RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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INTRODUCTION

This Article highlights the significant changes effected by the Indiana General Assembly and appellate courts in 1995 in the area of criminal law and procedure.

I. 1995 LEGISLATIVE ACTS

A. New Offenses

In response to confusion surrounding whether the pointing of an unloaded handgun constitutes Criminal Recklessness,[1] the General Assembly created the offense of "Pointing firearm at another person."[2] The new crime makes it illegal to "knowingly or intentionally point[] a firearm at another person." This is a class D felony; "[h]owever, the offense is a class A misdemeanor if the firearm was not loaded."[3] The section is not applicable to a law enforcement officer acting within the scope of his official duties "or to a person justified in using reasonable force to protect life or property."[4]

The General Assembly created a new offense entitled "Overpass mischief."[5] This crime, a class C felony, makes it illegal for a person on an overpass to drop, cause to drop, or throw an object that causes bodily injury to another person.[6] Further, it is a criminal offense for a person to place an object on an overpass which falls off the overpass and causes bodily injury to another person.[7] In this latter instance, the person must have intended for the object to fall off the overpass.[8] The offense is enhanced to a class B felony if it results in serious bodily injury to another person.[9] "Overpass" is broadly defined as "a bridge or other structure designed to carry vehicular or pedestrian traffic over any roadway, railroad track, or waterway."[10]

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1. IND. CODE § 35-42-2-2 (Supp. 1995).
2. *Id.* § 35-47-4-3.
3. *Id.* § 35-47-4-3(b).
4. *Id.* § 35-47-4-3(a).
5. *Id.* § 35-42-2-5.
6. *Id.* § 35-42-2-5(b)(1).
7. *Id.* § 35-42-2-5(b)(2).
8. *Id.*
9. *Id.* § 35-42-2-5(b).
10. *Id.* § 35-42-2-5(a).

"Battery by body waste," a new statute, makes it a class D felony for a person to place, in a rude, insolent, or angry manner, blood or another bodily fluid or waste on a law enforcement officer or a corrections officer while such officer is engaged in the performance of official duties.[11] This statute also makes it a crime for a person to coerce another person into doing the same.[12] The offense is enhanced to a class C felony if the person knew, or recklessly failed to know, that he was infected with hepatitis B, HIV, or tuberculosis, and a class B felony if commission of the offense transfers hepatitis B or tuberculosis to the other person.[13] The offense is a class A felony if that person knew or recklessly failed to know that he or she was infected with HIV and transmits HIV to the victim.[14]

It is now a class B felony for a person eighteen years of age or older to commit battery resulting in serious bodily injury to a person under fourteen years of age.[15] In addition, a person who violates a protective order that results in bodily injury to the petitioner is now subject to a five-day nonsuspendible term of imprisonment.[16] The court, which retains discretion to order the manner in which the term of imprisonment is served, must order at least forty-eight hours of consecutive imprisonment and the entire sentence must be served within six months of the order.[17] Credit time is not awarded while serving the five-day sentence.[18]

The General Assembly also broadened the scope of the offense of "Dealing in Cocaine or a narcotic drug."[19] It is now a class A felony to deliver, or finance the delivery of, cocaine in, on, or within 1,000 feet of a public park.[20] Public park is defined as "any property operated by a political subdivision for park purposes."[21]

It is now an offense to possess or use a code grabbing device to disarm a security alarm system or automatic door locking system of a motor vehicle in furtherance of committing a crime.[22] This offense is a class C misdemeanor.[23]

The General Assembly created a new offense this session entitled "Vending machine vandalism."[24]

A person who knowingly or intentionally damages a vending machine or

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11. *Id.* § 35-42-2-6(c).
12. *Id.*
13. *Id.* § 35-42-2-6(c)(1), (2).
14. *Id.* § 35-42-2-6(c)(3).
15. *Id.* § 35-42-2-1(4).
16. *Id.* § 35-46-1-15.1(b).
17. *Id.* § 35-46-1-15.1(b)(1)-(2).
18. *Id.* § 35-46-1-15.1(c).
19. *Id.* § 35-48-4-1.
20. *Id.* § 35-48-4-1(b)(3).
21. *Id.* § 35-41-1-23.7.
22. *Id.* § 33-45-12-2.
23. *Id.*
24. *Id.* § 35-43-4-7.

> removes goods, wares, merchandise, or other property from a vending machine without inserting or depositing a coin, bill, or token made for that purpose, or without the consent of the owner or operator of the vending machine commits a class B misdemeanor.[25]

Further, "the offense is a class A misdemeanor if the amount of damage or the value of the goods, wares, merchandise or other property removed from the vending machine is at least $250.00."[26]

The General Assembly also created a new crime of theft. The chapter, entitled "Conversion or Misappropriation of Title Insurance Escrow Funds," declares it a class D felony "to knowingly or intentionally convert[] or misappropriate[] money received or held in a title insurance escrow account; or receive or conspire to receive such money . . . ."[27] Under the statute the actor must be "an officer, a director, or an individual associated with the title insurer as an employee of an insured, independent contractor, or a title insurance agent . . . ."[28] The offense is enhanced to a class C felony if the amount of money converted, misappropriated, or received falls between $10,000 and $100,000.[29] However, if the amount is equal to or exceeds $100,000, the offense is a class B felony.[30] When a person is convicted of an offense under this chapter, "[t]he court shall direct the clerk of court to notify the Indiana department of insurance."[31] The chapter also provides for the payment of restitution to the victim.[32]

B. Sex Offenses

The General Assembly amended the sex offender registry by redefining an offender as a person convicted of a sex offense after June 30, 1994.[33] The statute was further amended to specify "that an offender's duty to register terminates ten (10) years after the date the offender is released from prison, placed on parole, or placed on probation, whichever occurs last."[34] The General Assembly also added the offense of sexual misconduct with a minor as a class A or B felony[35] and possession of child pornography[36] to the list of offenses for which an offender must register.

The penalty of voyeurism was enhanced this session from a class B misdemeanor to a class D felony when a camera, video camera or any other type

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25. *Id.* § 35-43-4-7(b).
26. *Id.*
27. *Id.* § 35-43-9-7(a).
28. *Id.*
29. *Id.* § 35-43-9-7(b)(1).
30. *Id.* § 35-42-9-7(b)(2).
31. *Id.* § 35-43-9-8.
32. *Id.* § 35-43-9-9.
33. *Id.* § 5-2-12-4.
34. *Id.* § 5-2-12-5(b).
35. *Id.* § 5-2-12-4.
36. *Id.* § 5-2-5-5.

of video recording device is used, without the consent of the victim, during the commission of the offense.[37] A second or subsequent offender of public indecency under Indiana Code section 35-45-4-1(a) is now required to serve thirty days of nonsuspendible jail time.[38]

The General Assembly broadened the scope of the child pornography and child exploitation statute by raising, from less than sixteen to less than eighteen years of age, the age of a child depicted or described.[39] Possession of child pornography is now a class D felony.[40] The knowing or intentional possession of any sexual representation of someone less then sixteen years of age or who appears to be less than sixteen years of age is a class A misdemeanor offense.[41]

C. Sentencing

The General Assembly once again amended the sentencing statutes for murder and class A felonies. A person who commits murder shall be imprisoned for a fixed term of fifty-five years,[42] a five-year increase from the 1994 legislation. As before, each sentence can be increased or decreased by not more than ten years for aggravating or mitigating circumstances.[43] Similarly, a person who commits a class A felony shall now be imprisoned for a fixed term of thirty years.[44] Twenty years may still be added and not more than ten years subtracted for aggravating and mitigating circumstances.[45]

In a bold attempt to punish those who commit drug offenses while possessing or using a firearm, the General Assembly enacted legislation that enhances the sentence received when a person commits a drug offense and the State separately proves, beyond a reasonable doubt, that the person knowingly or intentionally used or unlawfully possessed a handgun, sawed-off shotgun, or machine gun while committing the offense.[46] If the State sustains its burden, "the court may sentence the person to an additional term of imprisonment of not more than five years."[47] However, if the firearm used or unlawfully possessed is a sawed-off shotgun, the court may then sentence the person to an additional term of imprisonment of not more than ten years.[48] If the firearm used or unlawfully possessed is a machine gun or is equipped with a firearm silencer or firearm muffler, the court may enhance the person's term of imprisonment for a fixed term of up to twenty

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37. *Id.* § 35-45-4-5.
38. *Id.* § 35-50-3-1.
39. *Id.* § 35-42-4-4(b)(1)-(2).
40. *Id.* § 35-42-4-4(b).
41. *Id.* § 35-42-4-4(c).
42. *Id.* § 35-50-2-3(a).
43. *Id.*
44. *Id.* § 35-50-2-4.
45. *Id.*
46. *Id.* § 35-50-2-13 (a).
47. *Id.* § 35-50-2-13(b).
48. *Id.* § 35-50-2-13(b)(1).

years.[49] This new statute applies only to offenses committed after June 30, 1995.

To lessen the confusion surrounding what is an "episode of criminal conduct" for the purpose of limiting the term of imprisonment imposed as consecutive sentences,[50] the General Assembly defined "episode of criminal conduct" as "offenses or a connected series of offenses that are closely related in time, place, and circumstance."[51] Further, the General Assembly provided a list of offenses that are "crimes of violence," and thus exempt from the sentencing limitation for consecutive sentences.[52] The offenses include: murder, voluntary manslaughter, involuntary manslaughter, reckless homicide, aggravated battery, kidnapping, rape, criminal deviate conduct, child molesting, robbery as a class A or B felony, or burglary as a class A or B felony.[53]

The habitual offender sentencing statute was amended to delete the section that mandated the imposition of a term of life imprisonment if the person was convicted of committing three violent felonies.[54] This section, which had been added by 1994 legislation, was in effect less than one year.

Death penalty legislation was substantially amended this session. Effective July 1, 1995, the death penalty is to be imposed by means of lethal injection.[55] A court that sentences a defendant to death must now fix the date of execution not later than one year and one day after the date of conviction.[56] The Indiana Supreme Court has exclusive jurisdiction to stay the execution of a death sentence.[57] If such occurs, the Supreme Court must establish a new date for the execution.[58] If a petition for post-conviction relief is filed in a death penalty case, and the court concludes that the petition has some merit, the court must set a hearing date within ninety days after the petition is filed.[59] If the court fails to set a hearing date, that failure cannot be a basis for relief.[60] The attorney general is now required to answer the petition on behalf of the State.[61] The prosecuting attorney shall assist the attorney general if so requested. Finally, the post-conviction court is required to enter written findings of fact and conclusions of law within ninety days of the conclusion of the hearing.[62]

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49. *Id.* § 35-50-2-13(b)(2).

50. *See infra* notes 190-198 and accompanying text for a discussion of the manner in which Indiana's appellate courts have interpreted the phrase "episode of criminal conduct" in the old version of the consecutive sentencing statute.

51. IND. CODE § 35-50-1-2(b) (Supp. 1995).

52. *Id.* § 35-50-1-2(a).

53. *Id.*

54. IND. CODE § 35-50-2-8(f) (1993) (repealed 1995).

55. IND. CODE § 35-38-6-1(a) (Supp. 1995).

56. *Id.* § 35-50-2-9(h).

57. *Id.*

58. *Id.*

59. *Id.* § 35-50-2-9(i).

60. *Id.*

61. *Id.*

62. *Id.*

II. Case Developments in 1995

A. Community Corrections Programs

In 1995, the Indiana Court of Appeals clarified what steps the State must take under the requirements of the Due Process Clause to revoke a defendant's placement in a community corrections program. In doing so, the court relied heavily on prior Indiana decisions construing Indiana's probation statutes. In *Million v. State*,[63] Million pled guilty to nonsupport of a dependent and was sentenced by the trial court to a community corrections program on work release as an alternative to incarceration.[64] The trial court ordered Million to serve this sentence consecutively with a work release program he was already sentenced to as the result of another conviction.[65] Approximately one week before he completed his work release from the other conviction, the director of the community corrections program discovered that Million had violated the terms of his community corrections placement.[66]

The community corrections director, in a document entitled "Administrative Hearing," recommended that Million be committed to the Indiana Department of Correction for the nonsupport of a dependent conviction.[67] The trial court accepted the director's recommendation and revoked Million's community corrections placement without a hearing, then conducted a judicial review of the director's administrative determination and affirmed the revocation.[68]

The court of appeals reversed the revocation of Million's placement in the community corrections program and remanded the case to the trial court for a plenary hearing on the revocation.[69] The court made three significant holdings. First, the court held a defendant must receive notice of the terms of his placement in a community corrections program prior to placement in the program, even though the community corrections program statute[70] did not expressly provide that notice was required.[71] The court determined that because Million was orally advised of the terms of his placement at sentencing, he received adequate notice.[72] Second, the court, relying on *Ashba v. State*,[73] a case construing the probation

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63. 646 N.E.2d 998 (Ind. Ct. App. 1995).
64. *Id.* at 999.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 1003.
70. Ind. Code § 35-38-2.6-1 (Supp. 1995).
71. *Million*, 646 N.E.2d at 1000.
72. *Id.* at 1000-01.
73. 570 N.E.2d 937 (Ind. Ct. App. 1991), *aff'd*, 580 N.E.2d 244 (Ind. 1991), *cert. denied*, 503 U.S. 1007 (1992). The court in *Ashba* held that a trial court may revoke a defendant's probation before the defendant commences the portion of a suspended sentence during which he

revocation statute, held that trial courts may revoke a defendant's placement in a community corrections program even before the defendant enters the community corrections phase of the sentence.[74] The trial court thus held that the revocation of Million's placement was not improper when he was still serving his work release from his other conviction at the time he violated the terms of his placement.[75]

Most importantly, the court, relying on *Isaac v. State*,[76] another probation revocation case, held that in order for the trial court to comply with the requirements of due process, it must provide certain procedural safeguards before revoking a defendant's placement in a community corrections program.[77] The court of appeals, reiterating the Indiana Supreme Court's sentiments in *Isaac*, stated that the trial court must provide a defendant with the following: (1) written notice of the claimed violation; (2) disclosure of the evidence against the defendant; (3) an opportunity to be heard and present evidence; and (4) the right to confront and cross-examine adverse witnesses in a neutral hearing before the trial court.[78] The court held that because Million had not been afforded these safeguards, his right to due process of law was violated and he was entitled to a plenary hearing on the revocation of his placement.[79]

B. Evidence

1. Breath Testing Results.—The Indiana Court of Appeals handed down two important decisions relating to the admissibility of breath-test results from "breathalyzer" machines. In the first of the two cases, *Storrjohann v. State*,[80] the defendants, all of whom were charged with driving while intoxicated and with operating a vehicle with at least ten-hundredths percent by weight of alcohol in the blood, appealed the trial court's denial of their motions to suppress their breath test results. The defendants argued that their breath test results were inadmissible because the Department of Toxicology of the Indiana University School of Medicine, as required by statute,[81] failed to establish selection criteria for the

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or she is placed on probation. *Id.* at 939-40.

74. *Million*, 646 N.E.2d at 1000-02. The court noted that the trial court's authority to revoke a community corrections placement prior to the commencement of the defendant's community corrections phase was "inherent in the trial court's discretion both to order placement in a community corrections program and then revoke the placement upon a violation of its terms." *Id.* at 1002.

75. *Id.* at 1002.

76. 605 N.E.2d 144 (Ind. 1992), *cert. denied*, 508 U.S. 922 (1993). *Isaac* set forth the steps that the State must take under the Due Process Clause to revoke a defendant's probation.

77. *Million*, 646 N.E.2d at 1002-03.

78. *Id.* at 1003.

79. *Id.*

80. 651 N.E.2d 294 (Ind. Ct. App. 1995).

81. IND. CODE § 9-30-6-5(a) (Supp. 1995).

breath-testing equipment used to test them.[82]

The court rejected the defendants' argument. The court first noted that existing regulations in the Indiana Administrative Code[83] already provided some selection standards,[84] though these standards were not specifically designated as "selection criteria."[85] Second, the court noted that breath-test results are only inadmissible when some aspect of the test, including the testing equipment itself, is not approved by the Department of Toxicology.[86] Because there was no dispute that the testing equipment the police used to test the defendants was approved by the Department, the court found no basis to suppress the evidence.[87] Finally, the court stated that because the Department had adopted an approved method for the use of the machine used to test the defendants, the machine implicitly met the selection criteria the Department had specified.[88]

The companion case to *Storrjohann* was *Key v. State*.[89] Key, who was convicted of the same offenses as the defendants in *Storrjohann*, challenged his conviction on the same basis as the defendants in *Storrjohann*—that the results of his breath test were inadmissible because the Department had not promulgated standards for the selection of breath-testing equipment.[90] The *Key* court utilized virtually the same analysis that the court in *Storrjohann* had employed. However, unlike the defendants in *Storrjohann*, Key argued that the Department's subsequent adoption of a new administrative rule specifically setting forth selection criteria for breath-testing equipment supported his contention that the Department had not previously adopted selection criteria.[91] The court rejected Key's contention, finding that the new rule was merely a clarification and was not required by statute.[92]

2. Child Sexual Abuse Accommodation Syndrome.—The Indiana Supreme Court handed down a significant opinion regarding the use of expert testimony in

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82. *Storrjohann*, 651 N.E.2d at 295.

83. IND. ADMIN. CODE tit. 260, r.1.1-2-1, r.1.1-2.1 (1992).

84. These standards included: (1) the breath-testing equipment had to be capable of using a specific type of solution to simulate an actual breath test, (2) the machine's test results could not deviate from a specific range of results, and (3) the machine had to yield a result up to a third decimal. *Storrjohann*, 651 N.E.2d at 296.

85. *Id.*

86. *Id.* (citing IND. CODE § 9-30-6-5(d) (Supp. 1995); Mullins v. State, 646 N.E.2d 40, 49 (Ind. 1995)).

87. *Id.*

88. *Id.* at 296-97.

89. 651 N.E.2d 1190 (Ind. Ct. App. 1995).

90. *Id.* at 1191. The *Key* court considered Key's claim to be an issue of first impression because in *Storrjohann*, the two concurring judges concurred in result only. Therefore, the court in *Key* noted that "there was no majority opinion [in *Storrjohann*]. The opinion of a single judge is not an opinion of the Court of Appeals." *Id.* at 1191 & n.1.

91. *Id.* at 1191.

92. *Id.* at 1192.

child molestation cases in *Steward v. State*.[93] Steward was convicted of two counts of child molesting after the State presented evidence through two expert witnesses with experience in dealing with child sexual abuse victims. Both witnesses testified that child sexual abuse victims exhibit common behavioral patterns, more commonly referred to as Child Sexual Abuse Accommodation Syndrome (CSAAS). The witnesses also testified that one of the victims in Steward's case exhibited such behavior.[94] On appeal, Steward argued that this testimony was not scientifically reliable evidence and, therefore, was inadmissible.[95]

The court granted transfer, agreed with Steward, and reversed his conviction on one count.[96] In so doing, the court undertook an extensive analysis of relevant CSAAS periodical literature and case law from other jurisdictions. The court stated that, according to the periodical literature, CSAAS was never intended to be a diagnostic device.[97] Rather, the court explained that CSAAS is a tool for treating child victims and for helping to explain the reactions of children who suffered sexual abuse—such as delayed reporting of the abuse or recantation of allegations of abuse.[98] The court then noted that case law from other jurisdictions typically prohibited the use of CSAAS evidence to show directly or by implication that the victim was abused.[99] However, some of the decisions did permit the introduction of such evidence to rehabilitate the victim when evidence was previously elicited showing that the victim delayed in reporting the abuse or recanted allegations of abuse.[100]

The *Steward* court then determined the outcome of the case by employing the Indiana Rules of Evidence. The court noted that Rule 702(b) requires expert scientific testimony to be based upon reliable scientific principles.[101] Stating that the scientific reliability of CSAAS evidence to prove actual abuse is extremely doubtful and the subject of continued dispute among the legal and scientific communities, the court held that CSAAS evidence is not admissible to prove that sexual abuse occurred.[102] The court emphasized that CSAAS evidence is not admissible to prove abuse even when the expert does not explicitly opine that the victim in a given case was sexually abused.[103] The court reasoned that where an expert testifies that a victim exhibits CSAAS traits, the jury still may tend to infer that the child was abused.[104] This type of inference, the court stated, is forbidden

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93. 652 N.E.2d 490 (Ind. 1995).
94. *Id.* at 492.
95. *Id.*
96. *Id.* at 499-500.
97. *Id.* at 493.
98. *Id.*
99. *Id.* at 495-97.
100. *Id.*
101. *Id.* at 498; *see also* IND. R. EVID. 702(b)(1).
102. *Steward*, 652 N.E.2d at 499.
103. *Id.*
104. *Id.*

by Rule 403, which prohibits evidence that may potentially mislead the jury.[105] However, the court did not foreclose the possibility that sometime in the future, CSAAS evidence could be admissible to prove abuse, provided that subsequent scientific research and investigation sufficiently established the reliability of CSAAS evidence.[106]

Nevertheless, the court ultimately held that CSAAS evidence is admissible for the limited purpose of rehabilitating the victim if the defense discusses or presents evidence of the victim's behavior that is inconsistent with the allegations of abuse, or if the victim recants his or her prior allegation of abuse.[107] The court stated that Rule 702 does not prohibit the admission of CSAAS evidence for rehabilitating the victim because established research already accepts such evidence as reliable for explaining that sexual abuse victims typically exhibit behavior inconsistent with their allegations of abuse.[108] Furthermore, the court noted that Rule 403 does not prohibit the admission of the evidence for the limited purpose of rehabilitating the victim when the evidence is not unfairly prejudicial because "it merely informs jurors that commonly held assumptions are not necessarily accurate and allows them to fairly judge credibility."[109]

3. Impeachment Evidence.—In *Price v. State*,[110] the Indiana Court of Appeals continued to limit the types of evidence of prior criminal convictions that may be used to impeach the credibility of a witness. Price was convicted of burglary and sexual battery. A key witness for the State had previously been convicted of child molesting. On cross examination, the trial court prevented Price from using the child molestation conviction to impeach the witness's credibility.[111] On appeal, Price argued that he should have been permitted to use the prior conviction to impeach the witness.

The court of appeals, citing the Indiana Supreme Court's decision in *Ashton v. Anderson*,[112] found that the trial court properly prohibited Price from using the witness's prior child molestation conviction as impeachment evidence.[113] The court stated that the *Ashton* rule[114] allows a party to use as impeachment evidence

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105. *Id.* Although probative evidence may be excluded if it has the potential of misleading the jury, that potential must itself be great: "Although relevant, evidence may be excluded if its probative value is *substantially outweighed by* the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Ind. R. Evid. 403 (emphasis added).

106. *Steward*, 652 N.E.2d at 499.

107. *Id.*

108. *Id.*

109. *Id.* (quoting State v. Moran, 728 P.2d 248, 251-52 (Ariz. 1986)).

110. 656 N.E.2d 860 (Ind. Ct. App. 1995), *trans. denied.*

111. *Id.* at 862.

112. 279 N.E.2d 210 (Ind. 1972).

113. *Price*, 656 N.E.2d at 863.

114. *Id.* at 862. It should be noted that the court based its decision upon *Ashton* rather than IND. R. EVID. 609, which now governs the use of prior convictions as impeachment evidence. It is presumed that the court employed *Ashton* rather than Rule 609 because Price was convicted prior

only those crimes involving dishonesty or false statement's, or "infamous crimes," including the crime of rape.[115] Price argued that because the witness was convicted of child molestation based upon an act of intercourse, the witness's conviction was the functional equivalent of rape, and, therefore, the conviction was proper impeachment evidence under *Ashton*.[116]

In rejecting Price's claim, the court focused on its prior decision in *Sullivan v. Fairmont Homes, Inc.*,[117] a civil case in which the court held that child molestation is not the equivalent of rape for *Ashton* purposes.[118] The *Price* court extended the *Sullivan* ruling to include the criminal realm and again held that child molestation was not an "infamous crime" under *Ashton*.[119] The court acknowledged that, unlike the civil litigants in *Sullivan*, Price possessed the right to confront and cross-examine the witnesses against him.[120] However, the court stopped short of undertaking a detailed analysis of the confrontation issue. [121]

C. Insanity Defense

In *State v. Van Orden*,[122] the Indiana Court of Appeals discussed the legal implications of the administration of anti-psychotic medication to a defendant during proceedings against that defendant. Julie Van Orden, charged with the murder of a former Evansville mayor, raised the insanity defense at trial.[123] Court-appointed doctors diagnosed Van Orden as a paranoid schizophrenic. Refusing to take medication recommended for her schizophrenia, Van Orden was declared incompetent to stand trial.[124] However, after being hospitalized in a mental institution, Van Orden agreed to take the medication because she wished to stand

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to the effective date of the Indiana Rules of Evidence. However, because Rule 609 is substantially similar to the *Ashton* rule, the court probably would have reached the same result had it decided the case under Rule 609.

115. *Price*, 656 N.E.2d at 862.

116. *Id.* at 863.

117. 543 N.E.2d 1130 (Ind. Ct. App. 1989), *trans. denied.*

118. *Id.* at 1136.

119. *Price*, 656 N.E.2d at 863.

120. *Id.*

121. In fact, the court undertook a very cursory analysis of the confrontation issue. In justifying its holding, the court stated that *Sullivan* was grounded upon the Indiana Supreme Court's decision in Fletcher v. State, 340 N.E.2d 771 (Ind. 1976), in which the Supreme Court "declined to judicially extend the specifically enumerated *Ashton* crimes without direction from [the] legislature." *Price*, 656 N.E.2d at 863. As noted above, the Supreme Court denied transfer in *Price*. Thus, it appears that for the time being, impeachment evidence will be specifically limited to the crimes set forth in *Ashton* or Rule 609.

122. 647 N.E.2d 641 (Ind. Ct. App. 1995), *trans. denied.*

123. *Id.* at 643.

124. *Id.*

trial.[125] At trial, Van Orden appeared before the jury in a medicated state[126] and was convicted of murder.[127]

After losing her direct appeal, Van Orden filed a petition for post-conviction relief in the trial court.[128] The trial court granted Van Orden's petition, finding that she was involuntarily medicated to achieve competency to stand trial in violation of her due process rights and that defense counsel failed to introduce evidence distinguishing between her behavior with and without the medication.[129] The State appealed.

The court of appeals reversed. The court first found that while Van Orden had a protected liberty interest under the Due Process Clause against the unwanted and unnecessary administration of the medication,[130] there was no evidence that Van Orden was involuntarily medicated.[131] The court noted that while Van Orden originally objected to the administration of the medication, she readily acquiesced in its administration after she determined that she wished to stand trial.[132] Furthermore, the court held that the mere fact that she was confined at the time of receiving the medication did not make its administration involuntary.[133]

Next, the court held that the jury was adequately informed as to the type of medication Van Orden was receiving as well as the effect of the medication on her behavior.[134] The court stated that when a defendant raises the insanity defense, the jury is entitled to consider the defendant's in-court behavior and demeanor.[135] However, the court found that Van Orden presented substantial evidence of her mental health history to allow a jury to recognize that her calm demeanor at trial was the result of the medication.[136]

D. Jury Instructions

Two recent appellate decisions have focused on the propriety of different types of jury instructions. First, *Wright v. State*,[137] an Indiana Supreme Court decision, is the most significant case addressing jury instructions in 1995. Prior to *Wright*, several decisions relied upon dicta from the Indiana Supreme Court's decision in *Jones v. State*[138] to hold that the State, by drafting a charging instrument to track

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125. *Id.* at 644.
126. *Id.*
127. *Id.* at 643.
128. *Id.*
129. *Id.* at 643-44, 645.
130. *Id.* at 644 (citing Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 269 (1990)).
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 645.
135. *Id.* (citing Chambers v. Mississippi, 410 U.S. 284 (1973)).
136. *Id.*
137. 658 N.E.2d 563 (Ind. 1995).
138. 438 N.E.2d 972 (Ind. 1982) ("[T]he state through [its] drafting can foreclose as to the

statutory language defining the offense charged, could foreclose an instruction on a lesser included offense of the offense charged.[139] These cases reason that, to allow the State to charge one offense and then to allow the court to instruct the jury on a lesser included offense, would permit the jury to reach a "compromise verdict."[140] However, the court in *Wright* explicitly overruled these cases to the extent that they suggested or inferred that the State could preclude a lesser included offense instruction by the way the State framed the charge in the charging instrument.[141]

Wright was convicted of reckless homicide for the stabbing death of his nephew. The State charged Wright only with murder, but the jury returned a verdict of reckless homicide, a lesser included offense of murder, after the trial court instructed the jury on reckless homicide.[142] Relying on *Jones'* progeny, the court of appeals, in a divided decision, reversed Wright's conviction, finding that it was a violation of due process to convict Wright of an offense with which he was not charged.[143]

The Indiana Supreme Court granted transfer and affirmed Wright's conviction.[144] The court enunciated a three-part analysis to determine whether a trial court may properly give a lesser included offense instruction when a party to the case requests that one be given. First, the trial court must compare the statute defining the crime charged with the statute defining the lesser included offense and determine whether the alleged lesser included offense is "inherently" included within the crime charged.[145] Second, if the trial court determines that the alleged lesser included offense is not inherently included in the crime charged, then it must compare the statute defining the alleged lesser included offense with the charging instrument filed by the State to determine whether the alleged lesser included offense is "factually" included within the crime charged.[146] If the trial court determines that the alleged lesser included offense is either inherently or factually included in the crime charged, it *must* give the requested lesser included

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defendant, the tactical opportunity to seek a conviction for a lesser offense.").

139. Compton v. State, 465 N.E.2d 711, 713 (Ind. 1984); Sills v. State, 463 N.E.2d 228, 235-36 (Ind. 1984).

140. *Sills*, 463 N.E.2d at 235.

141. *Wright*, 658 N.E.2d at 570.

142. *Id.* at 565-66.

143. *Id.* at 566.

144. *Id.* at 572.

145. A lesser included offense is inherently included in the offense charged if:

> (a) the alleged lesser included offense may be established 'by proof of the same material elements or less than all the material elements' defining the crime charged . . . or (b) the only feature distinguishing the alleged lesser included offense from the crime charged is that a lesser culpability is required to establish the commission of the lesser offense.

Id. at 566 (quoting IND. CODE § 35-41-1-16 (1993)).

146. "If the charging instrument alleges that the means used to commit the crime charged include all of the elements of the alleged lesser included offense, then the alleged lesser included offense is *factually* included in the crime charged . . . ." *Id.* at 567.

offense instruction if there is a "serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense and if, in view of this dispute, a jury could conclude that the lesser offense was committed but not the greater."[147] The court emphasized that the wording of a charging instrument may never preclude an instruction on an inherently lesser included offense.[148] The court then employed this analysis and held that because reckless homicide is an inherently included offense of murder, the court of appeals was wrong in reversing Wright's conviction.[149]

The second appellate court decision to focus on the propriety of jury instructions was *Harvey v. State*,[150] which involved a novel jury instruction relating to the defendant's claim of self defense. Harvey was convicted of murder. The evidence at trial demonstrated that Harvey admitted to police that he did not have a license to carry the handgun he used to commit the murder.[151] The trial court gave the following instruction to the jury: "A person who is not in his home or fixed place of business and is carrying a handgun without a license cannot by law claim the protection of the law of self defense."[152] On appeal, Harvey claimed that this instruction deprived him of his only defense to the murder charge.[153]

The court of appeals agreed with Harvey and reversed his conviction.[154] The court examined Indiana Code section 35-41-3-2(d)(1), which provides that a person may not plead self defense if the person "is committing, or escaping after the commission of, a crime."[155] The court stated that a literal interpretation of this section of the self defense statute would authorize the trial court's instruction.[156] However, noting that self defense is "firmly entrenched" in the law of Indiana as a defense to criminal conduct, the court held that subsection (d)(1) of the self defense statute was intended to preclude the defense only where the defendant engaged in the commission of a crime and where that crime "produced the confrontation wherein the force was employed."[157] The court noted that the trial

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147. *Id.* In a concurring opinion, Justice DeBruler disagreed with the requirement that the trial judge evaluate the evidence to determine the propriety of a lesser included offense instruction. *Id.* at 572. Justice DeBruler felt that this requirement rests upon the incorrect assumption that unless the court evaluates the evidence, the jury will render a compromise verdict. *Id.*

148. *Id.* at 570.

149. *Id.* at 567.

150. 652 N.E.2d 876 (Ind. Ct. App. 1995), *trans. denied.*

151. *Id.* at 876.

152. *Id.*

153. *Id.*

154. *Id.* at 877.

155. *Id.*

156. *Id.*

157. *Id.* The court stated that if subsection (d)(1) were taken literally, then a person could not claim self defense if the person, at the time he acted, was coincidentally committing some criminal offense. *Id.* The court cited examples such as possession of a marijuana cigarette or the failure to file an income tax return. *Id.* However, the court did not specifically address how great of a nexus must exist between the crime that the person is committing and the confrontation to

court's instruction disregarded any connection between Harvey's unlawful possession of the firearm and the shooting.[158] It will be interesting to observe the development of this interpretation of the self defense statute, especially if the appellate courts have an opportunity to address it in the context of other crimes.

E. Search and Seizure

Three 1995 decisions discussed search and seizure issues never addressed in the Indiana appellate courts. In *Cutter v. State*,[159] the court of appeals addressed whether a valid search warrant authorizing a search for bodily samples also authorized the seizure of the defendant to obtain those samples. A judge issued a search warrant authorizing the police to search Cutter, a murder suspect, and to seize from him several different bodily samples, including hair, saliva and blood.[160] Cutter argued that when police transported him to a hospital to obtain the samples, this amounted to a "seizure" of his person for Fourth Amendment purposes which the search warrant issued by the judge did not authorize.[161]

The court rejected Cutter's claim and affirmed the trial court's denial of his motion to suppress the evidence.[162] In doing so, the court relied on an Ohio appellate court decision, *State v. Kutz*.[163] In *Kutz*, the defendant moved to suppress evidence of a blood sample taken from him where police obtained a search warrant to obtain the blood but had not placed the defendant under arrest.[164] The *Cutter* court held that a valid search warrant authorizing the taking of bodily samples also authorizes the detention of the person who is the subject of the warrant to the extent necessary to obtain the samples.[165]

In two companion cases, the Indiana Court of Appeals also discussed the "plain feel" doctrine as it relates to a *Terry*[166] "stop and frisk." In the first case, *C.D.T. v. State*,[167]police officers were dispatched to investigate complaints of

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which the person is claiming self defense in order for the option of self defense to be eliminated under the self defense statute. It would seem that in *Harvey*, the shooting would not have occurred but for Harvey's possession of the gun. This certainly presents a different situation than if Harvey had possessed a marijuana cigarette at the time of the shooting. Perhaps the extent of the nexus required will be clarified in future decisions.

158. *Id.*

159. 646 N.E.2d 704 (Ind. Ct. App. 1995), *trans. denied.*

160. *Id.* at 709.

161. *Id.* at 711.

162. *Id.* at 715.

163. 622 N.E.2d 362 (Ohio Ct. App. 1993).

164. *Cutter*, 646 N.E.2d at 711.

165. *Id.* "In the present case, a valid search warrant was obtained prior to obtaining the [bodily] sample[s] from [Cutter]. Because police had a valid search warrant, whether [Cutter] was under arrest at the time the [bodily] sample[s] [were] obtained is of no consequence." *Id.* (quoting *Kutz*, 622 N.E.2d at 365).

166. Terry v. Ohio, 392 U.S. 1 (1968).

167. 653 N.E.2d 1041 (Ind. Ct. App. 1995).

"open air" drug dealing.[168] The officers observed a car stopped in the middle of the street and C.D.T., a juvenile, leaning into the passenger side of the car with his hands inside the passenger window.[169] One officer approached C.D.T. and conducted a pat search of C.D.T.'s outer garments for weapons.[170] The search revealed no weapons but did uncover a crumpled plastic bag in C.D.T.'s front pants pocket.[171] The officer removed the bag and found cocaine inside.[172] After C.D.T. was charged with possession of cocaine in juvenile court, his motion to suppress the contents of the bag was denied.[173]

The court of appeals reversed the juvenile court's delinquency adjudication of C.D.T. after C.D.T. appealed the juvenile court's denial of his motion to suppress.[174] The court of appeals reviewed the officer's stop and search of C.D.T. under the *Terry* "stop and frisk" exception to the Fourth Amendment's warrant requirement.[175] The court reiterated that the purpose of a *Terry* "patdown" of a suspect's outer garments during an investigatory stop is to reveal concealed weapons and not to discover evidence of a crime.[176] However, addressing the State's argument that the plain feel doctrine lawfully permitted the officer to seize the cocaine from C.D.T.,[177] the court for the first time considered the "plain feel" doctrine as set forth in the United States Supreme Court case of *Minnesota v. Dickerson*.[178]

As set forth in *Dickerson*, the plain feel doctrine permits police officers to seize non-threatening contraband discovered during a *Terry* patdown search so long as the search remains within the scope of a valid *Terry* frisk and the officer "feels an object whose contour or mass makes its identity immediately apparent."[179] The court of appeals, relying on an Illinois case[180] that applied the *Dickerson* plain feel test, held that because the officer had already determined that C.D.T. possessed no weapons by the time he seized the cocaine, the search for and seizure of the cocaine was unlawful.[181] This decision suggests that in order for the plain feel doctrine to apply to a given *Terry* frisk, the State must demonstrate that the following factors are present: (1) the discovery of the non-threatening

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168. *Id.* at 1043.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 1048.
175. *Id.* at 1044-45.
176. *Id.* at 1045.
177. *Id.*
178. 508 U.S. 366 (1993).
179. *C.D.T.*, 653 N.E.2d at 1045 (quoting Minnesota v. Dickerson, 113 S. Ct. 2130, 2137 (1993)).
180. People v. Blake, 645 N.E.2d 580 (Ill. App. Ct. 1995), *cert. denied*, 649 N.E.2d 419 (Ill. 1995).
181. *C.D.T.*, 653 N.E.2d at 1046.

contraband must occur during the course of the *Terry* patdown and before the searching officer determines that the suspect is carrying no concealed weapons; and (2) the identity of the contraband must be immediately apparent to the officer upon the officer's feeling of it.

The court of appeals was presented with a different situation in *Drake v. State*.[182] In *Drake*, a police officer conducted a weapons patdown of Drake after the officer discovered Drake asleep in a parked, running car containing a broken steering column, two television sets and a large plastic bag in the passenger compartment. During the search, the officer felt a hard piece of material in Drake's right pants pocket that the officer believed was a weapon.[183] The officer asked Drake to remove the item and Drake pulled out a large roll of cash. When Drake pulled the money out, a plastic bag containing cocaine fell from the middle of the roll to the ground.[184] Drake was convicted of possession of cocaine after the trial court denied his motion to suppress the cocaine.[185]

On appeal, the court of appeals affirmed Drake's conviction.[186] Drake argued that the cocaine was seized as the result of a search that went beyond the scope permitted by *Terry*.[187] The court disagreed, specifically noting that unlike the search in *C.D.T.*, the officer's discovery of the cocaine on Drake occurred during the officer's search for weapons.[188] The court also concluded that the officer had reasonable grounds to believe that the hard object was a weapon.[189]

F. Sentencing

Several recent cases from the court of appeals interpreted the language in the new version of Indiana Code section 35-50-1-2, which provides that the sentence for crimes committed in one "episode of criminal conduct" may not exceed the presumptive term of imprisonment for a felony one class higher than the highest class of felony for which the defendant had been convicted.[190] In *Tedlock v. State*,[191] Tedlock had sold fraudulent securities to several people at different times over the course of two years. Each sale was separated by several weeks or, in one case, by several months. Tedlock pled guilty to four counts of securities fraud, all class C felonies, and was sentenced to an aggregate sixteen years. Tedlock argued that the sales constituted "an episode," and that he could only be sentenced to the presumptive ten-year term for a class B felony.

The State initially argued that Tedlock was not entitled to the benefit of the

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182. 655 N.E.2d 574 (Ind. Ct. App. 1995).
183. *Id.* at 576.
184. *Id.* at 575.
185. *Id.*
186. *Id.* at 577.
187. *Id.* at 575.
188. *Id.*
189. *Id.* at 577.
190. IND. CODE § 35-50-1-2 (Supp. 1995).
191. 656 N.E.2d 273 (Ind. Ct. App. 1995).

new sentencing provision because the statute in effect at the time of the crime did not provide for an upper limit, or cap, for his sentences. Citing the doctrine of amelioration,[192] the court determined that Tedlock was entitled to retroactive application of the "episode" language in the amendment, because it had been enacted after the crimes but prior to his sentencing.

The court went on to determine that in order for several crimes to be considered an "episode," the crimes must be closely related in time and space.[193] In defining an "episode," the court took into account the legislature's amendment of Indiana Code section 35-50-1-2, which provided that an "episode of criminal conduct" constitutes "offenses or a connected series of offense that are closely related in time and circumstance."[194] Because each sale of fraudulent securities was separated by a substantial amount of time, the court found that the sales did not constitute a single "episode" so as to cap the amount of time to which Tedlock could be sentenced.

In two cases following *Tedlock*, the definition of an episode became less clear. These decisions were very fact-sensitive, and seem to have taken a common-sense approach to the definition of "episode." In *Trei v. State*,[195] the defendant jumped out from behind a tree as the female victim and her friend were walking. He held the two at knifepoint while he raped one of the victims. He was convicted of sexual misconduct with a minor, a class A felony, and two counts of confinement, both class B felonies. He was sentenced to serve forty-five years on the sexual misconduct conviction and twenty years for each confinement conviction. The sentence for the sexual misconduct conviction and one of the confinement convictions were to be served concurrently, while the second confinement conviction was to be served consecutively to those sentences, resulting in an aggregate term of sixty-five years imprisonment. The court of appeals held that the three crimes constituted one "episode" and that the defendant's sentence could not exceed the presumptive fifty-year term for murder, which was one class of felony higher than the class A felony of sexual misconduct.[196] The court remanded the case to the trial court for imposition of the maximum fifty-year term.

Conversely, in *Reynolds v. State,*[197]the Defendant burglarized three separate homes in a single day. The trial court sentenced him to serve twenty years for each burglary conviction, to be served consecutive to one another. Taking the definition of "episode" in *Tedlock* into account, the court of appeals determined that each burglary constituted a "distinct episode in itself," because the burglaries were neither simultaneously committed nor contemporaneous with one another

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192. The doctrine of amelioration provides that a defendant may take advantage of an ameliorative amendment that decreases the penalty for a crime after the defendant has committed it but prior to his sentencing. *Id.* at 275.

193. *Id.* at 276.

194. *Id.* at 275.

195. 658 N.E.2d 131 (Ind. Ct. App. 1995).

196. *Id.* at 134.

197. 657 N.E.2d 438 (Ind. Ct. App. 1995).

and each burglary could be described without reference to the other burglaries.[198] The defendant could therefore be sentenced to serve the twenty-year sentences for each crime consecutively because the sentencing cap did not apply.

Another recent development in the area of consecutive sentencing implicating Indiana Code section 35-50-1-2, includes a case in which the court of appeals determined when a defendant must be sentenced to consecutive terms for a crime committed after he had been arrested and released "on bond." In *Martin v. State*,[199] the court noted that the circumstances under which a trial court must impose consecutive sentences include those in which a criminal act is committed while another criminal matter is pending.[200] Martin had committed a battery, and, while still subject to conditions imposed by an agreement executed with the prosecution, he committed a second and third battery. The agreement he executed was revocable if he failed to perform the conditions. The court concluded that he was "on bond" within the meaning of the statute because he had not yet performed the conditions imposed in the agreement.[201] Once conditions contained in such an agreement are performed, however, the charge is resolved and the defendant is no longer subject to mandatory consecutive sentences because he is no longer "on bond."[202] Because Martin committed the second and third batteries prior to performance of the conditions set out in the agreement, he was subject to consecutive sentencing.

An additional noteworthy case, *State v. Messenger*,[203] involved the vacation of a previous enhancement to an underlying conviction. In February 1993, Messenger was charged with Operating a Vehicle while Intoxicated with a Prior Conviction of Operating While Intoxicated (OWI with a prior) and Operating a Vehicle with ten hundredths percent or more by weight of alcohol in his blood with a Prior Conviction of Operating While Intoxicated. Both charges were filed as class D felonies because of two previous convictions: a 1988 conviction for Operating a Vehicle While Intoxicated, a class A misdemeanor, and a 1991 conviction for Operating a Vehicle While Intoxicated with a Prior Conviction, a class D felony. At some point, Messenger had successfully challenged the 1988 conviction by way of a petition for post-conviction relief. While the 1993 charges were pending, he made a similar challenge to the 1991 conviction, arguing that the conviction should be vacated because the 1988 conviction upon which it was based had been vacated. The post-conviction court agreed and vacated the 1991 class D felony conviction. However, on August 13, 1993,[204] the court entered the

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198. *Id.* at 441.

199. 645 N.E.2d 1100 (Ind. Ct. App. 1995). This case is the decision upon the petition for rehearing filed by the State. The original decision that the court reversed in the present opinion may be found at 638 N.E.2d 1349 (Ind. Ct. App. 1994).

200. *Martin*, 645 N.E.2d at 1102.

201. *Id.*

202. *Id.*

203. 650 N.E.2d 702 (Ind. Ct. App. 1995).

204. Although the order was dated July 13, 1993, there is some confusion in the opinion as to whether the order was actually dated July 13, 1993 or August 13, 1993.

conviction as a class A misdemeanor.[205]

Messenger then filed a motion to dismiss the two 1993 charges because the 1991 conviction was no longer a "prior" conviction due to the trial court's August 1993 entry. The trial court dismissed both charges. In an interlocutory appeal, taken by the State, Judge Rucker used complex reasoning to conclude that the trial court had erroneously dismissed the 1993 charges. The court held that where a defendant successfully challenges the enhancement of his OWI conviction, the underlying offense is not disturbed.[206] Thus, the underlying 1991 conviction, the class A misdemeanor, was not vacated but remained a "prior" conviction for purposes of the 1993 charges.[207] The August 13, 1993 order operated only to set aside the enhanced portion of Messenger's offense.[208]

In his dissent, Judge Sullivan disagreed with the majority's conclusion that the order of August 13th vacated only the enhancement. Instead, he determined that the trial court's order had vacated Messenger's entire conviction.[209] Judge Sullivan concluded that the August 13 order was not a *nunc pro tunc* entry, agreeing with Messenger that his conviction was not "prior" for purposes of the pending charge.[210]

G. Double Jeopardy

Several recent developments in Indiana clarify the law regarding double jeopardy analysis. In *Wethington v. State,*[211] the court seemed to use a different analysis in determining that a defendant had not been placed in jeopardy twice for his conduct. Wethington abducted the victim in her vehicle, demanded her money, threatened to kill her, and repeatedly struck her in the head with a tire iron. Wethington was convicted of robbery, as a class A felony, kidnapping, attempted murder, and auto theft. The court held that his attempted murder conviction, which required an intent to kill, was based upon his intentional act in swinging the tire iron at the victim, regardless of whether he actually inflicted any injury.[212] However, the serious bodily injury used to elevate the defendant's conviction of robbery to a class A felony required no intent.[213] Because Wethington had inflicted multiple injuries upon the victim, the injuries were not a single act. Thus, the court explicitly held that his convictions of attempted murder and robbery as a class A felony were based upon different acts.[214] Notably, the court did find that the auto theft charge of which Wethington had been convicted was a lesser

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205. *Messenger*, 650 N.E.2d at 703.
206. *Id.* at 704.
207. *Id.* at 704-05.
208. *Id.* at 704.
209. *Id.* at 705.
210. *Id.*
211. 655 N.E.2d 91 (Ind. Ct. App. 1995).
212. *Id.* at 96.
213. *Id.*
214. *Id.* at 96-97.

included offense of his robbery conviction because both convictions were based upon the taking of the same car.[215] The court concluded that the auto theft conviction violated his double jeopardy rights and vacated the conviction.[216]

In *State v. Allen,*[217] the State appealed the trial court's dismissal of conspiracy charges against two defendants. In *Allen*, Flora and Darlene Allen had been charged in federal court with conspiracy to possess with the intent to distribute and deliver cocaine. Both pled guilty to the federal conspiracy charge. They were then indicted on several charges, including a charge of Corrupt Business Influence based upon Indiana's Racketeer Influenced and Corrupt Organizations statute (RICO)[218] and conspiracy to deliver cocaine. The trial court determined that prosecution upon the state charges was barred due to the prior federal prosecution for the same conduct and subsequently dismissed the charges as to both Flora and Darlene. The court of appeals determined that the trial court erred in dismissing the Indiana RICO charges, but concluded that the state conspiracy prosecution was barred by Indiana's double jeopardy statute[219] and the conspiracy charge encompassed the same acts as the federal charge.

Relying mainly upon federal law, Judge Sullivan determined that the predicate offense for the Indiana RICO charge, the conspiracy to possess cocaine, was based upon the same conduct for which the defendants were convicted in the federal court.[220] However, the state charges did not violate Indiana's double jeopardy prohibition.[221] After finding that the Indiana legislature intended separate offenses for RICO charges and the predicate offenses charged therein, the court went on to conclude that the conspiracy to possess and deliver cocaine offense is not the "same offense" as an Indiana RICO violation because it requires proof of different elements than those required for the federal conspiracy charge.[222] In analyzing the predicate offenses for the RICO charges against Flora, the court found that because the prosecution for the underlying felonies did not violate double jeopardy, the RICO prosecution did not do so.[223] The court noted that she could be convicted of three counts of possession of cocaine as well as the federal conspiracy conviction without being subject to double jeopardy.[224] Thus, the state possession charges were different from that charged in the federal conspiracy count,[225] and, while the possession charges were the underlying felonies for the federal conspiracy charge, Flora could be subsequently prosecuted for the state

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215. *Id.* at 97.

216. *Id.*

217. 646 N.E.2d 965 (Ind. Ct. App. 1995).

218. IND. CODE §§ 35-45-6-1, -2 (1993).

219. IND. CODE § 35-41-4-5 (1993) (preclusive effect of former prosecutions in other jurisdictions).

220. *Allen*, 646 N.E.2d at 970.

221. *Id.*

222. *Id.* at 971.

223. *Id.* at 970-71.

224. *Id.* at 970.

225. *Id.*

RICO charges.

Likewise, the court held that Darlene was not subjected to double jeopardy where the State used two instances of possession of cocaine as predicate offenses, though she had been convicted of the federal conspiracy charge based upon the same conduct.[226] In so doing, the court cited federal law holding that a conspiracy conviction for possession or delivery of cocaine "may be used as a predicate offense for a RICO violation without violating double jeopardy."[227] The court did find, however, that the state prosecution for conspiracy to deliver cocaine constituted double jeopardy because it was clearly based upon conduct encompassed within the federal conspiracy charge.[228]

This year, the court also held that more than one hearing on a probation violation does not implicate double jeopardy concerns. In *Childers v. State,*[229] the court found that double jeopardy had not been implicated where the defendant's probation had been revoked based upon his escape from a county jail, the court later rescinded the revocation of probation, and the defendant was then subject to a second probation revocation hearing where his probation was finally revoked.[230] Double jeopardy prohibitions were not violated in the *Childers* case because the law does not consider a probation violation an "offense" for purposes of the Clause; instead, revocation proceedings are based only upon the violation of probation conditions, rather than upon the commission of a crime.[231]

In a related area, the court of appeals determined that administrative punishment of an inmate by prison officials does not preclude the State's subsequent criminal prosecution for the same acts. In *State v. Mullins,*[232] Mullins had been involved in a scuffle with a corrections officer. The court held that the Department of Correction may impose discipline, but may not lengthen a prison term based upon behavior committed within an institution.[233] Although the administrative action deprived Mullins of credit time, it did not impinge upon her liberty interest and, subsequently, did not trigger double jeopardy concerns.[234] The court found that the principle of double jeopardy applies only to criminal prosecutions.[235] Therefore, the administrative proceeding and its attendant consequences to Mullins did not preclude a subsequent criminal prosecution for battery.

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226. *Id.* at 971.
227. *Id.*
228. *Id.* at 972.
229. 656 N.E.2d 514 (Ind. Ct. App. 1995).
230. *Id.* at 515.
231. *Id.* at 517.
232. 647 N.E.2d 676 (Ind. Ct. App. 1995).
233. *Id.* at 678.
234. *Id.*
235. *Id.*

H. Due Process

An interesting development in the area of due process hinged upon the Indiana Supreme Court's analysis of Indiana Code section 35-26-7-1, which allows for permissive continuances and those continuances that the trial court must grant as a matter of right. In *Flowers v. State*,[236] the trial court denied the defendant's motion for continuance based upon the withdrawal of his DNA expert. Flowers obtained a second DNA expert, but the expert could not be prepared for trial until the following day. The court stated that a defendant is entitled to a continuance as a matter of right if he meets the requirements set out in the statute.[237] However, if the defendant does not meet the statutory requirements, the court must engage in a balancing test, weighing the interests of the State against those of the defendant.[238] The court made clear that if the trial court does not engage in the mandated balancing of the parties' interests in determining whether to grant a discretionary continuance, it abuses its discretion and, consequently, violates the defendant's due process rights.[239] Here, the defendant did not meet the requirements for a continuance as a right; however, the trial court had not engaged in the balancing process in denying his request for a continuance. Consequently, the case was remanded for a new trial.

In *Braxton v. State*,[240] the Indiana Supreme Court addressed the procedural limits placed upon probation revocations by the Due Process Clause. In 1992, Braxton had pled guilty to three counts of dealing in cocaine. She was sentenced to serve fifteen years, with one year executed, one year on home detention, and thirteen years on probation. After she began serving her term of home detention, Braxton was charged with violating the conditions of her detention by tampering with her monitoring device. When she was arrested for violating home detention, she became unruly enough for the police to charge her with disorderly conduct. After an inventory search, she was charged with possession of marijuana and tested positive for the drug. The court noted that the Due Process Clause requires that a probationer be accorded written notice of alleged violations.[241] Although the trial court had not informed her that the conditions of her home detention were also conditions of her probation, that omission was immaterial because "it is always a condition of probation that a probationer not commit an additional crime."[242] Because Braxton had been informed at the revocation hearing that the State sought probation revocation and because she had written notice of the alleged violations, the requirements of due process were satisfied.

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236. 654 N.E.2d 1124 (Ind. 1995).

237. *Id.* at 1125. In the opinion, the court does not enumerate the requirements or conditions to which it refers.

238. *Id.*

239. *Id.*

240. 651 N.E.2d 268 (Ind. 1995).

241. *Id.* at 270 (citing IND. CODE § 35-28-2-1(a) (1993)).

242. *Id.*

I. Controlled Substances Excise Tax and Forfeiture Law

The Indiana Supreme Court has recently made several determinations relative to Indiana's drug tax, known as the Controlled Substances Excise Tax, or CSET.[243] In *Bryant v. State*,[244] the court held that a prosecution for the failure to pay the civil CSET sanctions, pursuant to Indiana Code sections 6-7-3-8[245] and 6-7-3-11,[246] is a punishment for the purposes of double jeopardy.[247] After responding to a break-in at Bryant's home, police discovered over 250 marijuana plants, dried seeds, and assorted paraphernalia. The Indiana Department of Revenue assessed a tax of $83,680. When Bryant did not immediately pay the tax upon the demand of the Department's agent, the Department assessed a one-hundred percent penalty, which increased Bryant's total obligation to $167,360. In addition, the Department seized Bryant's home. The State later filed criminal charges against Bryant. He was charged with the failure to pay the CSET, a class D felony;[248] growing and cultivating over 30 grams of marijuana, a class D felony;[249] maintaining a common nuisance, a class D felony;[250] and possession of less than 30 grams of marijuana, a class A misdemeanor.[251] Bryant was convicted on all four counts.

The court noted that the Double Jeopardy Clause prohibits subsequent prosecution after either acquittal or conviction, as well as multiple punishment for the same offense.[252] In determining whether the CSET's civil sanctions constituted a punishment in addition to its criminal penalties, the court relied heavily upon the recent United States Supreme Court decision *Department of Revenue of Montana v. Kurth Ranch*.[253] The court also considered four factors; (1) the deterrent, as opposed to the revenue, purpose of the tax; (2) the high rate of the tax; (3) the prerequisite of the commission of a criminal offense before its assessment; and (4) the nature of the tax.[254]

After applying the *Kurth Ranch* test, the court held that the "assessment of the

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243. IND. CODE §§ 6-7-3-1 to -17 (1993).

244. 660 N.E.2d 290 (Ind. 1995).

245. Indiana imposes a tax on the delivery, possession, or manufacture of controlled substances in Indiana in violation of IND. CODE § 35-48-4 or 21 U.S.C. §§ 841-852. IND. CODE § 6-7-3-8 (1993).

246. Indiana Code § 6-7-3-11(a) provides that a person who fails to pay the tax is subject to a penalty of 100% in addition to the tax, while subsection (b) provides that a person who delivers, possesses, or manufactures a controlled substance without having paid the tax due commits a class D felony. IND. CODE § 6-7-3-11 (1993).

247. *Bryant*, 660 N.E.2d at 297.

248. IND. CODE § 6-7-3-11(b) (1993).

249. *Id.* § 35-48-4-11(2).

250. *Id.* § 35-48-4-13 (Supp. 1995).

251. *Id.* §35-48-4-11(1).

252. Bryant v. State, 660 N.E.2d 290, 300 (Ind. 1995).

253. 114 S. Ct. 1937 (1994).

254. *Bryant*, 660 N.E.2d at 296.

CSET" constituted a punishment for purposes of double jeopardy.[255] Because the taxpayer was required to show a receipt to prove he paid the CSET, and that receipt was valid for only forty-eight hours, thus requiring the taxpayer to continually renew the receipt while he possessed the drug, the tax evidenced a deterrent purpose.[256] In applying the second prong of the test, the court noted that the high rate of the civil CSET penalty indicated a "punitive character."[257] The court stated that the tax could not be viewed as a normal excise tax.[258] Additionally, the CSET could only be assessed after the drugs had been confiscated, thereby limiting the imposition of the tax until after arrest.[259]

Once the court determined that the CSET's civil sanction was a "jeopardy," it employed the *Blockburger v. United States*[260] analysis to determine that imposing both the civil and the criminal sanctions of the CSET constituted dual punishments for the same offense.[261] The elements of the CSET's civil and criminal sanctions were identical, except for the mens rea requirements of Indiana Code section 6-7-3-11(b), and the elements of subsection (a) were included within subsection (b). Moreover, the opinion clearly held that the assessment of the CSET is a critical juncture at which jeopardy attaches.[262] Once the CSET has been assessed, jeopardy attaches, barring a defendant's subsequent prosecution for the failure to pay the tax.[263] The court left the decision whether to assess the civil penalty or to seek criminal prosecution under the statute to the Department of Revenue and the prosecutor or to the General Assembly.[264] Not only did the court vacate Bryant's criminal conviction under Indiana Code section 6-7-3-11(b), but it also determined that his convictions for growing more than 30 grams of marijuana and possessing more than thirty grams of marijuana were subsequent, and impermissible, "jeopardies" to which he should not have been subjected.[265]

In *Clifft v. Indiana Department of Revenue,*[266] the court followed *Bryant*, holding that jeopardy attached when the CSET is assessed and that a subsequent guilty plea constituted double jeopardy.[267] The Indiana Supreme Court also

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255. *Id.* at 296-97.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. 284 U.S. 299 (1932).
261. *Bryant*, 660 N.E.2d at 297-98.
262. *Id.* at 299.
263. *Id.* at 300.
264. *Id.*
265. *Id. Bryant* is also notable for the court's decision regarding the initial search of Bryant's house when police responded to the burglar alarm. The court recognized an exception to the Fourth Amendment's warrant requirements, holding that police may enter private property when they "reasonably believe that the premises have recently been or are being burglarized." *Id.*
266. 660 N.E.2d 310 (Ind. 1995).
267. *Id.* at 313.

applied the test enumerated in *Marchetti v. United States*[268] and *Grosso v. United States*[269] to uphold the CSET against a self-incrimination challenge.[270] The CSET does not require the impermissible disclosure of information admitting that the defendants conducted illegal activity; nor does the CSET require taxpayers to personally present themselves to the Department of Revenue.[271] Additionally, the CSET does not violate the precepts of procedural due process because it allows for meaningful relief, providing the equitable remedy of injunctive relief prior to the deprivation of the taxpayer's property, as well as the opportunity for administrative and judicial hearings after the deprivation.[272] In essence, the court held that the postponement of administrative and judicial remedies is not a denial of due process.[273]

In another case decided on the same day as *Bryant,* the Indiana Supreme Court determined that convictions of both dealing in cocaine and the failure to pay the CSET in the same proceeding violated double jeopardy. In *Collins v. State*,[274] the court affirmed the court of appeals decision vacating Collins' conviction for failing to pay the CSET because it violated the Double Jeopardy Clause. Because Collins had been subject to multiple punishments in a single proceeding, the analysis focused upon whether those punishments were for the "same offense," or whether one crime was included within the other.[275]

Comparing the elements required to convict Collins of delivering cocaine under Indiana Code section 35-48-4-1 to the elements required to convict him for failing to pay the CSET under Indiana Code section 6-7-3-11(b), the court determined that the convictions constituted punishments for the same offense.[276] Further, because the delivery of cocaine and the failure to pay the CSET were based upon the same cocaine, or *res*, the offense of delivery was encompassed within the elements of the CSET's "criminal penalty."[277] Thus, dealing is a lesser included offense of the CSET's criminal sanction because the only unique fact to be proven for a conviction under Indiana Code section 6-7-3-11(b) was the failure to pay the tax.[278]

However, in an interesting twist, the Indiana Supreme Court applied the conventional *Blockburger* double jeopardy analysis to another CSET case, *Whitt v. State*.[279] The court determined that sufficient evidence supported Whitt's conviction for possession of cocaine within one thousand feet of school property

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268. 390 U.S. 39, 47-48 (1968).
269. 390 U.S. 62 (1968).
270. *Clifft*, 660 N.E.2d at 314-17.
271. *Id.* at 316-17.
272. *Id.* at 318.
273. *Id.*
274. 659 N.E.2d 509 (Ind. 1995).
275. *Id.* at 509.
276. *Id.* at 510.
277. *Id.* at 511.
278. *Id.*
279. 659 N.E.2d 512 (Ind. 1995).

under Indiana Code section 35-48-4-6.[280] Further, Whitt's double jeopardy rights had not been violated because his conviction required that the State prove the element of possession within one thousand feet of school property, while his conviction under Indiana Code section 6-7-3-11(b) for failure to pay the CSET required that the State prove that he possessed cocaine without having paid the CSET.[281] Although Whitt cited *Kurth Ranch*[282] for the proposition that his convictions violated his double jeopardy rights, the court determined Whitt could be convicted of both possession of cocaine within one thousand feet of school property and of failing to pay the CSET because each crime contained an element that the other did not,[283] unlike Collins' convictions in *Collins v. State*.[284] The court did not apply the "same conduct" test to Whitt's convictions.

Whitt is particularly notable in that it appears to limit the application of the double jeopardy principles that the supreme court applied in *Bryant, Collins,* and *Clifft*, solely to cases in which the defendant is charged with dealing and failing to pay the CSET. In cases where the State charges the defendant with a drug-related crime that has an additional element, as it did in *Whitt*, there appears to be no prohibition of prosecuting him for both crimes. However, in light of the vacated offenses in *Bryant*, it remains to be seen whether the court will apply the same analysis to situations where a different combination of offenses is charged.

In a related area, the Indiana Court of Appeals in *Tracy v. State*,[285] made an interesting addition to the scant Indiana precedent regarding the forfeiture of property seized by law enforcement agencies as the result of a defendant's participation in a crime. Tracy had been the subject of a controlled buy in which Tracy and a cohort, Donald, exchanged $26,000 for 26 pounds of marijuana with an officer of the Hamilton County Drug Task Force. Both men were apprehended as they left the motel room with the marijuana. Donald had carried a compact disc case in which the men had brought the money for the purchase. Upon their arrest, police seized the case, the drug money and an additional amount of money unrelated to the buy from the compact disc case Donald was carrying. The State released the entire amount, $29,126.04, to the DEA several months prior to Tracy's guilty plea. In return, the Hamilton County Drug Task Force received forty percent of the proceeds.

Although Tracy relied on Indiana Code section 35-33-5-5 to contend that the State was required to hold all of the money until the final disposition of Tracy's case, the court of appeals determined that it was not necessary to determine that issue because there had been no "seizure" of the $26,000 within the definition of the statute—Tracy had consensually exchanged the money with the officer.[286] Because there was no seizure, the Drug Task Force was not required to hold the

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280. *Id.* at 513. *See* IND. CODE § 35-48-4-6 (1993).
281. *Whitt*, 659 N.E.2d at 514.
282. Montana Dep't of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994).
283. *Whitt*, 659 N.E.2d at 514.
284. 659 N.E.2d 509 (Ind. 1995).
285. 655 N.E.2d 1232 (Ind. Ct. App. 1995).
286. *Id.* at 1235.

$26,000 until Tracy's final disposition.[287] Even had there been a seizure, the appellate court would not interpret the statute to apply to all property seized as a result of a criminal investigation; it would apply only to property seized under the specific circumstances enumerated in the statute.[288] Further, the court also determined that Donald carried the money at the time of his arrest and that Tracy failed to prove by a preponderance of the evidence that he was the rightful owner of the additional funds.[289]

In his dissent, Judge Friedlander disagreed with the court's disposition of the issue Tracy raised regarding whether the Drug Task Force had improperly neglected to obtain a court order prior to turning the money in excess of the $26,000 over to the DEA while Tracy's criminal case was ongoing.[290] Applying several federal courts' statutory construction of similar state laws, he astutely recognized that Indiana Code section 35-33-5-5(a) vested jurisdiction over the seized money in the state court because it had been seized as the result of an arrest.[291] Consequently, the dissent found that the transfer from the state police to the DEA was not authorized by the court having jurisdiction over the money.[292]

J. Guilty Pleas

This year, the Indiana Supreme Court laid to rest any confusion that might have arisen regarding the standard of review for the factual basis of a guilty plea. In *Butler v. State*,[293] the court of appeals granted post-conviction relief on finding that the trial court abused its discretion when it accepted Butler's guilty plea without proof of all the relevant facts constituting the elements of the crime, even though the defendant and the prosecutor acknowledged that the facts supported a plea.[294] Butler had initially been charged with several crimes resulting from an auto accident, including operating a motor vehicle while intoxicated causing death, reckless homicide, four counts of criminal recklessness causing serious bodily injury, four counts of operating a motor vehicle while intoxicated causing serious bodily injury, driving while suspended and an habitual substance offender charge. After pleading guilty to the habitual substance offender charge and operating a vehicle while intoxicated resulting in death or serious bodily injury, Butler challenged his status as an habitual substance offender through a petition for post-conviction relief. He claimed that at the time he pled guilty to the habitual substance offender charge he was unaware that the statute required the two prior convictions to be class A misdemeanors or felonies; one of his prior convictions was a class C misdemeanor. The post-conviction court had made a finding that,

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287. *Id.*
288. *Id.*
289. *Id.* at 1236.
290. *Id.* at 1236-37.
291. *Id.* at 1237.
292. *Id.*
293. 658 N.E.2d 72 (Ind. 1995).
294. *Id.* at 74.

contrary to his assertions, Butler had indeed been convicted of a class A, rather than a class C, misdemeanor.[295]

The court reframed Butler's issue as whether an adequate factual basis existed for his guilty plea rather than whether the trial court erred in its determination that he had committed two prior class A misdemeanors.[296] While acknowledging that a lower court has wide discretion regarding the various "degrees and inquiries" required by the circumstances, the Indiana Supreme Court enumerated the standard regarding the quantity and type of evidence that may constitute an adequate factual basis for a guilty plea: "a factual basis exists when there is evidence about the elements of the crime from which a court could reasonably conclude that the defendant is guilty."[297] The court noted that "relatively minimal" evidence has, in the past, constituted an adequate basis, and the court need not find proof of guilt beyond a reasonable doubt in order to support a guilty plea.[298] Using the post-conviction relief standard, the court concluded that Butler had not proven that he did not commit the predicate offenses because he acknowledged the allegations in the information and his two prior "D.U.I.'s" at the guilty plea hearing.[299] Because the evidence did not lead to a conclusion opposite that reached by the post-conviction court, the supreme court reversed the appellate court's grant of post conviction relief.[300]

K. Post-Conviction Relief

Several interesting developments have arisen this year regarding the procedures to be followed when a defendant pursues post-conviction relief. In *Howard v. State*,[301] the Indiana Supreme Court interpreted Indiana Rule of Post-Conviction Relief 2(1) as a remedy for belated *direct* appeals, rather than for belated appeals of other post-judgment petitions. Indiana Rule of Post-Conviction Relief 2 reads, "[w]here a defendant convicted after a trial or plea of guilty fails to file a timely praecipe, a petition for permission to file a belated praecipe for appeal of the conviction may be filed with the trial court . . . ."[302] The court determined that the 1994 amendment to the rule, which added the words "for appeal of the conviction," made it the vehicle for belated direct appeals, whereas the previous incarnation of Post-Conviction Relief 2 had allowed for belated appeals of other petitions including petitions for post-conviction relief under Post-Conviction Relief 1.[303] Because Howard attempted to initiate an untimely appeal of the denial of his petition for post-conviction relief rather than a

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295. *Id.* at 78.
296. *Id.* at 75.
297. *Id.* at 77.
298. *Id.*
299. *Id.* at 78.
300. *Id.* at 79.
301. 653 N.E.2d 1389 (Ind. 1995).
302. IND. R. POST CONVICTION RELIEF 2(1) (1996).
303. *Howard*, 653 N.E.2d at 1389.

conviction after a trial or a guilty plea, the supreme court affirmed the appellate court's denial of his petition for permission to file a belated praecipe pursuant to the rule.[304]

Another procedural development concerning petitions for post-conviction relief includes an opinion in which the Indiana Supreme Court determined that a petitioner may not use Indiana Trial Rule 60(B) to collaterally challenge his conviction while circumventing post-conviction procedures. In *Van Meter v. State,*[305] the court held that Van Meter could not use Trial Rule 60(B) to challenge his convictions of burglary, attempted theft, and an habitual offender adjudication because the Trial Rules applied only to civil cases.[306] Relying on the language of Indiana Rule of Post-Conviction Relief 1, the court noted that the Rule specifically precluded other previously available methods for challenging such convictions.[307] The post-conviction procedures required Van Meter to present his claim of newly discovered evidence by way of those rules.[308]

L. Equal Protection and Privileges and Immunities

In *American Legion Post #113 v. State,*[309] the American Legion challenged Indiana's anti-gambling statutes[310] as violative of the Privileges and Immunities Clause of the Indiana Constitution[311] and the Equal Protection Clause of the United States Constitution.[312] The appellate court determined that the challenged statutes were general prohibitions against gambling that did not differentiate among classes of persons, and that the legislature's authorization of certain types or "forms" of gambling, such as riverboat and pari-mutuel, did not create unlawful classifications of individuals; instead, they allowed all individuals to participate in those specific activities.[313] After applying the two-part standard of *Collins v. Day,*[314] the court found that the statutory authorization of the State Lottery Commission, which exempted it from prosecution, is reasonably related to the State's interest in maintaining integrity and control over gambling activities.[315] The statutory authorization of the State Lottery Commission was therefore

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304. *Id.* The reasoning of *Howard* has been recently applied in Bailey v. State, 653 N.E.2d 518 (Ind. Ct. App. 1995). The court of appeals held that the trial court correctly denied Bailey's petition for permission to file a belated praecipe to appeal the trial court's denial of his petition for post-conviction relief. *Id.*

305. 650 N.E.2d 1138 (Ind. 1995).

306. *Id.*

307. *Id.*

308. *Id.* at 1139.

309. 656 N.E.2d 1190 (Ind. Ct. App. 1995).

310. IND. CODE §§ 35-45-5-2, -3, -4 (1993).

311. IND. CONST. art. I, § 23.

312. U.S. CONST. amend XIV.

313. *American Legion*, 656 N.E.2d at 1193.

314. 644 N.E.2d 75 (Ind. 1995).

315. *American Legion*, 656 N.E.2d at 1193.

constitutional.[316]

As for the American Legion's fourteenth amendment rights to equal protection, the court applied a "rational basis" analysis determining that the "lottery exception" is rationally related to a legitimate government purpose, to wit: the State's interest in maintaining control over a generally illegal industry and in producing revenue that benefits the public welfare.[317] In addition, the appellate court upheld the statutes against a challenge to the State's police power, noting that the Indiana Supreme Court recognized that the State has a legitimate interest in protecting the health, safety and welfare of its citizens in relation to gambling activities through its exercise of its police power.[318]

316. *Id.*
317. *Id.* at 1194.
318. *Id.*