INDIANA CONSTITUTIONAL DEVELOPMENTS: EVOLUTION ON INDIVIDUAL RIGHTS

JON LARAMORE*

I. DECISIONS RELATING TO INDIVIDUAL RIGHTS

During the survey period, Indiana's appellate courts continued developing doctrine applying the Indiana Constitution on a number of topics. The Indiana Supreme Court issued significant opinions explaining the scope of the Open Courts Clause in article 1, section 12 and addressing the rights of accused persons under article 1, section 13. Both sections elaborate rights under the Indiana Constitution that go beyond rights extended by the United States Constitution.[1] Also, the Indiana Court of Appeals issued a decision explaining the rights of students to an adequate education under article 8 (although the Indiana Supreme Court's grant of transfer in that case shifts the issue to the higher court)[2] and another decision using the *Ex Post Facto* Clause to invalidate, on an as-applied basis, restrictions on residency for convicted sex offenders who have completed their sentences.[3] Both courts continued to develop state constitutional doctrine on search and seizure and "multiple punishments" double jeopardy, expanding protections in both areas beyond those provided by the United States Constitution.[4] These decisions show doctrinal advancement in some areas of individual rights guaranteed by the Indiana Constitution.

A. The Open Courts Clause of Article 1, Section 12

The Indiana Supreme Court used the Open Courts Clause of article 1, section 12 to invalidate a statute restricting prisoners from filing lawsuits in certain circumstances in *Smith v. Department of Correction*.[5] The statute in question required trial courts to dismiss any civil lawsuit brought by a prisoner who previously filed three or more civil lawsuits that were dismissed as frivolous under the Frivolous Claims Act.[6] The trial court in this case dismissed the prisoner's lawsuit, and the court of appeals affirmed, ruling that the state's interest in limiting frivolous lawsuits by prisoners outweighed a prisoner's right to file.[7]

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* Partner, Baker & Daniels LLP. Former chief counsel to Governor Frank O'Bannon and Governor Joseph E. Kernan and former adjunct professor, Indiana University School of Law—Indianapolis.

1. *See infra* Part I.A, C.

2. *See* Bonner *ex rel.* Bonner v. Daniels, 885 N.E.2d 673 (Ind. Ct. App. 2008), *trans. granted and aff'd*, 907 N.E.2d 516 (Ind. 2009).

3. *See infra* Part I.B, D.

4. *See infra* Part I.F-G.

5. 883 N.E.2d 802 (Ind. 2008).

6. *See* P.L. 80-2004, § 6, *codified at* IND. CODE § 34-58-2-1 (2008). The Frivolous Claims Act is found at IND. CODE § 34-58-1-2 (2008).

7. *Smith*, 883 N.E.2d at 805.

In the 3-2 decision by Justice Boehm, the Indiana Supreme Court majority applied the Open Courts Clause, which states "[a]ll courts shall be open and every person, for injury done him in his person, property, or reputation, shall have remedy by due course of law."[8] The court found that, while cases in Indiana and other states have examined similar provisions, there is little history showing the framers' motivation or purpose for enacting the language.[9]

The majority in *Smith* based its decision largely on the language of the clause, stating that "as a matter of ordinary usage, the provision that remedy by due course of law is available to all is readily understood to mean, at a minimum, that to the extent the law provides a remedy for a wrong, the courts are available and accessible to grant relief."[10] The clause "demonstrates an embracing of the notion . . . of an independent judiciary, and guarantees access to the courts to redress injuries to the extent the substantive law recognizes an actionable wrong."[11] The court also recognized its prior decisions holding that the clause does not restrict the legislature's power to alter, abolish, or condition remedies.[12]

Applying this analysis, the majority invalidated the law.[13] It noted that many states and the federal government have imposed restrictions on prisoner lawsuits, but no jurisdiction had gone as far as Indiana's total ban, finding that Indiana law "bars claims purely on the basis of the plaintiff's prior activity without regard to the merits of the claim presented."[14] Even if the prisoner has a clearly redressable claim, such as a claim for theft of his property, the statute would bar it.[15]

Smith is consistent with the court's prior decisions applying section 12, and it also follows Indiana courts' penchant for construing prisoners' rights very narrowly.[16] In prior cases, the Indiana Supreme Court made clear that section 12 did not restrict the General Assembly's right to alter the scope of substantive rights and of the remedies available.[17] But just as the court held in *Smith*, when the General Assembly has defined a right and provided a remedy, section 12 requires that the courts be available to effectuate that remedy.[18]

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8. IND. CONST. art. 1, § 12.
9. *Smith*, 883 N.E.2d at 807.
10. *Id.*
11. *Id.*
12. *Id.* at 808.
13. *Id.* at 810.
14. *Id.* at 809-10.
15. *Id.* at 810.
16. *See, e.g.*, Israel v. Ind. Dep't of Corr., 868 N.E.2d 1123, 1124 (Ind. 2007) (holding that there is no judicial review of administrative decision affecting prisoner); McIntosh v. Melroe Co., 729 N.E.2d 972, 977 (Ind. 2000) (construing section 12 to allow legislative branch to define rights and remedies); Martin v. Richey, 711 N.E.2d 1273, 1282 (Ind. 1999) (holding that section 12 invalidates, as applied, a statute precluding a plaintiff from obtaining a remedy permitted by the legislature for a wrong defined by the legislature).
17. *McIntosh*, 729 N.E.2d at 977-78.
18. *Martin*, 711 N.E.2d at 1282.

Chief Justice Shepard dissented, noting that the court's decision would lead to greater burdens on the judicial system and would therefore hinder other litigants' cases.[19] Justice Sullivan also dissented, reasoning that invalidating the statute altogether was unnecessary and advocating instead an as-applied approach, which would create exceptions to a general ban for non-frivolous prisoner cases.[20]

B. Right to Adequate Education Under Article 8

The Indiana Supreme Court vacated the court of appeals' opinion in *Bonner ex rel. Bonner v. Daniels* when it granted transfer, and the supreme court has now entered its opinion; however, the subject matter of the lawsuit is sufficiently important to merit discussion.[21] The lawsuit, brought by a group of public school parents on behalf of their children, alleges that the State has failed to fulfill its duty under the Indiana Constitution to provide an education "that equips them with the knowledge and skills they need to compete for productive employment, to pursue higher education, and to become responsible and informed citizens."[22] The lawsuit is based in part on the existing state academic standards and argues that Indiana provides insufficient resources to some students, guaranteeing that they will not be able to meet the standards already established by the State Board of Education and other authorities as measurements of adequate education.[23]

The constitutional basis for the lawsuit is article 8, section 1, which 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.[24]

The complaint sought relief in the form of two declarations:

> That the Indiana Constitution imposes an enforceable duty on the General Assembly to provide a quality public education that prepares all children to function . . . in society . . . ; and Indiana's current system of financing violates the Indiana Constitution, with the result that the class of affected students are not receiving their constitutionally guaranteed

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19. *Smith*, 883 N.E.2d at 811 (Shepard, C.J., dissenting).

20. *Id.* (Sullivan, J., dissenting).

21. 885 N.E.2d 673 (Ind. Ct. App. 2008), *trans. granted, opinion vacated*, No. 49S02-0809-CV-525 (Ind. Sept. 23, 2009) (unpublished), *available at* http://indianalawblog.com/documents/092608list.pdf. The Indiana Supreme Court ruled, in a decision after the Survey period, that the Indiana Constitution conveys no judicially enforceable right to any particular standard of educational quality. Bonner *ex rel.* Bonner v. Daniels, 907 N.E.2d 516 (Ind. 2009).

22. *Id.* at 677.

23. *Id.*

24. IND. CONST. art. 8, § 1.

right to education.[25]

The students sued on behalf of a class, and the defendants were the Governor, the Superintendent of Public Instruction, and the State Board of Education.[26]

The defendants first argued that the lawsuit raised no justiciable issue, at least not against the named defendants.[27] They argued that the plaintiffs lacked standing because they could show no personal injury; that the complaint was not redressable because declaratory relief would not guarantee improvement in the students' status; and that the named defendants could not provide relief—only the General Assembly could.[28] They also argued that the constitutional language was so general that it provided no judicially manageable standards for determining whether the clause was violated or a remedy was adequate.[29] The Indiana Court of Appeals, in a 2-1 opinion by Judge Riley, rejected each of these challenges.

The court determined that the students had standing to obtain declaratory relief because the controversy clearly affected their legal rights and they had a substantial interest in the relief sought.[30] The court also ruled that declaratory relief was meaningful redress for the students' complaint.[31] The court could permissibly assume that, if the Judicial Department declared that the school funding formula was inadequate under the Indiana Constitution, action would be taken to provide a remedy without further need for coercive relief.[32] The court also concluded that the defendants were proper, and the students did not have to sue the General Assembly.[33] The Governor and Superintendent, as members of the Education Roundtable, are responsible for making recommendations on education policy, and the State Board of Education is also charged with making education policy.[34] Also, it is common to sue executive branch officials who are responsible for carrying out legislation alleged to be unconstitutional.[35]

With regard to the substantive issue in the case, the court concluded that article 8 provides sufficient guidance for the courts to determine whether the General Assembly is meeting whatever duty it may have to provide free public education. "On numerous occasions Indiana courts have developed standards for enforcing constitutional provisions that are sparse and require further interpretation."[36] Indiana courts previously have applied the language of article

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25. *Bonner*, 885 N.E.2d at 679.
26. *Id.* at 673.
27. *Id.* at 681-87.
28. *Id.*
29. *Id.* at 687-88.
30. *Id.* at 683-84.
31. *Id.* at 685.
32. *Id.* at 685-86.
33. *Id.* at 687.
34. *Id.* at 686-87.
35. *Id.* at 686.
36. *Id.* at 688 (citing Boehm v. Town of St. John, 675 N.E.2d 318 (Ind. 1996), in which the

8 in other contexts, never finding it so vague that it could not be interpreted.[37] In particular, the court found guidance in the history of article 8, concluding that "the evil to be addressed by what became [a]rticle [8] of our Constitution was a lack of education and the subsequent problem of illiteracy among Indiana's citizens."[38] The court also pointed out that many other states have addressed the adequacy of their school funding formulas under their state constitutions, some with constitutional language less clear that Indiana's.[39]

The court concluded that the case was justiciable and that the Indiana Constitution provided sufficient standards to allow the question to be adjudicated, stating "we hold that [a]rticle [8] imposes a duty on the [s]tate to provide an education that equips students with the skill and knowledge enabling them to become productive members of society."[40] It further concluded,

> the State's constitutional duty necessarily must extend beyond mere reading, writing, and arithmetic. It also includes broad educational opportunities needed in today's society to prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas.[41]

Judge Friedlander dissented, stating his position that the Constitution commits the adequacy of education solely to the legislature.[42]

The Indiana Supreme Court's grant of transfer nullifies the court of appeals' opinion. But the opinion exposes the arguments the State has raised in its attempt to avoid judicial entanglement in Indiana educational finance. As the court of appeals pointed out, a number of other states have endured protracted litigation over what funding formula and what level of funding is appropriate to meet the constitutional standard.[43] Time will tell whether the Indiana Supreme Court views the justiciability issue in the same way as the court of appeals, what standard the supreme court might establish for educational adequacy, and whether this litigation will move forward to break constitutional ground in Indiana.

Indiana Supreme Court interpreted general language governing property tax assessment to require wholesale changes in assessment methodology).

37. *Id.* at 689 (citing Nagy v. Evansville-Vanderburgh Sch. Corp., 844 N.E.2d 481, 484-85 (Ind. 2006); State *ex rel.* Clark v. Haworth, 23 N.E. 946, 947-48 (Ind. 1890); Robinson v. Schenck, 1 N.E. 698, 705 (Ind. 1885)).

38. *Id.* at 691 (quoting *Nagy*, 844 N.E.2d at 484).

39. *Id.* at 692-93. The court pointed out that during the past ten years, "only eight states have refused to consider challenges similar to the case before us; whereas, seventeen states have adjudicated the claims." *Id.* at 692 (footnotes omitted).

40. *Id.* at 694.

41. *Id.* at 695.

42. *Id.* (Friedlander, J., dissenting).

43. *Id.* at 693.

C. Rights of Individuals Accused of Crimes Under Article 1, Section 13

Indiana courts continued to expand the scope of protections provided by article 1, section 13 in cases decided during the survey period. In *Biddinger v. State*,[44] the Indiana Supreme Court addressed the right of a criminal defendant who pleads guilty to make a statement in allocution before sentencing.[45] Biddinger pleaded guilty to aggravated battery in connection with a shooting, and the plea agreement allowed the parties to argue their positions on sentencing. [46]

Biddinger offered witnesses on sentencing, then at the close of evidence offered to make a statement.[47] The trial judge did not allow the statement because Biddinger did not agree to be sworn as a witness or to be cross-examined.[48] Biddinger instead made a written offer of proof of what he would have said in allocution.[49]

In a unanimous opinion by Justice Rucker, the Court ruled that after pleading guilty, a defendant who asks to make an unsworn statement should be permitted to do so.[50] This ruling was based in part on article 1, section 13's provision that "the accused shall have the right . . . to be heard by himself and counsel."[51] The court noted "that the Indiana Constitution places a unique value upon the desire of an individual accused of a crime to speak out personally in the courtroom and state what in his mind constitutes a predicate for his innocence of the charges."[52] The court noted that a statute requires the trial judge to ask a defendant whether he wants to make an allocution after he has been convicted, but not when he has plead guilty (as Biddinger did).[53] The court ruled that when a defendant makes a request to allocute after pleading guilty, he has a right to do so.[54] Moreover, because the allocution is not testimony, but "more in the nature of a closing argument," it is not subject to cross-examination.[55] Nevertheless, in this case the court found the trial court's denial of Biddinger's allocution request harmless error because the allocution repeated information already before the trial court.[56]

In another section 13 case, *Vasquez v. State*,[57] the Indiana Supreme Court concluded—in part for constitutional reasons—that a defendant has a right to obtain testimony from a witness even though the witness was disclosed after the

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44. 868 N.E.2d 407 (Ind. 2007).
45. *Id.*
46. *Id.* at 409.
47. *Id.*
48. *Id.*
49. *Id.* at 409-10.
50. *Id.* at 412.
51. *Id.* (quoting IND. CONST. art. 1, § 13).
52. *Id.* (quoting Vicory v. State, 802 N.E.2d 426, 429 (Ind. 2004)).
53. *Id.* (citing IND. CODE § 35-38-1-5 (2006)).
54. *Id.*
55. *Id.* at 413.
56. *Id.* at 412-13.
57. 868 N.E.2d 473 (Ind. 2007).

deadline set by the trial court and, indeed, after trial began.[58] Vasquez was being prosecuted for burglary, and on the first day of trial he informed his lawyer of a potential witness who would testify that he overheard others say that they would blame Vasquez for the burglary (an undercurrent in the opinion was Vasquez's inability to communicate with his counsel, who spoke only English.)[59] When Vasquez's attorney notified the trial court about the witness, the State objected and the trial court did not permit the witness to testify.[60] It was undisputed that the failure to disclose the witness was neither intentional nor designed to obtain unfair advantage.

In a unanimous opinion by Justice Dickson, the court ruled that the witness should have been allowed to testify.[61] The witness's testimony was very important, and any prejudice to the State was slight and could have been cured by a "short continuance."[62] The court stated: "Indiana jurisprudence recognizes a strong presumption to allow defense testimony, even of late-disclosed witnesses: 'The most extreme sanction of witness exclusion should not be employed unless the defendant's breach has been purposeful or intentional or unless substantial and irreparable prejudice would result to the State.'"[63] The court emphasized the accused's rights under the Sixth Amendment and article 1, section 13 "to present evidence and to have a fair trial," stating they are "of immense importance."[64]

The Indiana Court of Appeals also addressed section 13 in *Caraway v. State*,[65] examining when the right to counsel attaches. Caraway, an adult, was caught in a sex act with a young child and taken to the police station for questioning.[66] While the appellate opinion is not specific about Caraway's mental abilities, it notes that he could not read and that police had to read back statements he dictated.[67] Months later, a police officer visited Caraway, who had not yet been charged, and persuaded him to sign an agreement that he would take a polygraph examination and that the results of the examination would be admissible in court.[68] Caraway was read *Miranda* warnings, but not until after he signed the agreement about the polygraph.[69]

Caraway's trial counsel moved to exclude the results of the polygraph test, arguing that he was never offered counsel before signing the polygraph

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58. *Id.* at 477.
59. *Id.* at 474.
60. *Id.* at 475.
61. *Id.* at 477.
62. *Id.* at 475-76.
63. *Id.* at 476 (quoting Wiseheart v. State, 491 N.E.2d 985, 991 (Ind. 1986)).
64. *Id.* at 477.
65. 891 N.E.2d 122 (Ind. Ct. App. 2008), *reh'g denied.*
66. *Id.* at 123.
67. *Id.*
68. *Id.* at 124. Judicial opinions have restricted the admissibility of polygraph test results. *See* Owens v. State, 373 N.E.2d 913, 915 (Ind. App. 1978).
69. *Caraway*, 891 N.E.2d at 124.

agreement.[70] The court concluded that Caraway should have been offered counsel before the polygraph agreement was discussed.[71] The court stated:

> Article [1], [s]ection 13 of the Indiana Constitution guarantees the right to counsel at any critical stage of the prosecution where counsel's absence might derogate from the accused's right to a fair trial; however, "the rights afforded under [s]ection 13 also attach prior to the filings of formal charges against the defendant."[72]

Although Caraway was not charged or arrested at the time the officer discussed the polygraph examination, he was entitled to be offered counsel before the polygraph agreement was discussed with him because it was such an important aspect of his right to a fair trial (in Sixth Amendment terms, a "critical stage").[73] The court's decision conflicts with *Kochersperger v. State*,[74] which examined a similar issue, but the State did not seek transfer in *Caraway*.

D. Constitutional Decisions Relating to Restrictions on Sex Offenders

The Indiana Court of Appeals applied Indiana constitutional principles to three cases involving restrictions on sex offenders, and the result was a mixed bag.[75] In *Doe v. Town of Plainfield*,[76] the court approved a local ordinance excluding individuals whose names are on the Sex and Violent Offender Registry from public parks in Plainfield. The plaintiff, listed on the registry because of earlier child pornography convictions, frequently took his child to parks and recreation areas in Plainfield, but the ordinance precluded him from doing so any more.[77] The court rejected Doe's argument that his right to enter parks was protected by article 1, section 1 of the Indiana Constitution, which describes inalienable rights including "life, liberty, and the pursuit of happiness."[78] Bypassing whether article 1, section 1 creates judicially enforceable rights at all, the court concluded that the provision does not protect "the right to enter public

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70. *Id.*

71. *Id.* at 126-27.

72. *Id.* (quoting Hall v. State, 870 N.E.2d 449, 460 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 213 (Ind. 2007)).

73. *Id.* at 127. Judge Robb concurred, basing her decision on the Fifth Amendment. *See id.* at 128 (Robb, J., concurring).

74. 725 N.E.2d 918 (Ind. Ct. App. 2000).

75. The court also invalidated a statute imposing a lifetime registration requirement on certain individuals, holding that it violated the *ex post facto* clause. Jensen v. State, 878 N.E.2d 400 (Ind. Ct. App. 2007), *trans. granted*, 891 N.E.2d 43 (Ind. 2008). The Indiana Supreme Court, in a decision after the Survey period, disagreed. Jensen v. State, 905 N.E.2d 384 (Ind. 2009).

76. 893 N.E.2d 1124 (Ind. Ct. App. 2008). The Sex and Violent Offender Registry is established by IND. CODE § 36-2-13-5.5 (2007).

77. *Doe*, 893 N.E.2d at 1128.

78. *Id.* at 1132.

parks for legitimate purposes."[79] The court also rejected Doe's argument that the ordinance violated his right under article 1, section 12, which the court said "contains a substantive component requiring legislative enactments to be rationally related to a legitimate legislative goal."[80] Doe argued that excluding those on the registry from public parks is not rationally related to the goal of public protection because no evidence shows that any particular person on the registry is likely to re-offend.[81] The court concluded that this argument did not support Doe's facial challenge to the ordinance because it did not foreclose constitutional application of the ordinance "in all instances."[82] This approach may leave open the door for as-applied challenges by individuals listed on the registry who can prove that they pose little or no risk of re-offending. The court also rejected Doe's challenge under article 1, section 24, the *Ex Post Facto* clause of the Indiana Constitution.[83] The court found that the ordinance was not an impermissible *ex post facto* law because its primary intent was not punitive, but rather aimed mainly at public protection.[84]

In *State v. Pollard*,[85] in contrast, the Indiana Court of Appeals invalidated a statute governing sex offenders as applied to Pollard. The statute precluded persons on the Sex and Violent Offender Registry from living within 1000 feet of a school, youth program center, or public park.[86] Pollard had lived at the same address, in a home he owned, for twenty years.[87] In 1997, he was convicted of committing a sex-related offense, and he was required to place his name on the registry.[88] The statute prohibiting anyone on the registry from living within 1000 feet of a school, youth program center, or public park was enacted in 2006,[89] long after Pollard bought his home and almost a decade after his conviction.[90] In 2007, the State charged Pollard with violating the residency statute.[91]

The Indiana Court of Appeals concluded that the statute was criminal in nature because it created a class D felony for someone on the registry to live within 1,000 feet of a school, youth program center, or public park.[92] It further

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79. *Id.* at 1131. The Indiana Court of Appeals previously has cast doubt on whether article 1, section 1 contains any judicially enforceable rights. *See* Morrison v. Sadler, 821 N.E.2d 15, 31-32 (Ind. Ct. App. 2005).

80. *Doe*, 893 N.E.2d at 1132.

81. *Id.* at 1133.

82. *Id.*

83. *Id.* at 1136.

84. *Id.* at 1135-36.

85. 886 N.E.2d 69 (Ind. Ct. App. 2008), *trans. granted and rev'd*, 908 N.E.2d 1145 (Ind. 2009).

86. IND. CODE § 35-42-4-11 (2006).

87. *Pollard*, 886 N.E.2d at 71.

88. *Id.*

89. IND. CODE § 35-42-4-11 (2006).

90. *Pollard*, 886 N.E.2d at 71.

91. *Id.*

92. *Id.* at 73-74.

held that the effect of the statute was to "[increase] the penalty applied to affected sex offenders by preventing those offenders from residing and taking full advantage of their ownership rights in property acquired prior to conviction and prior to the imposition of the statute."[93] The court invalidated the statute as to Pollard and persons in similar circumstances because of the importance of property rights and the statute's retroactive restriction on property ownership in violation of article 1, section 24.[94]

E. Article 1, Section 22's Limits on Shielding Assets from Creditors

Prime Mortgage USA, Inc. v. Nichols[95] addressed many issues arising from a shareholder dispute, including one issue of Indiana constitutional law. After the trial court awarded the plaintiff approximately $8 million in damages, she took a number of steps to collect her judgment, including garnishment orders.[96] The constitutional issue arose from an attempt to garnish a life insurance policy obtained by the corporation for its employee, who was also a judgment debtor in the case. Indiana Code section 27-1-12-17.1 exempts such insurance policies, in their entirety, from creditors' claims.[97]

The constitutionality of this statute is suspect under article 1, section 22, which allows the legislature to enact laws "exempting a reasonable amount of property from seizure or sale" to allow a debtor "to enjoy the necessary comforts of life."[98] Unlimited exemptions from garnishment such as the one in this case are suspect.[99] "[W]hen the statute contains no limitation, our supreme court has put the burden on the debtor to demonstrate that the exemption fits within the 'necessary comforts of life purpose of the Indiana Constitution.'"[100] Because the defendant made no effort to justify the unlimited nature of the exemption, the Indiana Court of Appeals remanded this portion of the case to the trial court for relevant evidence, concluding it was "not in a position to conclude that the claimed exemption is not reasonably necessary" or to determine "whether any or part of the value of the . . . insurance policy is sufficiently related to [Defendant's] enjoyment of the necessary comforts of life."[101]

F. Limits on Searches and Seizures Under Article 1, Section 11

The Indiana Supreme Court applied federal and state constitutional principles

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93. *Id.* at 74.

94. *Id.* at 75.

95. 885 N.E.2d 628 (Ind. Ct. App. 2008).

96. *Id.* at 666.

97. *See* IND. CODE § 27-1-12-17.1 (2006).

98. *Id.* at 670 (quoting IND. CONST. art. 1, § 22).

99. *Id.* (citing Citizens Nat'l Bank of Evansville v. Foster, 668 N.E.2d 1236, 1242 (Ind. 1996)).

100. *Id.* at 671 (quoting *Citizens Nat'l Bank*, 668 N.E.2d at 1242) (internal quotation omitted).

101. *Id.* at 672.

to invalidate a search in *Campos v. State*,[102] involving a roadside search after a traffic stop. The unanimous decision was written by Justice Boehm. An officer pulled over the car containing Campos and Santiago because it had been speeding.[103] The officer questioned the two occupants separately, and their stories did not match completely.[104]

After giving a written warning, the officer told them they could leave.[105] But before they did so, he asked if they had anything illegal in the car.[106] After they denied having anything illegal, the officer asked if he could search the car. "Santiago asked, 'Is it really necessary?'[107] [The officer] responded, 'Yes.'"[108] While the car was being searched, Campos and Santiago were placed in the police car, where they were recorded on the car's video system, without their knowledge, making incriminating admissions.[109] The search of the car revealed cocaine.[110]

The court concluded that the officer had probable cause to detain the pair but lacked probable cause to search the car, so valid consent was necessary for the fruits of the search to be admissible.[111] The court applied the federal standard to assess voluntariness of the consent, stating that the same standard applied under article 1, section 11 of the Indiana Constitution.[112] The court ruled that when the officer told Santiago that the search was "necessary," it was the same as saying that Santiago had no right to say no, making the consent involuntary and the search invalid.[113]

The court found a separate violation of the Indiana Constitution under the doctrine of *Pirtle v. State*.[114] That case expands a suspect's rights beyond the guarantees of the U.S. Constitution, requiring that a suspect who is in custody be offered the opportunity to consult with a lawyer before being asked for consent to a search.[115] In this case, the State contended that Santiago was not in custody when he was asked whether he would consent to a search of the car.[116] The court again relied on the officer's statement that consent was "necessary" to conclude that *Pirtle* applied because "no reasonable person would think that he had the right to leave or to decline [the officer's] request" under those circumstances, and

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102. 885 N.E.2d 590 (Ind. 2008).
103. *Id.* at 594.
104. *Id.* at 595.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 595-96.
110. *Id.* at 596.
111. *Id.* at 598.
112. *See id.* at 600.
113. *Id.*
114. *Id.* at 601-02 (citing Pirtle v. State, 323 N.E.2d 634, 640 (Ind. 1975)).
115. *See Pirtle*, 323 N.E.2d at 640.
116. *Campos*, 885 N.E.2d at 601.

thus, Santiago was in custody.[117] Because Santiago was not offered legal counsel before being asked to consent to the search, the search was invalid on that separate ground.[118] The court excluded the evidence found in the search and remanded for a new trial.[119]

The court further concluded that Santiago's and Campos's videotaped statements while in the police car were admissible.[120] Because there was no interrogation, no *Miranda* warning had to be given, and the pair had no reasonable expectation of privacy within the police car.[121] Santiago and Campos offered no separate analysis under the Indiana Constitution as to the videotaped statements; so the court did not separately analyze that claim.[122]

The Indiana Supreme Court addressed the retroactivity of a constitutional decision on searches in *Membres v. State*,[123] another drug case. Evidence against Membres was found in a search of the trash that he had placed outside for regular pickup. Membres argued that he should be protected by the holding governing trash searches in *Litchfield v. State*,[124] which was decided two weeks after the search that led to his conviction.[125]

In a 3-2 decision, the court ruled that *Litchfield* did not apply retroactively to *Membres*'s case.[126] At the time of Membres's search, the governing case was *Moran v. State*,[127] which allowed a search of trash left out at the curb on a totality of circumstances analysis.[128] The court stated that "*Litchfield* expressly adopted the requirement of articulable individualized suspicion as an elaboration of *Moran* but did not overrule *Moran*."[129] *Litchfield* was consistent with *Moran* but not foreshadowed by *Moran*, and thus, *Litchfield* represented a new rule of criminal procedure.[130]

The court recognized the general principle that new rules of criminal procedure are applied retroactively to cases not yet final (that is, when trial or appeal still is pending) when the new rule is announced.[131] But Indiana is not required to follow this federal principle when the new rule arises from the state constitution.[132]

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117. *Id.*
118. *Id.*
119. *Id.* at 603.
120. *Id.*
121. *Id.* at 602.
122. *Id.* at 602 n.3.
123. 889 N.E.2d 265 (Ind. 2008), *reh'g denied.*
124. 824 N.E.2d 356 (Ind. 2005).
125. *Membres*, 889 N.E.2d at 268.
126. *Id.* at 275.
127. 644 N.E.2d 536 (Ind. 1994).
128. *Membres*, 889 N.E.2d at 269-70 (citing *Moran*, 644 N.E.2d at 539-40).
129. *Id.* at 271.
130. *Id.*
131. *Id.* at 271-72.
132. *Id.* at 272.

The majority, in a decision by Justice Boehm, distinguished cases involving the exclusionary rule for special retroactivity analysis.[133] The exclusionary rule, the majority stated, is designed to deter law enforcement misconduct and not to ensure a fair trial or exclude unreliable evidence.[134] Because the purpose of the exclusionary rule is deterrence and does not affect the fairness of the trial, the majority ruled that a new rule of criminal procedure relating to the exclusionary rule need not be applied retroactively.[135] "The rule announced in *Litchfield* is designed to deter random intrusions into the privacy of all citizens. Retroactive application of that rule would not advance its purpose for the obvious reason that deterrence can operate only prospectively."[136]

The majority's ultimate application of these principles was as follows:

> *Litchfield* applies in *Litchfield* itself, and also any other cases in which substantially the same claim was raised before *Litchfield* was decided. But challenges to pre-*Litchfield* searches that did not raise *Litchfield*-like claims in the trial court before *Litchfield* was decided are governed by pre-*Litchfield* doctrine" even if the cases were "not yet final" at the time *Litchfield* was decided.[137]

Because the search in this case was reasonable under the *Moran* standard, the majority ruled that the evidence could be admitted.[138]

Justice Sullivan dissented, arguing that longstanding retroactivity principles required *Litchfield* to be applied retroactively.[139] He also noted that, under the court's analysis, Membres could have succeeded only if he had raised a *Litchfield* argument in the fourteen days between his arrest and the issuance of *Litchfield*—a time during which charges were not even filed against him.[140] Justice Rucker dissented in part and concurred in result, echoing Justice Sullivan's point that longstanding case law required retroactive application of *Litchfield*.[141] But Justice Rucker concluded that the search would be valid under *Litchfield*, justifying his concurrence.[142]

The Indiana Court of Appeals applied the Indiana Constitution to several other searches during the survey period. In *Wendt v. State*,[143] the court addressed the good faith exception to the warrant requirement under article 1, section 11. A search of Wendt's home, made pursuant to a warrant, turned up drugs and

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133. *Id.* at 273.
134. *Id.*
135. *Id.* at 274.
136. *Id.*
137. *Id.*
138. *Id.* at 275.
139. *Id.* at 276 (Sullivan, J., dissenting).
140. *Id.* at 277.
141. *Id.* at 278-79 (Rucker, J., dissenting in part and concurring in result).
142. *Id.* at 281.
143. 876 N.E.2d 788 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 38 (Ind. 2008).

paraphernalia.[144] Wendt argued that the warrant should not have been issued because the officer providing information to the issuing magistrate indicated that the confidential informant who was the source of the information had provided reliable information in similar situations previously.[145] In fact, the informant's prior information, while reliable, had come when the confidential informant was himself implicated in the crime, not when he was acting as a confidential informant.[146] The court, in a unanimous opinion by Judge May, found that the officer providing the information for the warrant had misinformed the issuing magistrate, but not intentionally.[147] The court also approved application of a good faith exception under the Indiana Constitution based on both the similarity of the language in article 1, section 11 to the Fourth Amendment and the lack of "any compelling reason for rejecting" the Fourth Amendment good faith exception.[148]

But the Indiana Court of Appeals used section 11 to find unreasonable the lengthy detention of a suspect prior to arrest in *Buckley v. State*.[149] Police suspected Buckley in a murder, followed his car when he left his home, and stopped him after he committed traffic infractions.[150] Police did not ticket him, but rather told him he was not free to leave until a detective arrived to question him.[151] Police then took him to a police station, where he was kept for several hours before search warrants could be obtained, and his car was impounded.[152] Police found a hand gun in his car, and he was convicted of its illegal possession—not the murder.[153] The court found these actions unreasonable in the context of the totality of circumstances under article 1, section 11 and suppressed the gun.[154] The court concluded that the officers lacked probable cause to arrest Buckley and that holding him for hours violated his rights.[155] Applying the *Litchfield* factors, the court concluded that, although police had reasonable suspicion Buckley had committed a murder, the degree of intrusion into Buckley's ordinary activities was "substantial" and law enforcement needs were minimal because there was no emergency.[156]

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144. *Id.* at 789.

145. *Id.*

146. *Id.* at 791.

147. *Id.*

148. *Id.* at 790 (quoting Mers v. State, 482 N.E.2d 778, 783 (Ind. Ct. App. 1985) (also applying good faith exception under Indiana Constitution)); *see* Hopkins v. State, 582 N.E.2d 345, 351 (Ind. 1991) (citing *Mers* with approval); *see also* United States v. Leon, 468 U.S. 897, 923 (1984) (establishing good faith exception under the U.S. Constitution).

149. 886 N.E.2d 10 (Ind. Ct. App. 2008).

150. *Id.* at 13.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 16.

155. *Id.* at 15.

156. *Id.*

The court evaluated standing to contest a search under section 11 in *Allen v. State*,[157] in which Allen was convicted of murdering his mother and grandparents and burying them under concrete in the basement of the grandparents' home. After the murders, Allen lived in the home for several weeks and had keys to the residence, and he claimed that his privacy interest in the home was violated by the warrantless search that discovered the bodies.[158] Allen had no Fourth Amendment standing because the home was not his.[159] A defendant has standing to contest a search under section 11 if he establishes "ownership, control, possession, or interest in the premises searched or the property seized."[160] In a unanimous opinion by Judge Crone, the court concluded that Allen had no standing to challenge the search because he had no legitimate possessory interest in the home—he lived there only because of his crime, which eliminated the lawful possessors.[161] Allen was a trespasser who obtained possession by illegal means, and thus lacked standing to challenge the search.

In another standing case, *Jackson v. State*,[162] the passenger in a traffic stop challenged the results of a search of the passenger compartment of the car, which led to his conviction for sale of cocaine. Applying standing language from *Campos*,[163] the Indiana Court of Appeals concluded that federal and state standing principles were identical in these circumstances, and "[w]here the defendant offers sufficient evidence indicating that he has permission of the owner to use the vehicle, the defendant plainly has a reasonable expectation of privacy in the vehicle and standing to challenge the search of the vehicle."[164] In this case, there was no evidence indicating that Jackson lacked permission to be in the car, which belonged neither to him nor the driver.[165] Because it was uncontested that Jackson had a right to be in the car, the court concluded that he had standing to challenge the search.[166] The court concluded, however, that the search was a reasonable inventory search and did not suppress the evidence.[167]

The Indiana Court of Appeals approved a search warrant although it was based on stale information in *Mehring v. State*.[168] Investigators linked Mehring

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157. 893 N.E.2d 1092 (Ind. Ct. App. 2008), *trans. denied.*

158. *Id.* at 1095.

159. *Id.*

160. Peterson v. State, 674 N.E.2d 528, 534 (Ind. 1996).

161. *Allen*, 893 N.E.2d at 1100.

162. 890 N.E.2d 11 (Ind. Ct. App. 2008).

163. Campos v. State, 885 N.E.2d 590, 595 (Ind. 2008).

164. *Id.* at 16 (quoting *Campos*, 885 N.E.2d at 598-99).

165. *Id.* at 16-17.

166. *Id.* at 17.

167. *Id.* at 19. In the unanimous opinion by Judge Mathias, the court cautioned "that inventory searches performed at the scene [of the arrest] invite challenges. Inventory searches conducted at the impound lot by an officer assigned to such duties are greatly preferred to searches conducted at the scene, without a warrant, by the arresting officer." *Id.* (citation omitted).

168. 884 N.E.2d 371, 373 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1222 (Ind. 2008).

to child pornography, tracing web postings to his home computer.[169] Although he had moved since the initial determination that the child pornography was posted from his home computer, police obtained a warrant for Mehring's residence based on expert testimony that traffickers in child pornography kept images for long periods of time.[170] In a 2-1 decision written by Judge Friedlander, the court determined that the warrant was valid despite the passage of ten months since the discovery of the information on which the warrant was based.[171] After a thorough Fourth Amendment analysis, the court stated that a "different analysis" must be applied under section 11 despite its similar wording.[172] The court concluded that

> the totality of the circumstances—including, the information contained in the [probable cause] affidavit, the nature of the crime, the nature of the items being sought, and the normal and common sense inferences regarding where one might keep such items—established a substantial basis to believe that there was a fair probability that evidence of child pornography would be found in Mehring's apartment.[173]

In a different case, the court also found that two-week-old information from a reliable informant that drugs were being sold at a given location was not sufficiently stale to render it unreasonable as a basis for law enforcement examination of household trash, which led to a search warrant, arrest, and conviction.[174]

In *McDermott v. State*,[175] the defendant was standing in the middle of a street shouting incoherently at traffic. When police approached, he fled, eventually entering the unlocked front door of a home.[176] He would not identify himself or provide identification, police did not know whether the home he entered was his, and they entered the home and ultimately subdued him with a taser and arrested him for resisting law enforcement, disorderly conduct, and public intoxication.[177] McDermott argued that the officers' warrantless entry to his home was unreasonable under section 11.[178] Emphasizing the importance of learning McDermott's identity to protect public safety, the court concluded that their entry

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169. *Id.* at 374.

170. *Id.*

171. *Id.* at 381.

172. *Id.*

173. *Id.* Judge Mathias dissented, stating first that the expert testimony that child pornographers retain their images for long periods of time was not corroborated or subject to cross-examination; second that law enforcement could easily have obtained corroboration by electronically eavesdropping on Mehring's computer; and third that there is little case law support for such lengthy delays before obtaining a warrant. *Id.* at 382-83 (Mathias, J., dissenting).

174. Teague v. State, 891 N.E.2d 1121, 1130 (Ind. Ct. App. 2008).

175. 877 N.E.2d 467, 469 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 39 (Ind. 2008).

176. *Id.* at 469-70.

177. *Id.* at 470.

178. *Id.* at 471.

into the home was reasonable and not in violation of section 11.[179] In *Rush v. State*,[180] the court similarly approved warrantless entry into a home to investigate underage drinking, which was obvious based on neighbors' reports and conduct that could be observed from the street.

The court rejected police actions at another party in *King v. State*,[181] where officers staged a roadblock to stop each person leaving the party. The court relied on *State v. Gerschoffer*,[182] in which the Indiana Supreme Court established rules for drunk driving roadblocks under the Indiana Constitution.[183] The court rejected the roadblock because it was not established pursuant to a formal policy, used no neutral guidelines to determine which cars should be stopped, and was targeted at a specific group rather than the general public.[184] Also, the court noted that there was no evidence presented at trial that the officers had perceived that anyone at the party consumed alcohol, further negating any purpose for the roadblock.[185] The court found not only that police conduct was not reasonable, but also that there was very little evidentiary basis in the record justifying any sort of police intrusion at all. The court rejected the evidence obtained at the roadblock showing that one driver was intoxicated and reversed his conviction.[186]

The Indiana Court of Appeals also used the Indiana Constitution as a basis for rejecting an automobile search that occurred after a legitimate traffic stop, but with no reasonable suspicion that the driver had committed any other crime.[187] It also invalidated an automobile search conducted after an officer arrested the driver for operating while intoxicated, when the officer had no suspicion of any other crime.[188] It found that seeking identification from a passenger in a traffic stop is not unreasonable under article 1, section 11, using the *Litchfield* factors to conclude that the intrusion is minimal and law enforcement need was substantial because of the concern for officer safety.[189]

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179. *Id.* at 473.

180. 881 N.E.2d 46, 53 (Ind. Ct. App. 2008).

181. 877 N.E.2d 518, 524 (Ind. Ct. App. 2007).

182. 763 N.E.2d 960 (Ind. 2002).

183. *King*, 877 N.E.2d at 521 (citing *Gerschoffer*, 763 N.E.2d 960).

184. *Id.* at 522.

185. *Id.*

186. *Id.* at 525.

187. Baniaga v. State, 891 N.E.2d 615, 620 (Ind. Ct. App. 2008). The officer admitted that he did not suspect the driver of drug use (he found drugs in his search); rather "he searched her vehicle because he was looking for '[a]nything. Anything at all. Just—you never know what you'll find.'" *Id.*

188. State v. Parham, 875 N.E.2d 377, 380 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 36 (Ind. 2008). The officer testified that he did not base the search on a concern for his safety. *Id.* at 379.

189. Cade v. State, 872 N.E.2d 186, 188-89 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 218 (Ind. 2007).

G. Protection Against Double Jeopardy Under Article 1, Section 14

Indiana's courts continued to develop their separate test, based on article 1, section 14, for "multiple punishments" double jeopardy.[190] The first part of Indiana's test is the same as the federal "multiple punishments" test, addressing whether each crime for which a defendant is convicted contains at least one element not contained by any other crime for which the defendant was convicted.[191] But Indiana's test does not stop there. Rather, Indiana law contains an "actual evidence" test, examining whether each offense of which a defendant is convicted is proved by at least one fact not used to prove any other offense of which the defendant was convicted. To succeed on this claim, "a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense."[192]

The Indiana Supreme Court applied this test in *Lee v. State*,[193] in which a defendant had been convicted of burglary and armed robbery after forcing his way into an apartment, brandishing a gun, making threats, and demanding money.[194] Lee argued that the jury could have used his barging into the house to establish both the burglary and the substantial step toward armed robbery that supported his conviction on that charge.[195]

In a unanimous opinion by Justice Boehm, the court noted that it "ha[d] decided several cases where there were separate facts to support two convictions, but the case was presented in a way that left a reasonable possibility that the jury used the same facts to establish both."[196] But in other cases, the court did not find any violation of the "actual evidence" test when the charging information, jury instructions, arguments of counsel, or other factors showed that the State presented its case so that each charge was established by separate facts, even if the jury theoretically could have found that multiple charges were established by the same facts.[197]

In *Lee*, the court ruled that it was likely that the jury used different facts to convict Lee of each offense, basing its conclusion in part on "the fact that the prosecutor highlighted these specific facts as she reviewed the elements of each crime in her closing argument."[198] These arguments established that "the

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190. *See* Richardson v. State, 717 N.E.2d 32, 49-50 (Ind. 1999) (explaining separate test).

191. *See* Blockburger v. United States, 284 U.S. 299, 302 (1932) (establishing federal test).

192. *Richardson*, 717 N.E.2d at 53. Indiana courts have done little to explain the significance of the word "essential" in this test. In application, the word "essential" appears to be superfluous.

193. 892 N.E.2d 1231 (Ind. 2008).

194. *Id.* at 1234-35.

195. *Id.* at 1235.

196. *Id.* (citing Bradley v. State, 867 N.E.2d 1282 (Ind. 2007); Lundberg v. State, 728 N.E.2d 852 (Ind. 2000); Guffey v. State, 717 N.E.2d 103 (Ind. 1999)).

197. *Id.* at 1236 (citing Redman v. State, 743 N.E.2d 263 (Ind. 2001); Griffin v. State, 717 N.E.2d 73 (Ind. 1999)).

198. *Id.*

burglary was complete when Lee barged into the home, but the attempted armed robbery was just beginning."[199] The court pointed out that "more deliberate prosecution of multiple offenses would avoid these double jeopardy problems."[200] If prosecutors make clear in charging instruments, instructions, and closing arguments which facts are intended to prove which offenses, the double jeopardy problem will seldom exist.

Prosecutors took this advice to heart in at least two cases during the survey period, where the Indiana Court of Appeals rejected double jeopardy arguments because careful prosecutors clearly separated the evidence supporting one conviction from evidence supporting another. In *Hardley v. State*,[201] the Indiana Court of Appeals affirmed convictions of confinement and battery because the charging instrument clearly stated that the confinement charge was based on Hardley's holding the victim down while the battery charge was based on striking her with his fists. Similarly, in *Storey v. State*,[202] the Indiana Court of Appeals affirmed a conviction for possession of methamphetamine with intent to deliver and another conviction of manufacture of methamphetamine. At trial, the prosecutor used a quantity of unfinished methamphetamine to support the conviction for manufacturing and a quantity of finished methamphetamine to support the conviction of possession.[203] "It is evident to us that the State carefully parsed the evidence pertaining to both the possession and manufacturing offenses," the Court stated.[204] "In doing so, the State set forth independent evidence that Storey (1) possessed methamphetamine in excess of three grams with the intent to deliver and (2) manufactured methamphetamine in excess of three grams."[205] This appeal was Storey's second based on the same incident. His first conviction was reversed on Fifth Amendment grounds.[206] Ironically, Storey's co-defendant had certain convictions reversed on appeal because of double jeopardy violations, and the prosecution in Storey's retrial heeded the advice in the co-defendant's appellate decision that "the State may have been able to support dual convictions by carefully parsing the evidence at trial."[207]

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199. *Id.*

200. *Id.* at 1237.

201. 893 N.E.2d 1140, 1142-43 (Ind. Ct. App. 2008), *trans. granted and aff'd in part*, 905 N.E.2d 399 (Ind. 2009). Senior Judge Patrick Sullivan dissented on the double jeopardy issue, arguing that the state did not sufficiently separate the facts supporting the charges and that there was "a reasonable possibility" under *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999), that the jury used the same evidence to convict of two crimes. *Hardley*, 893 N.E.2d at 1147-48. The supreme court opinion on transfer left this holding undisturbed but addressed an important sentencing issue.

202. 875 N.E.2d 243, 250 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 35 (Ind. 2008).

203. *Id.* at 248.

204. *Id.* at 250.

205. *Id.*

206. Storey v. State, 830 N.E.2d 1011, 1022 (Ind. Ct. App. 2005), *aff'd*, 875 N.E.2d 243 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 35 (Ind. 2008).

207. *Storey*, 875 N.E.2d at 248 (quoting Caron v. State, 824 N.E.2d 745, 754 n.6 (Ind. Ct.

The Indiana Court of Appeals vacated certain convictions during the survey period as failing the "same evidence" test. In *Williams v. State*,[208] the court ruled that the same evidence—the fact that Williams presented a stolen and fraudulent check for a bank to negotiate—supported convictions of both forgery and attempted theft. The court therefore reversed the conviction on the lesser offense, attempted theft.[209] A second case, also called *Williams v. State*,[210] presented a more complicated fact pattern and convictions of attempted rape, criminal confinement resulting in serious bodily injury, and battery resulting in serious bodily injury.[211] After a thorough analysis of the facts proved at trial, Judge Darden's opinion concludes that it was unlikely the jury used the same facts to support the convictions for attempted rape and battery, but that there was "a reasonable probability . . . that the same evidentiary facts the jury used to establish his commission of these two offenses were also used to establish the essential elements of the third offense—criminal confinement."[212] The State failed to establish that the force used to accomplish the attempted rape and criminal confinement was different than the force used to commit the battery. The court therefore reversed the criminal confinement conviction.[213] In *Smith v. State*,[214] the Indiana Court of Appeals applied the "same evidence" test sua sponte to reverse a criminal conviction arising from an attempted jail escape.[215] The court found it "improper for the State to rely on evidence of the same injury to sustain a conviction for both class A felony robbery and class B felony aggravated battery."[216] The State presented evidence of only one injury, and as a result, "there is a reasonable possibility the jury used the same evidence to establish the essential injury elements of both the elevated robbery charge and the aggravated battery charge."[217] The court remanded with instructions to enter judgment on the robbery charge as a C felony, not elevated for the injury.[218]

The Indiana Court of Appeals rejected double-jeopardy arguments under the State Constitution in several cases where proof of distinct acts occurred. In *Moore v. State*,[219] the court rejected a double jeopardy argument relating to rape and criminal deviate conduct. The court concluded that Moore's pre-trial guilty plea to battery could not be used "to deprive the State of the opportunity to fully

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App. 2005).

208. 892 N.E.2d 666, 669 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1228 (Ind. 2008).

209. *Id.*; *see* Richardson v. State, 717 N.E.2d 32, 55 (Ind. 1999) (reasoning that vacating the lesser conviction is the proper remedy).

210. 889 N.E.2d 1274 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1225 (Ind. 2008).

211. *Id.* at 1277.

212. *Id.* at 1280 (internal quotations omitted).

213. *Id.*

214. 881 N.E.2d 1040 (Ind. Ct. App. 2008).

215. *Id.* at 1047.

216. *Id.* at 1048.

217. *Id.*

218. *Id.*

219. 882 N.E.2d 788 (Ind. Ct. App. 2008).

prosecute, or to determine which charges will, or will not, be pursued against him."[220] In other words, a defendant cannot manufacture a multiple-punishments double-jeopardy problem by pleading guilty to a lesser included offense. The court also rejected his argument for reversal based on the contention that his convictions of rape and criminal deviate conduct were based on the same use of force that supported the battery conviction.[221] The court found evidence of separate force supporting each of the three convictions.[222] The court rejected double-jeopardy arguments as to six counts of forgery and twenty-one counts of practicing nursing without a license in *Lohmiller v. State*,[223] concluding that Lohmiller's signatures on twenty-seven different documents were each separate acts supporting different convictions.[224] Similarly in *Rawson v. State*,[225] the court affirmed convictions for attempted aggravated battery, intimidation, and criminal recklessness, concluding that the intimidation charge was proved by Rawson's brandishing a gun, the aggravated battery conviction was proved by his firing the gun, and the criminal recklessness conviction was supported by his separately firing a gun in the direction of another victim.[226]

H. Issues of Sentencing and Proportionality

During the survey period, both the Indiana Supreme Court and Indiana Court of Appeals revised criminal sentences under authority derived from article 7, section 4 of the Indiana Constitution. Some of these cases are analyzed in Professor Schumm's article on developments in Indiana criminal law, also appearing in this issue of the *Indiana Law Review*.[227]

Manigault v. State[228] applied the provision of article 1, section 16 requiring sentencing proportional to the offense. Manigault was convicted of possession of cocaine within 1,000 feet of a family housing complex, a B felony.[229] He challenged the sentence, arguing that if he had merely possessed cocaine he would have been guilty of only a class D felony; so he argued that he was punished disproportionately for the same crime.[230] The Indiana Court of Appeals

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220. *Id.* at 793.

221. *Id.* at 795.

222. *Id.* at 794-95.

223. 884 N.E.2d 903, 914 (Ind. Ct. App. 2008).

224. *Id.*; *see also* Bennett v. State, 883 N.E.2d 888, 893 (Ind. Ct. App. 2008) (convictions of three counts of child molesting supported by evidence of three separate incidents), *trans. denied.*

225. 865 N.E.2d 1049, 1054-56 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 206 (Ind. 2007).

226. *Id.* at 1055; *see also* Baltimore v. State, 878 N.E.2d 253, 260-61 (Ind. Ct. App. 2007) (convictions of burglary resulting in bodily injury and sexual battery supported by evidence of two separate touchings), *trans. denied*, 891 N.E.2d 38 (Ind. 2008).

227. *See* Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 42 IND. L. REV. 937 (2009).

228. 881 N.E.2d 679 (Ind. Ct. App. 2008).

229. *Id.* at 684.

230. *Id.* at 688.

ruled unanimously that there was no violation of the Proportionality Clause because the State was required to prove additional facts to elevate the offense to class B.[231]

I. Free Expression Under Article 1, Section 9

The prior article on Indiana constitutional law discussed the Indiana Court of Appeals' opinion in *A.B. v. State*, which held that a student's derogatory comments about her principal on the MySpace social networking site was protected speech under article 1, section 9.[232] On transfer, the Indiana Supreme Court also reversed the student's juvenile adjudication, but not based on constitutional rights.[233] Rather, the court concluded that the student's post did not meet the statutory requirement that it be intended to "harass, annoy, or alarm another person" because it was posted on a private portion of the website, and the court could discern no intent to communicate the message to the principal.[234]

In *Anderson v. State*,[235] the Indiana Court of Appeals affirmed a conviction for disorderly conduct over a challenge that the defendant's speech was protected political speech under article 1, section 9. The defendant made profane and angry comments directed at police officers who removed him from a tanning booth at the request of management after he failed to leave when his time expired, and he continued those comments even after being escorted out of the business.[236] The court concluded that these comments were not political comments directed at the arresting officers, but rather were comments on his own behavior that interfered with the ability of police to fulfill their duties.[237]

J. Mental Illness and Capital Punishment

The Indiana Supreme Court's decision in *Overstreet v. State* addressed when

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231. *Id.*

232. Jon Laramore, *Indiana Constitutional Developments: Incremental Change*, 41 IND. L. REV. 923, 928-29 (2008) (citing A.B. v. State, 863 N.E.2d 1212 (Ind. Ct. App. 2007), *trans. granted and rev'd*, 885 N.E.2d 1223 (Ind. 2008)).

233. A.B. v. State, 885 N.E.2d 1223, 1227-28 (Ind. 2008).

234. *Id.* at 1227. The court noted that the record contained little information about the operation of MySpace, and the court did independent research to discern its operation, particularly with regard to which portions of the website are private. In the opinion, Justice Dickson wrote:

> The Commentary to Canon 3B of the Indiana Code of Judicial Conduct advises: "A judge must not independently investigate facts in a case and must consider only the evidence presented." Notwithstanding this directive, in order to facilitate understanding of the facts and application of relevant legal principles, this opinion includes information regarding the operation and use of MySpace from identified sources outside the trial record.

Id. at 1224.

235. 881 N.E.2d 86, 91-92 (Ind. Ct. App. 2008).

236. *Id.* at 88-89.

237. *Id.* at 90.

severe mental illness can bar a death-sentenced prisoner's execution under the U.S. and Indiana constitutions.[238] Although the U.S. Constitution prohibits execution of one who is "insane," the law has insufficiently developed exactly who fits within that definition.[239] Overstreet suffered from severe, documented mental illness, including some type of schizophrenia.[240] The illness caused hallucinations and illusions, and Overstreet "heard voices" of devils and demons.[241]

In the opinion by Justice Rucker, the court nevertheless found that Overstreet's condition did not satisfy the federal test.[242] Although he "suffers from a severe, documented mental illness . . . [that] is a psychotic disorder that is the source of gross delusions," the delusions did not prevent him "from comprehending the meaning and purpose of the punishment to which he has been sentenced."[243]

The court also analyzed the case under the Indiana Constitution, which prohibits "cruel and unusual punishments" and requires that penalties be proportionate to the nature of the offense.[244] The court recited that the Indiana Constitution requires a different analysis than federal provisions and that it may provide additional protections.[245]

In this portion of the opinion, Justice Rucker wrote for himself only, adopting the "logic and underlying rationale" of *Atkins v. Virginia*,[246] the U.S. Supreme Court case prohibiting the execution of persons who were mentally retarded.[247] Justice Rucker stated his belief that severe mental illness indicates diminished capacity to understand and process information, to communicate, and to learn and engage in logical reasoning and impulse control.[248] These reasons supported prohibiting execution of those with mental retardation and should similarly prohibit execution of those with severe mental illness, Justice Rucker wrote.[249] He found "no principled distinction" between the reasons for not executing mentally retarded persons and the reasons for not executing mentally ill persons.[250] No other justices agreed with Justice Rucker's analysis, and they "vote[d] to affirm the judgment" sustaining Overstreet's conviction and death sentence against post-conviction challenge.[251]

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238. 877 N.E.2d 144 (Ind. 2007), *cert. denied*, 129 S. Ct. 458 (2008).
239. *Id.* at 172 (citing Ford v. Wainwright, 477 U.S. 399, 410 (1986)).
240. *Id.* at 172-73.
241. *Id.* at 173.
242. *Id.*
243. *Id.* (quoting Panetti v. Quarterman, 551 U.S. 930, 960 (2007)).
244. IND. CONST. art. 1, § 16.
245. *Overstreet*, 877 N.E.2d at 174.
246. 536 U.S. 304 (2002).
247. *Overstreet*, 877 N.E.2d at 175.
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.* A short opinion by Chief Justice Shepard, speaking for the other justices, stated that

II. Decisions Relating to Governmental Structure and Powers

A. Exhausting Administrative Remedies in Constitutional Challenges

The Indiana Court of Appeals examined whether exhaustion of administrative remedies was required to challenge the constitutionality of an agency's rule in *LHT Capital, LLC v. Indiana Horse Racing Commission*.[252] The case arose in the context of transfer of ownership of a pari-mutuel race track by LHT to another entity.[253] During the time period before the Horse Racing Commission was to approve the license transfer as required by statute, the Commission adopted an emergency rule stating that in considering whether to grant a request to transfer ownership of a horse racing track "the commission will consider the extent to which the state would share in any monetary payment to or economic benefit realized by the person divesting the ownership interest."[254] LHT asserted in the appeal that the Commission requested a payment of $15 million to the State as a condition of approving the sale.[255]

At the administrative hearing on the transfer application, LHT did not raise the constitutionality of the rule.[256] On appeal, LHT stated that the Commission's counsel indicated before the hearing that the Commission would not entertain a challenge to the rule's constitutionality, but there was no record support for that assertion.[257] In its petition for judicial review of the Commission's decision—which approved the transfer conditioned upon payment to the State of $9 million, a $9 million charitable contribution, and a $10 million investment in a private business—LHT alleged that the rule was void for vagueness, violated separation of powers principles, went beyond the Commission's jurisdiction, and was an unconstitutional taking.[258]

The Indiana Court of Appeals ruled that the trial court lacked jurisdiction over the petition for judicial review because LHT had not exhausted its administrative remedies, and exhaustion is a jurisdictional prerequisite.[259] Because LHT failed to raise the constitutionality of the rule before the

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the issue already had been decided adversely to Overstreet in *Matheney v. State*, 833 N.E.2d 454 (Ind. 2005), and *Baird v. State*, 831 N.E.2d 109 (Ind. 2005). *Overstreet*, 877 N.E.2d at 176. Justice Boehm then wrote separately to state his view that those cases did not decide the issue Overstreet presented, but that he believed the Indiana Constitution's protections in this area coincided with those of the U.S. Constitution, and thus gave Overstreet no relief. *Id.* at 177-78.

252. 891 N.E.2d 646 (Ind. Ct. App. 2008), *trans. denied.*

253. *Id.* at 649.

254. *Id.* at 648-49 (quoting 71 Ind. Admin. Code § 11-1-13(d) (2006)).

255. *Id.* at 650.

256. *Id.* at 651.

257. *Id.* at 650 n.4.

258. *Id.* at 651.

259. *Id.* at 656-57.

Commission, its failure to exhaust precluded judicial review of the question.[260] The court also concluded that LHT's failure to exhaust was not excused.[261] The court rejected LHT's argument that exhaustion would have been futile because no evidence in the record supported any argument that the Commission would not have taken the argument seriously.[262] LHT's failure to exhaust also was not excused because the Commission lacked authority to address constitutional issues.[263] The court noted that even when a party complains that a statute is unconstitutional and the agency lacks authority to address the question, exhaustion still may be required to resolve the case on other grounds, make a factual record, or develop a record of the agency's position.[264] The court noted that the cases excusing exhaustion on constitutional questions were declaratory judgment actions, not petitions for judicial review of actions the agency already took.[265] In this case, the court found that LHT negotiated an agreement with the Commission to obtain quick action on license transfer to facilitate installation of slot machines at the race track and did not raise the constitutional question to avoid disrupting the settlement.[266] LHT "accepted the benefits of its agreement," then tried to challenge the settlement on judicial review after benefiting from it.[267] Stating that it might have reached a different conclusion if LHT had sought declaratory relief before any administrative hearing was held, the court affirmed dismissal of the judicial review action because LHT did not exhaust administrative remedies on the constitutional question it raised.[268]

B. Division of Powers Under Article 3

The Indiana Supreme Court addressed division of powers in *Clark County Council v. Donahue*,[269] where judges sought a declaratory judgment indicating what the county council could lawfully do with supplemental adult probation fees. The law requires judges to charge a user fee to persons on probation.[270] The same statute specifies that the fees are to be placed in each county's

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260. *Id.* at 656.

261. *Id.*

262. *Id.* at 654. LHT alleged that the Commission's general counsel indicated that the Commission would not entertain a constitutional challenge, but that allegation was unsupported by any record evidence. *Id.* at 650 n.4.

263. *Id.* at 654.

264. *Id.* In this case, for example, the Commission might have determined not to enforce its rule or to do so only minimally.

265. *Id.* at 655-56 (distinguishing cases that involve declaratory judgments from the case at bar).

266. *Id.* at 656.

267. *Id.*

268. *Id.*

269. 873 N.E.2d 1038 (Ind. 2007), *reh'g denied.*

270. IND. CODE § 35-38-2-1(b) (2008).

"supplemental adult probation services fund."[271] The county council argued that it could use the fund without participation by the judges in where the funds were used and that the funds could be used for purposes including, but not limited to, probation services.[272] In contrast, the judges argued that judges have the responsibility to determine how the fund is to be spent.[273]

The court found the answer in the statute, which it interpreted to require the fund to be spent only for supplemental or new probation services and increases or expansions of existing probation services.[274] The court concluded that "constitutional due process and separation of functions considerations point to this result."[275] The court continued, "[p]robation users' fees are imposed on persons convicted of crimes. The Due Process Clause of the U.S. Constitution and analogous protections under the Indiana Constitution limit the amount and circumstances under which probation users' fees and other conditions may be imposed on criminal defendants."[276] If ongoing court and probation operations were dependent upon the fees, courts might be (or appear) tempted to convict more people to raise more revenue, a violation of due process and analogous state principles.[277]

C. Due Course of Law (Article 1, Section 12) and Equal Privileges and Immunities (Article 1, Section 23)

As usual during the survey period, a small number of cases raised challenges to statutes under the Due Course of Law Clause in article 1, section 12 and the Equal Privileges and Immunities Clause in article 1, section 23, but they failed to meet the high standard the courts have set for such challenges to succeed. The Indiana Supreme Court rejected an equal privileges challenge under the Worker's Compensation Act (Act) in *Brown v. Decatur County Memorial Hospital*.[278] The court ruled that, under the Act, a medical provider obtaining compensation for treating a patient was not entitled to interest on his claim because the Act did not provide for interest.[279] The court then rejected the provider's claim that denying him interest violated the Equal Privileges and Immunities Clause because other medical providers were entitled to interest when they sued in court.[280] The court found that providers obtaining payment within the worker's compensation system were different than other medical providers; so, it was permissible for the

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271. *Id.* § 35-38-2-1(f).
272. *Donahue*, 873 N.E.2d at 1039-40.
273. *Id.* at 1040.
274. *Id.* at 1041 (construing IND. CODE § 35-38-2-1(f), (h) (2008)).
275. *Id.* at 1042.
276. *Id.*
277. *Id.*
278. 892 N.E.2d 642 (Ind. 2008).
279. *Id.* at 649-50.
280. *Id.* at 651.

legislature to treat them differently by not providing for interest.[281] Those treating patients eligible for worker's compensation are guaranteed that their claims will be paid, while other medical providers "may or may not receive payment for services rendered," justifying different treatment.[282]

A plaintiff challenged provisions of the Occupational Diseases Act on equal privileges and immunities grounds in *Roberts v. ACandS, Inc.*[283] The worker's compensation claim was made by the widow of an insulator who died from asbestos-related illness.[284] She sued multiple parties, and some settled by making payments.[285] ACandS, Roberts's direct employer, then moved to dismiss the worker's compensation claim against it because, under Indiana Code section 22-3-7-36, when an employee obtains payment for an injury from a third party, the employer's obligation under the worker's compensation system ceases.[286] The court found that the statute violated neither article 1, section 12 nor article 1, section 23.[287] The plaintiff challenged the statute as applied to her, claiming that it created two subclasses, employees injured through no fault of their own and employees injured at least in part by the actions of their employers, and denied full compensation to the second group.[288] The court rejected this contention, holding that it is no violation to allow fault to be apportioned to the employer even though no compensation is forthcoming from the employer because of the Act[289]. Rather, it held that the worker's compensation system is not fault-based, and "[t]he humanitarian purpose of these acts is to provide workers with an expeditious and *adequate* remedy, not a complete remedy."[290] Thus, it is permissible as part of the overall, no-fault worker's compensation system to eliminate one source of payment (the employer) when the employee opts to pursue relief through different channels.

The court also rejected a section 12 challenge, made on an as-applied basis, contending that the law unreasonably and arbitrarily burdened the plaintiff's ability to obtain "a complete tort remedy."[291] Rather, section 12 does not specify any particular remedy, but only guarantees a right to pursue judicially any remedy that the General Assembly may have prescribed for a given harm.[292]

Adding to the lengthy list of cases applying article 1, section 12 in the medical malpractice context is the Indiana Supreme Court's decision in

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281. *Id.*

282. *Id.*

283. 873 N.E.2d 1055 (Ind. Ct. App. 2007).

284. *Id.* at 1057.

285. *Id.* at 1057-58.

286. *Id.* at 1058 (citing IND. CODE § 22-3-7-36 (2006)).

287. *Id.* at 1060-63 (discussing the Privileges and Immunities Clause and the Open Courts Clause).

288. *Id.* at 1060.

289. *Id.* at 1062.

290. *Id.*

291. *Id.*

292. *Id.* (citing Cantrell v. Morris, 849 N.E.2d 488, 499 (Ind. 2006)).

Brinkman v. Beuter.[293] The Indiana Supreme Court has ruled that the two-year, occurrence-based medical malpractice statute of limitations is facially constitutional but may be unconstitutional as-applied in certain cases where strict application would deny a plaintiff the remedies otherwise guaranteed by law.[294] This principle makes applying the statute of limitations fact sensitive. In *Brinkman*, the plaintiff had a difficulty pregnancy, delivered a healthy baby in 1995, and shortly thereafter suffered from eclampsia and its symptoms, including pain and seizures.[295] She was advised to avoid another pregnancy.[296] In 2000 she became pregnant again, and her new treating physician told her that her medical treatment in 1995 had been improper and she should not have been counseled to refrain from having children.[297] She then sued for malpractice. The Indiana Supreme Court ruled that her lawsuit was untimely.[298] The statute of limitations began to run in 1995, and she was well aware of her symptoms at that time and could have obtained additional medical and legal opinions.[299] Unlike cases where the illness had a long latency and could not be detected until after the statute of limitations had expired, the Brinkmans were aware of the facts and symptoms in 1995, and nothing prevented them from investigating and filing suit at that time.[300]

In re Creation of South-West Lake Maxinkuckee Conservancy District included several challenges to the establishment of this district to provide sewage treatment, most about whether various procedural requirements for establishing the district were met.[301] The intervenor challenging the district also argued that his rights under article 1, section 12 were violated because he was not given an opportunity to opt out of the district, while others were.[302] He argued that allowing some to opt out precluded them from being heard on whether they should be part of the district, violating the provision of section 12 stating that "every person, for injury done to him in his person, property, or reputation, shall have remedy by due course [of] law."[303] The court rejected this claim because it failed to disclose that a full hearing had been held at which all with interests could be heard and those with similar interests were treated similarly.[304]

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293. 879 N.E.2d 549 (Ind. 2008). Many of the cases applying section 12 in the medical malpractice context are discussed in the opinion at 553-54.

294. *Id.* at 554 (citing Martin v. Richey, 711 N.E.2d 1273 (Ind. 1999); Van Dusen v. Stotts, 712 N.E.2d 491 (Ind. 1999)).

295. *Id.* at 551.

296. *Id.*

297. *Id.* at 552.

298. *Id.* at 554-55.

299. *Id.*

300. *Id.*

301. 875 N.E.2d 222 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 40 (Ind. 2008).

302. *Id.* at 233.

303. *Id.* (quoting IND. CONST. art. 1, § 12).

304. *Id.* at 233-34.