “[n]o preference shall be given, by law, to any creed, religious society, or mode of worship.”¹⁰⁸ The court

99. 951 N.E.2d 244 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 651 (Ind. 2011).

100. *Id.* at 246.

101. *Id.* at 247. Article 8, section 1 states: “Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.”

102. 907 N.E.2d 516 (Ind. 2009).

103. *Id.* at 522.

104. *Save Our Schools*, 951 N.E.2d at 248-49.

105. *Id.* at 249. Judge Riley concurred in the result but would have based the decision entirely on mootness, since the school at issue was already closed and the students assigned to other schools by the time the court of appeals made its decision. *Id.* at 251-52 (Riley, J., concurring).

106. 943 N.E.2d 870 (Ind. Ct. App.), *trans. denied*, 950 N.E.2d 1207 (Ind. 2011).

107. See IND. CODE § 35-43-2-1(1)(B)(ii) (2011).

108. *Burke*, 943 N.E.2d at 871-72 (citing IND. CONST. art. 1, § 4).

of appeals' opinion includes a lengthy Establishment Clause analysis, which concludes that there is no violation.¹⁰⁹

With regard to the Indiana Constitution, the court applied a different analysis, looking at whether the penalty-enhancing statute placed a material burden on Burke's right to be free of governmental preference for religion.¹¹⁰ "The [statutory] provision will amount to a material burden upon a core constitutional value '[i]f the right, as impaired, would no longer serve the purpose for which it was designed.'"¹¹¹ The court concluded that the penalty enhancement did not demonstrate a preference for a particular religion or religion in general and, "[t]o the extent that the provision may benefit structures used for religious worship in the form of added protection, such benefit is too slight to frustrate [a]rticle 1, [s]ection 4's core constitutional value."¹¹² The court affirmed Burke's conviction and sentence.¹¹³

VI. DUE COURSE OF LAW—ARTICLE 1, SECTION 12

In *Baird v. Lake Santee Regional Waste and Water District*,¹¹⁴ the plaintiff Baird argued that foreclosure on her property for failure to pay sewer connection fees violated several statutory and constitutional provisions, including the due course of law provisions of article 1, section 12.¹¹⁵ For health reasons, the regional waste and water district required Baird and her neighbors to discontinue the use of septic systems and to connect to sewers.¹¹⁶ When Baird refused to make the change, the district assessed various penalties provided by law, and when she did not pay the penalties, the district foreclosed on her property.¹¹⁷ The court rejected Baird's argument that the district's ordinances violated article 1, section 12's requirement that legislation be rationally related to a legitimate legislative goal.¹¹⁸ The court found that the district's goal and the methods it chose to reach those goals, including the penalties for failure to comply, were related to public health, safety and welfare.¹¹⁹ The court also rejected a federal due process challenge.¹²⁰

*Workman v. O'Bryan*¹²¹ is another case in the line of cases applying article

109. *Id.* at 872-76.

110. *Id.* at 877.

111. *Id.* (second alteration in original) (citation omitted).

112. *Id.* at 878.

113. *Id.*

114. 945 N.E.2d 711 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 546 (Mar. 23, 2011).

115. *Id.* at 713.

116. *Id.*

117. *Id.* at 713-14.

118. *Id.* at 716-17.

119. *Id.* at 717.

120. *Id.* at 715-16.

121. 944 N.E.2d 61 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 641 (Ind. 2011).

1, section 12, to the medical malpractice statute of limitations.¹²² Indiana's two-year medical malpractice statute of limitations is occurrence-based, but the Indiana Supreme Court has ruled that in situations when a plaintiff could not reasonably have discovered the malpractice in time to sue within the statutory period, the limitations period may be tolled by article 1, section 12, which states that "[a]ll courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law."¹²³ Plaintiff O'Bryan was diagnosed with neurogenic bladder and reduced kidney function, and she alleged that Dr. Workman should have diagnosed and treated the condition some three years before it was finally diagnosed, and if he had she would have avoided kidney damage.¹²⁴

The court of appeals concluded that she should have known of the potential malpractice by December 2006 at the earliest, and the statute of limitations expired January 28, 2007.¹²⁵ Thus, she was required to file her malpractice complaint by January 28, 2007 unless it was not reasonably possible to do so.¹²⁶ The court concluded that it was not reasonably possible for her to file by that date because she did not have time after being diagnosed with renal failure in December 2006 to put together all the necessary facts and inferences to bring her claim by the deadline.¹²⁷ She was therefore required to file within a reasonable time of discovering the potential malpractice.¹²⁸ She did so on December 12, 2007, more than ten months after the statute of limitations ran and almost a year after she learned the information that should have triggered her investigation.¹²⁹ The court ruled that it could not say, as a matter of law, that she waited unreasonably long to file the complaint, although the timeliness of her filing could be an issue of fact at trial.¹³⁰

VII. EX POST FACTO CLAUSE—ARTICLE 1, SECTION 24

The Indiana Supreme Court's decision in *Lemmon v. Harris*¹³¹ is another in a series of cases applying the Ex Post Facto Clause to the oft-amended sexually violent predator statute.¹³² Harris pled guilty to child molesting in 1999, before the sexually violent predator statute was on the books, and he was ultimately

122. See, e.g., *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692 (Ind. 2000); *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999).

123. IND. CONST. art. 1, § 12; *Workman*, 944 N.E.2d at 65.

124. *Workman*, 944 N.E.2d at 63-64.

125. *Id.* at 65-66.

126. *Id.* at 67.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 67-68.

131. 949 N.E.2d 803 (Ind. 2011).

132. The supreme court's decision contains a lengthy summary of the statutory amendments. *Id.* at 806-07.

released from custody and parole in 2008.¹³³ When he was released, the Department of Correction notified him that he had to register as a sexually violent predator.¹³⁴ He sought declaratory relief in the form of an order that he was not required to register for his entire lifetime, but only for the ten years following his incarceration.¹³⁵ The State argued that Harris was required by a 2007 amendment to register as a sexually violent predator for the rest of his life.¹³⁶ Harris contended that the statute in effect at the time of his conviction did not require that registration and that the Department was not empowered to change his status.¹³⁷

The supreme court concluded that the 2007 amendment changed the law so that the sexually violent predator determination was no longer made by a court, but rather took effect by operation of law, and the amendment explicitly applied to all persons released from custody after 1994 (including Harris).¹³⁸ The court then ruled that this statutory designation system did not run afoul of the Ex Post Facto Clause.¹³⁹ It applied the “intents-effects” test it adopted in *Wallace v. State*,¹⁴⁰ and ruled, after examining the multiple elements of the test, that the 2007 amendment was civil and regulatory in nature.¹⁴¹ Because it was civil and regulatory, not punitive, the amendment was not barred by the Ex Post Facto Clause.¹⁴² The court also analyzed the claim that the 2007 statute was unconstitutional because the designation of sexually violent predator status by operation of law violated separation of powers by changing Harris’s sentence.¹⁴³ The court found no constitutional violation, concluding that the statute simply added another consequence to Harris’s offense and neither reopened his judgment of conviction nor diminished the trial court’s sentencing authority.¹⁴⁴

Justice Dickson dissented, arguing that Harris’s reclassification violated the Ex Post Facto Clause.¹⁴⁵

VIII. BAIL—ARTICLE 1, SECTION 16

The Indiana Court of Appeals applied the bail language in article 1, section 16, in *Sneed v. State*,¹⁴⁶ a methamphetamine prosecution. The trial court set bail

133. *Id.* at 804.

134. *Id.* at 805.

135. *Id.*

136. *Id.* at 807-08.

137. *Id.* at 808.

138. *Id.*

139. *Id.* at 809-10.

140. 905 N.E.2d 371 (Ind. 2009).

141. *Lemmon*, 949 N.E.2d at 810-13.

142. *Id.* at 813.

143. *Id.* at 813-14.

144. *Id.* at 814-15.

145. *Id.* at 816 (Dickson, J., dissenting).

146. 946 N.E.2d 1255 (Ind. Ct. App. 2011).

at \$12,500 for each of two offenses, cash only, after the defendant told the court she had no income other than child support and no assets.¹⁴⁷ She filed a motion to reduce bail, stating that she had no funds to purchase a bond.¹⁴⁸ She had ties to the community, including three daughters at home.¹⁴⁹ The trial court denied her motion to reduce bail or allow her to post a ten percent cash bond or surety.¹⁵⁰

The court of appeals pointed out that article 1, section 16, forbids excessive bail.¹⁵¹ The court reviewed the factors in Indiana Code section 35-33-8-4 that trial courts are to weigh in setting bail.¹⁵² It stated that the defendant has the burden to show that bail is excessive, but a defendant need not show changed circumstances to obtain reduced bail.¹⁵³ The court stated that several of the statutory factors, including her ties to the community, her appearance at court hearings connected to prior prosecutions, and her lack of funds, weighed in favor of reduced bail.¹⁵⁴ The court noted, however, that she faced lengthy imprisonment if convicted, weighing against low bail.¹⁵⁵ The court of appeals concluded that the facts justified the \$25,000 total bail set for Sneed but that by denying her the option of surety bond the trial court effectively condemned her to imprisonment before trial because of her lack of funds.¹⁵⁶ The court found that the trial court abused its discretion when it denied the option of a surety bond and remanded for further proceedings.¹⁵⁷

IX. RIGHT TO COUNSEL—ARTICLE 1, SECTION 13

One of the stranger cases of the year involved attorney David Schalk, who represented a defendant on a Class A felony methamphetamine dealing charge.¹⁵⁸ Schalk learned the identity of a confidential informant against his client and believed that confidential informant was continuing to sell drugs.¹⁵⁹ To challenge the informant's credibility, Schalk set up a transaction to buy a large quantity of marijuana from the informant so that the informant's continued drug selling could be used as impeachment.¹⁶⁰ Soon after the transaction was completed, Schalk petitioned the trial court to take custody of the marijuana (which, it turned out,

147. *Id.* at 1256.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 1257.

152. *Id.*

153. *Id.*

154. *Id.* at 1258.

155. *Id.* at 1258-59.

156. *Id.* at 1260.

157. *Id.* at 1260-61.

158. *Schalk v. State*, 943 N.E.2d 427, 428 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 639 (Ind. 2011).

159. *Id.*

160. *Id.* at 428-29.

was all smoked by the individuals Schalk induced to take purchase the marijuana).¹⁶¹ Because Schalk's petition included verified statements that he arranged the marijuana purchase, police charged Schalk with conspiracy to possess marijuana, and he was ultimately convicted of attempted possession of marijuana.¹⁶²

Schalk's argument on appeal was that his actions were not illegal because he was acting in his capacity as an attorney, providing a defense to his client.¹⁶³ The court of appeals rejected this argument, holding that Schalk enjoyed no special status allowing him to break the law.¹⁶⁴ The court ruled that the constitutional right to counsel does not permit an attorney to engage in conduct that is otherwise unlawful and affirmed his conviction.¹⁶⁵

The court of appeals also applied the right to counsel in *Belmares-Bautista v. State*,¹⁶⁶ a case involving waiver of the right to counsel by an individual who spoke Spanish rather than English.¹⁶⁷ Belmares-Bautista was convicted of possessing a counterfeit government-issued identification, in this case a Mexican driver's license.¹⁶⁸ Belmares-Bautista signed a Spanish-language waiver of counsel form and represented himself at trial, where he acted through an interpreter.¹⁶⁹ No English translation of the waiver appeared in the appellate record, and Belmares-Bautista contended that the record therefore did not show that his waiver was knowing and voluntary.¹⁷⁰ The court of appeals disagreed, noting that Belmares-Bautista did not argue that the translated waiver form was inaccurate in any way.¹⁷¹ The court of appeals therefore affirmed the conviction, noting that it would address the waiver issue only if there was an argument that the forms were insufficient, that a defendant was coerced into signing them, or that a defendant lacked the capacity to read or understand them.¹⁷²

X. SEARCH AND SEIZURE—ARTICLE 1, SECTION 11

The Indiana Supreme Court decided several other search cases. In *Garcia-Torres v. State*,¹⁷³ the court strongly implied that the Indiana Constitution did not

161. *Id.* at 429.

162. *Id.*

163. *Id.* at 430-31.

164. *Id.* at 431.

165. *Id.* at 431-32. The court did not engage in any different right-to-counsel analysis under article 1, section 13, than under the Sixth Amendment.

166. 938 N.E.2d 1229 (Ind. Ct. App. 2010). Retired Indiana Supreme Court Justice Theodore Boehm wrote the opinion in his capacity as a senior judge on the court of appeals. *Id.* at 1229.

167. *Id.* at 1230.

168. *Id.* at 1229-30.

169. *Id.* at 1230.

170. *Id.*

171. *Id.*

172. *Id.* at 1230-31.

173. 949 N.E.2d 1229 (Ind. 2011).

mandate a warrant before police could obtain a cheek swab to test DNA.¹⁷⁴ Relying primarily on federal precedent, the court analogized the cheek swab to fingerprinting, which does not require a separate probable cause determination.¹⁷⁵ But in this case both sides assumed probable cause was necessary, and the court therefore analyzed the State's theory that Garcia-Torres validly consented to the cheek swab, negating the need for a separate probable cause determination.¹⁷⁶ The court additionally analyzed whether Garcia-Torres was entitled to a warning under *Pirtle v. State*, Indiana's rule that the state constitution requires police to inform an individual in custody that the individual is entitled to consult with counsel before giving consent to any search.¹⁷⁷ The court declined to apply *Pirtle* because it found the cheek swab "minimally intrusive," involving only slight inconvenience for a few seconds and no discomfort.¹⁷⁸ Justice Rucker dissented on the *Pirtle* issue.¹⁷⁹ *Garcia-Torres* is the latest in a line of cases eroding *Pirtle*'s reach.¹⁸⁰

The supreme court also blessed a search over state constitutional objections in *State v. Hobbs*,¹⁸¹ involving use of a drug-sniffing dog. Hobbs was arrested for an unrelated crime, and police used the dog on his car.¹⁸² The dog indicated that illegal narcotics were in the car, and police searched it without Hobbs's consent, finding marijuana and paraphernalia.¹⁸³ Applying the automobile exception, the court found no Fourth Amendment violation.¹⁸⁴ Under the Indiana Constitution, the court looked to the reasonableness of law enforcement conduct, including the degree to which the search disrupted the subject's normal activities and the facts and observations supporting police need for the search.¹⁸⁵ The court concluded that the search worked almost no disruption on Hobbs, who already was under arrest for a different crime, and that the drug-sniffing dog gave police plenty of

174. *See id.* at 1235.

175. *Id.*

176. *Id.* at 1236-37.

177. *Id.* at 1238-39 (analyzing *Pirtle v. State*, 323 N.E.2d 634 (Ind. 1975)).

178. *Id.* at 1238.

179. *Id.* at 1239-42 (Rucker, J., dissenting).

180. *See* *Datzek v. State*, 838 N.E.2d 1149, 1158-60 (Ind. Ct. App. 2006); *Schmidt v. State*, 816 N.E.2d 925, 942-44 (Ind. Ct. App. 2004); *Ackerman v. State*, 774 N.E.2d 970, 979-82 (Ind. Ct. App. 2002). The Indiana Court of Appeals followed the logic of *Garcia-Torres* in *Cohee v. State*, 945 N.E.2d 748 (Ind. Ct. App.), *reh'g denied*, 2011 Ind. App. LEXIS 1616 (Aug. 17, 2011), *trans. denied*, 962 N.E.2d 652 (Ind. 2011), finding no violation of the Indiana Constitution when a suspect was not given the *Pirtle* advisement before being asked to consent to a blood draw to show blood alcohol content. *Cohee*, 945 N.E.2d at 752-53.

181. 933 N.E.2d 1281 (Ind. 2010).

182. *Id.* at 1284.

183. *Id.*

184. *Id.* at 1286-87. Justice Sullivan, joined by Justice Rucker, dissented on the automobile exception point. *Id.* at 1287 (Sullivan, J., dissenting).

185. *Id.* at 1287. These criteria originate in *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005).

reason to suspect the presence of unlawful drugs in the car.¹⁸⁶ The search was therefore valid under the Indiana Constitution, the court ruled.¹⁸⁷

The supreme court ruled in *Lacey v. State*¹⁸⁸ that police do not have to obtain a “no-knock” warrant before entering a premises without knocking and announcing their presence, even when they know ahead of time of the facts that are likely to require a “no-knock” entry.¹⁸⁹ In this case, police obtained a warrant (but not a “no-knock” warrant) based on reports by persons arrested for drug possession that they had purchased from Lacey, observation of the premises revealing many persons stopping there briefly, and a search of trash from the premises showing drug residue. Police knew in advance that Lacey was likely to be armed and had previously resisted arrest, but they did not obtain a “no-knock” warrant.¹⁹⁰ The supreme court nevertheless found no error in denying the motion to suppress the evidence seized under the warrant, concluding that whether to enter without knocking and announcing had to be left to police on the scene who could judge the exigencies of the particular situation.¹⁹¹ This approach also places the risk on police—if they lack proper reason for a “no-knock” entry, they risk losing the fruits of their search to a motion to suppress.¹⁹² The court therefore wrote that “the better police practice is to minimize legal uncertainty by seeking such advance approval when supported by facts known when the warrant is sought.”¹⁹³

The Indiana Court of Appeals made new law under article 1, section 11 in *Trotter v. State*,¹⁹⁴ in which police investigated a report of shots being fired in a rural area. Officers found two men sitting around a fire at a farmhouse who had apparently been drinking alcohol and shooting a firearm.¹⁹⁵ Police also looked for a third man inside a nearby structure attached to a dwelling, and they did so with no warrant and (the court found) no exigent circumstance.¹⁹⁶ Police found the third man pointing a rifle at them, and they arrested him for pointing a firearm and criminal recklessness.¹⁹⁷ The court of appeals suppressed the evidence found in the search, concluding that it was unreasonable under the Indiana Constitution because it was a significant intrusion into a residence with little, if any, police need to do so (since there was no ongoing disturbance and police found no

186. *Hobbs*, 933 N.E.2d at 1287.

187. *Id.*

188. 946 N.E.2d 548 (Ind. 2011), *reh'g denied*, 2011 Ind. LEXIS 745 (Sept. 2, 2011).

189. *Id.* at 548.

190. *Id.* at 549; *see also* *Lacey v. State*, 931 N.E.2d 378 (Ind. Ct. App. 2010), *summarily aff'd*, 946 N.E.2d 548.

191. *Lacey*, 946 N.E.2d at 552.

192. *Id.*

193. *Id.* at 548.

194. 933 N.E.2d 572 (Ind. Ct. App. 2010).

195. *Id.* at 577.

196. *Id.* at 577-78.

197. *Id.* at 578.

evidence of a crime).¹⁹⁸

The new law in this case addresses the doctrine of attenuation, which allows admission of evidence that is sufficiently attenuated from the police misconduct that invalidated the search.¹⁹⁹ The court of appeals ruled that the doctrine of attenuation is purely a creature of the Fourth Amendment and “has no application under the Indiana Constitution.”²⁰⁰ In this case, the court held, because the police acted contrary to Trotter’s constitutional rights, the evidence had to be suppressed notwithstanding any attenuation from unlawful police conduct.²⁰¹

The court ruled similarly in *State v. Foster*,²⁰² excluding drugs found in a search that occurred after police misrepresented their reasons for entering the dwelling (they lied that they were investigating a “911 hang-up”) and searched without a warrant (although they probably had sufficient evidence to get one).²⁰³ The court ruled that the search was unreasonable under the Indiana Constitution because, although police had ample reason to believe there was unlawful activity, the degree of intrusion was high and police had no need to enter immediately without obtaining a warrant.²⁰⁴

In another case involving police deception, *Godby v. State*,²⁰⁵ the court of appeals excluded the results of a search that turned up evidence of methamphetamine-related offenses. The suspect’s wife gave police consent to search a garage only after they told her, falsely, that they believed there was a methamphetamine lab in the garage and that it could be dangerous.²⁰⁶ They did not seek, and she did not provide, consent to search a locked box in the garage, and it was in that locked box that the incriminating evidence was found.²⁰⁷ The court recognized that the suspect had excluded his wife from the locked box by locking it and not providing her with a key, and it noted that the locked box contained several items “that a man might wish to hide from his wife.”²⁰⁸ The court found the search of the locked box invalid under the Fourth Amendment and unreasonable under article 1, section 11.²⁰⁹ Applying the *Litchfield* factors, the court found the degree of intrusion high and law enforcement need to immediately open the box, rather than get a warrant, to be minimal.²¹⁰

The court of appeals also found searches valid under the Indiana Constitution

198. *Id.* at 580-81.

199. *Id.* at 581.

200. *Id.* at 582-83.

201. *Id.*

202. 950 N.E.2d 760 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 644 (Ind. 2011).

203. *Id.* at 761.

204. *Id.* at 762-63.

205. 949 N.E.2d 416 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 642 (Ind. 2011).

206. *Id.* at 418.

207. *Id.* at 419.

208. *Id.* at 421 (citation omitted).

209. *Id.*

210. *Id.* at 421-22.

in many cases. For example, in *Saffold v. State*²¹¹ the court found no violation when a suspect who had been removed from a car was patted down a second time after officers found ammunition in his car but detected no weapon on the first pat-down.²¹² Additionally, in *Chiszar v. State*,²¹³ the court found no violation in a search that found child pornography after the suspect had consented to the search.²¹⁴

XI. DOUBLE JEOPARDY—ARTICLE 1, SECTION 14

During the survey period, Indiana's courts have continued to apply Indiana's unique, constitutionally based rules governing multiple punishments, where a defendant claims that a single act is being punished more than once. Indiana's test for double jeopardy involves two steps. The first step, which is identical to the federal test, examines whether an individual has been convicted for a crime as to which the elements are the same as another crime for which the individual has been convicted (and if the elements are the same, there is a violation).²¹⁵ The second step, unique to Indiana, examines whether an individual has been convicted of a crime using exactly the same evidence that was used to convict the individual of another crime.²¹⁶

The Indiana Supreme Court applied this doctrine in *Nicoson v. State*,²¹⁷ addressing a conviction for confinement while armed with a deadly weapon, with an additional five years added to the sentence based on a statute authorizing the additional term where the perpetrator used a firearm while committing the offense.²¹⁸ The defendant argued that the additional sentence violated Indiana's double jeopardy restriction because it constituted an enhancement based on an act that was an element of the crime.²¹⁹ The class of felony was enhanced to Class B because a deadly weapon was used, and the use of a firearm permitted the additional five-year term of incarceration.²²⁰

The court found no double jeopardy violation.²²¹ It reiterated that questions of sentence enhancements are primarily statutory and not constitutional, and that the general rule about double enhancements applied only when the legislature has not given explicit contrary direction.²²² In this case, the Indiana General Assembly explicitly allowed not only the enhanced class of felony for use of a

211. 938 N.E.2d 837 (Ind. Ct. App. 2010).

212. *Id.* at 839-41.

213. 936 N.E.2d 816 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1212 (Ind. 2011).

214. *Id.* at 831.

215. *See* *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999).

216. *Id.* at 48-49.

217. 938 N.E.2d 660 (Ind. 2010).

218. *Id.* at 661.

219. *Id.* at 662.

220. *Id.*; *see also* IND. CODE §§ 35-42-3-3, 35-50-2-11 (2011).

221. *Nicoson*, 938 N.E.2d at 662.

222. *Id.* at 663-64.

firearm but also the additional term of years when a firearm is used.²²³ The court spent several paragraphs analyzing the statutory language and concluded that what Nicoson complained of as a “double enhancement” was intended by the legislature.²²⁴ The court noted that the Class B enhancement was available when the perpetrator merely possessed a deadly weapon, and the five-year additional sentence was predicated on *use* of the firearm.²²⁵

Justice Rucker dissented, joined by Justice Sullivan.²²⁶ They agreed that this particular case is not governed by the constitutional double jeopardy analysis, but rather by “a series of rules of statutory construction and common law that are often described as double jeopardy.”²²⁷ They argued that this case fell within the prohibition against multiple enhancements for the same behavior.²²⁸ That is, the same evidence that proved Nicoson was armed with a deadly weapon also proved that he used a firearm, so the double enhancement was also prohibited.²²⁹

The Indiana Court of Appeals decided several double jeopardy cases during the survey period. The one attracting the most notice was likely *Kendrick v. State*,²³⁰ in which the court vacated convictions for feticide using double jeopardy analysis.²³¹ Kendrick perpetrated a bank robbery during which he shot a visibly pregnant teller.²³² The teller was seriously injured, and her twins had to be delivered; neither survived more than a few hours.²³³ Kendrick was convicted of attempted murder and two counts of feticide, among other crimes.²³⁴ The court of appeals ruled that the feticide convictions had to be vacated under the “same evidence” rule because they were proved using precisely the same evidence used to prove the attempted murder.²³⁵ The court remanded for resentencing,

223. *Id.*

224. *Id.*

225. *Id.* at 665. The Indiana Court of Appeals generally followed *Nicoson*'s analysis in *Cooper v. State*, 940 N.E.2d 1210 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 397 (Feb. 21, 2011), *trans. denied*, 950 N.E.2d 1208 (Ind. 2011), rejecting a double jeopardy claim by another defendant who received the five-year sentencing enhancement for use of a firearm. *Id.* at 1217. Unlike *Nicoson*, in *Cooper* there was no other enhancement based on the weapon used. *Id.* at 1211. *Cooper*'s claim was simply that the five-year enhancement was proved with the same evidence used to prove the underlying crime. *Id.* at 1214.

226. *Nicoson*, 938 N.E.2d at 666 (Rucker, J., dissenting).

227. *Id.* (quoting *Pierce v. State*, 761 N.E.2d 826, 830 (Ind. 2002)).

228. *Id.*

229. *Id.*

230. 947 N.E.2d 509 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 1370 (July 26, 2011), *trans. denied*, 962 N.E.2d 649 (Ind. 2011), *cert. denied*, 132 S. Ct. 1752 (2012).

231. *Id.* at 519.

232. *Id.* at 512-13.

233. *Id.* at 513.

234. *Id.*

235. *Id.* at 514. The court noted that the analysis would have been entirely different had the fetuses been viable. *Id.* at 514 n.7. Because there would then have been three separate victims, there would have been no double jeopardy violation. *Id.* But because the fetuses were not viable,

specifically noting that the trial court could consider the victim's pregnancy and its termination as aggravators.²³⁶

The court of appeals also applied Indiana's double jeopardy analysis to nonpayment of child support. In *Porter v. State*,²³⁷ the defendant was convicted of two counts of Class C felony nonsupport based on failure to pay a total of more than \$54,000 in child support owed to his two children.²³⁸ He was given a ten-year executed sentence.²³⁹ The felony conviction was enhanced to Class C based on the size of the arrearage.²⁴⁰ Porter argued a double jeopardy violation because he had been convicted a few years earlier of the same crime, and at that time his arrearage was \$35,000—an amount included in the \$54,000 arrearage charged in the later offenses.²⁴¹ By using the same arrearage twice, the court found, “the State proceeded against Porter twice for the same criminal transgression.”²⁴² The court adopted in part the State's harmless error argument, which was that it proved an additional arrearage of \$20,000 that accrued since the prior conviction.²⁴³ But it ruled that common law double jeopardy principles precluded using the same \$20,000 arrearage to enhance both convictions.²⁴⁴ The \$20,000 arrearage the State proved also did not satisfy the statutory requirement for the enhancement—that a \$15,000 arrearage be proved for *one child* to justify the enhancement.²⁴⁵ A \$20,000 combined arrearage could not generate separate \$15,000 arrearages to enhance each of the two convictions. The court remanded with instructions to reduce one Class C felony conviction to Class D.²⁴⁶

The Indiana Court of Appeals vacated several other convictions that it concluded were proved using the same evidence to support two different crimes, including robbery and battery,²⁴⁷ theft and obstruction of justice,²⁴⁸ operating a vehicle in a highway work zone resulting in death and reckless disregard of a traffic control device in a highway work zone resulting in death,²⁴⁹ robbery and

the State did not argue that there were separate victims in this case.

236. *Id.* at 514-15.

237. 935 N.E.2d 1228 (Ind. Ct. App. 2010).

238. *Id.* at 1230-31.

239. *Id.* at 1231.

240. *Id.* at 1232-33.

241. *Id.* at 1232.

242. *Id.*

243. *Id.* at 1233.

244. *Id.*

245. *Id.* at 1234.

246. *Id.*

247. *Troutner v. State*, 951 N.E.2d 603 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 647 (Ind. 2011).

248. *Osburn v. State*, 940 N.E.2d 853 (Ind. Ct. App.), *trans. denied*, 950 N.E.2d 1203 (Ind. 2011).

249. *Hurt v. State*, 946 N.E.2d 44 (Ind. Ct. App.), *trans. denied*, 950 N.E.2d 1213 (Ind. 2011).

criminal confinement;²⁵⁰ and theft and possession of stolen property.²⁵¹ It also addressed several cases claiming double jeopardy violations for multiple sentence enhancements, finding violations in some cases²⁵² but not in others.²⁵³

XII. SENTENCING—ARTICLE 7, SECTION 4

As happens every year, Indiana appellate courts exercised their authority under article 7 to review and revise criminal sentences. These cases are reviewed in Professor Schumm's article on developments in criminal law.²⁵⁴ The most noteworthy of these cases was the Indiana Supreme Court's opinion in *Akard v. State*,²⁵⁵ the first case in which the court of appeals exercised its review and revision authority to *increase* a sentence using the authority the supreme court announced in *McCullough v. State*.²⁵⁶ *Akard* involved a series of violent sexual crimes committed against a homeless woman who was confined against her will, crimes the supreme court labeled "heinous" and "despicable."²⁵⁷ The supreme court disagreed with the court of appeals' decision, which increased the sentence from ninety-three years to 118 years.²⁵⁸ The supreme court left the trial court's sentence intact, reasoning that the State did not argue for a longer sentence at trial and, on appeal, described the sentence as appropriate.²⁵⁹

XIII. OTHER CRIMINAL MATTERS

In *Moore v. State*,²⁶⁰ the defendant was the passenger in a car driven by a designated driver.²⁶¹ The car was pulled over by police for a minor infraction,

250. *Wright v. State*, 950 N.E.2d 365 (Ind. Ct. App. 2011).

251. *White v. State*, 944 N.E.2d 532, *aff'd on reh'g*, 950 N.E.2d 1276 (Ind. Ct. App. 2011), *aff'd*, 963 N.E.2d 511 (Ind. 2012). In the opinion on rehearing, the court noted that the habitual offender enhancement, which had been vacated because of insufficient evidence, could be retried on remand without violating double jeopardy because it is not a separate crime or separate sentence, but rather a sentence enhancement. *White*, 950 N.E.2d at 1278.

252. *See, e.g.*, *Deloney v. State*, 938 N.E.2d 724 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 279 (Feb. 15, 2011), *trans. denied*, 950 N.E.2d 1210 (Ind. 2011); *Jones v. State*, 938 N.E.2d 1248 (Ind. Ct. App. 2010).

253. *See, e.g.*, *Stokes v. State*, 947 N.E.2d 1033 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 638 (Ind. 2011); *Orta v. State*, 940 N.E.2d 370 (Ind. Ct. App.), *trans. denied*, 950 N.E.2d 1201 (Ind. 2011).

254. *See* Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 45 IND. L. REV. 1067 (2012).

255. 937 N.E.2d 811 (Ind. 2010).

256. 900 N.E.2d 745 (Ind. 2009).

257. *Akard*, 937 N.E.2d at 812-13.

258. *Compare id.* at 814, with *Akard v. State*, 924 N.E.2d 202, *aff'd on reh'g*, 928 N.E.2d 623 (Ind. Ct. App. 2010), *aff'd in part, Akard*, 937 N.E.2d 811.

259. *Akard*, 937 N.E.2d at 814.

260. 949 N.E.2d 343 (Ind. 2011).

261. *Id.* at 344.

and the defendant Moore was arrested for public intoxication.²⁶² She admitted she was intoxicated in a public place but sought reversal of her conviction because, she argued, it violated the public policy encouraging the use of designated drivers.²⁶³ Although the Indiana Court of Appeals reversed the conviction by a 2-1 vote, the Indiana Supreme Court granted transfer and affirmed the trial court's judgment of conviction.²⁶⁴ It found that her actions met the statutory definition of public intoxication, and it rejected her argument, based on article 1, section 1 of the Indiana Constitution, that she had a right to consume alcoholic beverages (she quoted an 1855 case stating that the constitutional right "embraces the right, in each . . . individual, of selecting what he will eat and drink . . . so far as he may be capable of producing them, or they may be within his reach, and that the legislature cannot take away that right by direct enactment").²⁶⁵ The court stated that it was not restricting her right to consume alcohol, only her right to appear in public after being intoxicated.²⁶⁶ Justice Rucker dissented, arguing that the public intoxication statute should be applied only when the intoxicated person is annoying or interfering with the public.²⁶⁷

The Indiana Supreme Court reversed a civil forfeiture judgment in *Serrano v. State*,²⁶⁸ in which a trial court ordered forfeiture of a truck owned by a person who was erroneously arrested because he had the same name as someone for whom there was an outstanding warrant.²⁶⁹ After the arrest (which followed a police chase), a drug-sniffing dog alerted on the arrestee's truck. But a search turned up only \$51 in cash, \$500 in quarters, and cocaine residue in the truck's carpet.²⁷⁰ The trial court concluded that this evidence was sufficient to show that the truck had been used in a drug sale business, but the Indiana Supreme Court reversed, finding that the State had failed to prove that the arrestee was anything more than a cocaine user, a fact insufficient to support forfeiture.²⁷¹ The court raised in a footnote the constitutional provision requiring that "all forfeitures" be deposited in the Common School Fund, questioning whether a statute allowing reimbursement of law enforcement costs before depositing any money in the Common School Fund met the constitutional command.²⁷²

The court of appeals also addressed several Indiana constitutional questions in criminal cases in which it applied the same analysis to the Indiana and federal constitutional provisions at issue. In *McCain v. State*,²⁷³ the court concluded that

262. *Id.* at 345.

263. *See id.*

264. *Id.* at 344.

265. *Id.* at 345 (quoting *Herman v. State*, 8 Ind. 545, 558 (1855) (first alteration in original)).

266. *Id.*

267. *Id.* at 345-46 (Rucker, J., dissenting).

268. 946 N.E.2d 1139 (Ind. 2011).

269. *Id.* at 1140.

270. *Id.*

271. *Id.* at 1141, 1143-44.

272. *Id.* at 1142 & n.3.

273. 948 N.E.2d 1202 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 642 (Ind. 2011).

a defendant's right to cross-examine under the Sixth Amendment and article 1, section 13, was violated when the trial court did not permit cross-examination of a witness as to precisely what penalties the witness avoided by cooperating with the police and testifying against the defendant.²⁷⁴ The court stated that "the defendant is entitled to elicit the specific penalties a witness may have avoided through her agreement with the State," but the court found the error harmless and did not vacate the conviction.²⁷⁵ In another case, the court found no violation of article 1, section 13, or the Sixth Amendment when a trial court applied Evidence Rule 412 to preclude inquiries about the prior sexual conduct of a witness in a criminal deviate conduct prosecution, applying the same analysis to both constitutional provisions.²⁷⁶

The court of appeals also applied the same analysis to state and federal constitutional claims in *Pryor v. State*,²⁷⁷ where a defendant claimed ineffective assistance of counsel relating to his waiver of jury trial. He claimed that when he waived his jury-trial right, he did not understand that he was waiving it not only as to the guilt phase, but also as to the habitual offender phase.²⁷⁸ The court of appeals ruled that the advisement given by the trial court was sufficient to warn the defendant that his waiver applied to both.²⁷⁹ And in *Boston v. State*,²⁸⁰ the court of appeals found no violation of the state or federal ex post facto provisions when it concluded that a statutory amendment could be applied retroactively.²⁸¹ The statute changed no element of or penalty for the crime charged (operating a motor vehicle while intoxicated), but it did change the rules as to which medical personnel were permitted to administer the blood test that proved this defendant's guilt.²⁸² The court applied the same analysis to the state and federal claims in concluding that the statutory amendment was remedial and violated no vested right.²⁸³

274. *Id.* at 1207.

275. *Id.* at 1207-08.

276. *Conrad v. State*, 938 N.E.2d 852, 856-57 (Ind. Ct. App. 2010).

277. 949 N.E.2d 366 (Ind. Ct. App. 2011).

278. *Id.* at 370.

279. *Id.* at 372.

280. 947 N.E.2d 436 (Ind. Ct. App. 2011).

281. *Id.* at 443.

282. *Id.*

283. *Id.*