

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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This Article will survey developments in the area of criminal law and procedure that were enacted by the 1999 Indiana General Assembly and addressed by the Indiana appellate courts since the last Survey.

I. 1999 LEGISLATIVE ENACTMENTS

A. *Victim Rights*

The legislature created a new article in Title 35 that seeks to statutorily implement the victims' rights amendment to article I, section 13 of the Indiana Constitution.¹ The new act also repealed and replaced the existing statutes regarding victim assistance programs and victim notification.² Under the new act, a victim is defined as a person who "has suffered harm as a result of a crime that was perpetrated directly against the person."³ A victim has the following rights: to be informed when a person is accused or convicted of the crime;⁴ to be notified of the convicted person's release or escape from custody;⁵ to confer with the prosecutor's office; and to be heard at a hearing involving sentence or post-conviction release of the convicted person.⁶ The act does not give the victim the authority to direct the prosecution,⁷ challenge a charging decision or a

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1. See IND. CODE § 35-40-1 (Supp. 1999). The amendment to the Indiana Constitution provides:

Victims of crime, as defined by law, shall have the right to be treated with fairness, dignity, and respect throughout the criminal justice process; and, as defined by law, to be informed of and present during public hearings and to confer with the prosecution, to the extent that exercising these rights does not infringe upon the constitutional rights of the accused.

IND. CONST. art. I, § 13(b).

2. See IND. CODE §§ 33-14-10; 35-33-12 (1997), *repealed by* Pub. L. 139-1999.

3. *Id.* § 35-40-4-8 (Supp. 1999).

4. See *id.* § 35-40-5-2(a).

5. See *id.* § 35-40-5-2(b).

6. See *id.* § 35-40-5-5.

7. See *id.* § 35-40-5-3.

conviction,⁸ obtain a stay of a trial,⁹ or obtain a new trial.¹⁰ The act is also not meant to give rise to a claim for damages against the State of Indiana, a political subdivision, or any public official.¹¹

B. New Criminal Offenses

The Indiana General Assembly created several new offenses that became effective in 1999.

1. *Domestic Battery*.—The legislature codified domestic battery as an independent battery offense,¹² and deleted references to domestic violence in the battery statute.¹³ A domestic battery occurs when the battery is directed at a person who “is or was a spouse of the other person,” “is or was living as if a spouse of the other person,” or “has a child in common with the other person” and the incident results in bodily injury.¹⁴ A domestic battery cannot occur unless the touching results in bodily injury.¹⁵ As with any other battery that results in bodily injury, domestic battery is a Class A misdemeanor.¹⁶ However, the offense is elevated to a Class D felony if the person has a previous, unrelated domestic battery conviction.¹⁷

A domestic battery conviction may also have ramifications for child visitation. Section 31-14-14-5 of the Indiana Code was amended to create a rebuttable presumption in favor of supervised visitation when the court finds that the noncustodial parent has been convicted of domestic battery that was witnessed or heard by the child.¹⁸ Following a conviction, supervised visitation will be required for at least one year but not more than two years or until the child is emancipated.¹⁹

2. *Cemetery Mischief*.—Cemetery mischief is defined as recklessly, knowingly, or intentionally damaging a cemetery or facility used for memorializing the dead; damaging the grounds owned or rented by a cemetery or facility used for memorializing the dead; or disturbing, defacing, or damaging a cemetery monument, grave marker, grave artifact, grave ornamentation, or cemetery enclosure.²⁰ The offense is a Class A misdemeanor, which is enhanced

8. *See id.* § 35-40-2-1(1).

9. *See id.*

10. *See id.*

11. *See id.* § 35-40-2-1.

12. *See id.* § 35-42-2-1.3.

13. *See id.* § 35-42-2-1.

14. *Id.* § 35-42-2-1.3.

15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.* § 31-14-14-5.

19. *See id.*

20. *See id.* § 35-43-1-2.1.

to a Class D felony if the pecuniary loss is at least \$2500.²¹

3. *Railroad Mischief and Criminal Trespass.*—In addition to cemetery mischief, the legislature also created a railroad mischief offense defined as recklessly, knowingly or intentionally damaging or vandalizing various railroad equipment.²² The offense is a Class D felony enhanced to a Class C felony if the mischief results in serious bodily injury, or a Class B felony if it results in death.²³ Another railroad related offense was created when the criminal trespass statute was amended to include traveling by train without lawful authority or the railroad carrier's consent.²⁴

4. *Body Piercing.*—The legislature made it a Class A misdemeanor for a person to perform body piercing upon a person less than eighteen years of age absent the consent of a parent or guardian.²⁵ Body piercing is defined as “the perforation of any human body part other than an earlobe for the purpose of inserting jewelry or other decoration or for some other nonmedical purpose.”²⁶ The law exempts health care professionals acting in the course of practice.²⁷

C. Enhancements to Previous Statutes

Several penalty enhancements became effective in 1999. The general assembly added a habitual sexual offender provision to the Indiana Criminal Code.²⁸ The provision permits the State to seek to have a person sentenced as a repeat sexual offender by alleging, on a separate charging instrument, that the person has accumulated one prior, unrelated felony conviction for a sexual offense.²⁹ The court may sentence a person found to be a repeat sexual offender to an additional fixed term equal to the presumptive sentence for the underlying offense, not to exceed ten years.³⁰

In response to an outbreak of church break-ins and fires in Indiana, the legislature amended the arson³¹ and burglary³² statutes to include religious structures among those buildings and structures listed in the respective statutes. The amendments elevated the arson and burglary of a religious structure to Class B felonies.³³

21. *See id.*

22. *See id.* § 35-42-2-5.5.

23. *See id.*

24. *See id.* § 35-43-2-2(a)(6)(A).

25. *See id.* § 35-42-2-7(c), -7(e).

26. *Id.* § 35-42-2-7(b).

27. *See id.* § 35-42-2-7(d).

28. *See id.* § 35-50-2-14.

29. *See id.* § 35-50-2-14(a).

30. *See id.* § 35-50-2-14(e).

31. *See id.* § 35-43-1-1(a)(4).

32. *See id.* § 35-43-2-1(1)(B)(ii).

33. *See id.* §§ 35-43-1-1(a)(4); 35-43-2-1(1)(B)(ii). Before the amendment, arson of a church would have been a Class D felony if the pecuniary loss was more than \$250 but less than

The legislature increased the penalty for neglect of a dependent from a Class D felony to a Class C felony if the neglect results in bodily injury or consists of cruel and unusual confinement or abandonment, or a Class B felony if the neglect results in serious bodily injury.³⁴ The general assembly also enhanced the penalty for trafficking with an inmate from a Class A misdemeanor to a Class C felony when the article delivered, carried, or received by the inmate is a controlled substance or a deadly weapon.³⁵ Finally, Indiana's sentencing statute was amended to include a person's employment at a penal facility as an aggravating circumstance when sentencing the person for drug trafficking.³⁶

D. Sex Offenders and Violent Offenders

The general assembly passed a provision requiring sex and violent offenders to register with local law enforcement authorities and prohibited a sex and violent offender who is on parole or probation from residing within 1000 feet of school property without the approval of the parole board or the court.³⁷ The general assembly also enacted a provision requiring the sex and violent offender registry be placed on the internet, but prohibited it from including the offender's home address.³⁸

II. CASE DEVELOPMENTS

A. Search and Seizure

The United States Supreme Court and Indiana's appellate courts decided several significant Fourth Amendment cases during the survey period. This section focuses on decisions relating to the rights of automobile passengers and drivers.

Two cases during the survey period addressed application of the Fourth Amendment to the search of a passenger's personal items found inside an automobile. In *Wyoming v. Houghton*,³⁹ a police officer performing a traffic stop noticed that the driver of the car had a syringe in his shirt pocket. The driver admitted to using the syringe to take drugs, giving the officer probable cause to search the car for contraband.⁴⁰ The officer ordered the driver and the two

\$5000 and a Class B felony if the loss was \$5000 or more. See IND. CODE § 35-43-1-1 (1998), amended by IND. CODE § 35-43-1-1(a)(4) (Supp. 1999). Burglary of a church would have been a Class C felony. See *id.* § 35-43-2-1, amended by IND. CODE § 35-43-2-1(1)(B)(ii) (Supp. 1999).

34. See *id.* § 35-46-1-4.

35. See *id.* § 35-44-3-9. Also, the drug trafficking statute was broadened to encompass juvenile facilities. See *id.*

36. See *id.* § 35-38-1-7.1(b)(13).

37. See *id.* §§ 11-13-3-4(g)(2); 35-38-2-2.2(2).

38. See *id.* § 5-2-12-11(b).

39. 526 U.S. 295 (1999).

40. See *Maryland v. Dyson* 527 U.S. 465 (1999); *United States v. Ross*, 456 U.S. 798

female passengers, including Houghton, out of the vehicle while he conducted a search. The officer discovered a purse in the back seat of the car that Houghton admitted belonged to her. Upon examining the purse, the officer discovered two containers that held syringes and illegal drugs.⁴¹ Houghton was convicted of drug possession.⁴² The Wyoming Supreme Court reversed the conviction, stating

Generally, once probable cause is established to search a vehicle, an officer is entitled to search all containers therein which may contain the object of the search. However, if the officer knows or should know that a container is the personal effect of a passenger who is not suspected of criminal activity, then the container is outside the scope of the search unless someone had the opportunity to conceal the contraband within the personal effect to avoid detection.⁴³

The Wyoming court held that the search of respondent's purse violated the Fourth and Fourteenth Amendments because the officer "[k]new or should have known that the purse did not belong to the driver, but to one of the passengers," and because "[t]here was no probable cause to search the passengers' personal effects and no reason to believe that contraband had been placed within the purse."⁴⁴

In a 6-3 opinion authored by Justice Scalia, the United States Supreme Court reversed the judgment of the Wyoming Supreme Court, holding that "police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search."⁴⁵ The Court reiterated its holding in *United States v. Ross* that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."⁴⁶ The Court emphasized that its later cases describing *Ross* have characterized its holding as "applying broadly to all containers within a car, without qualification as to ownership."⁴⁷ Additionally, the Court found no historical evidence to support a distinction for searching packages based on ownership and concluded that the Fourth Amendment's balancing test tipped in favor of the government.⁴⁸ The Court further noted that a "passenger's property" exception to car searches

(1982); *Carroll v. United States*, 267 U.S. 132 (1925) (holding that police may conduct a warrantless search of an automobile where they have probable cause to believe the vehicle contains contraband). Similarly, in *Florida v. White*, 526 U.S. 559 (1999), the Court held that police do not need a warrant or exigent circumstances to publicly seize an automobile when they have probable cause to believe the automobile is forfeitable contraband under a state statute.

41. *See Houghton*, 526 U.S. at 298.

42. *See id.*

43. *Houghton v. State*, 956 P. 2d 363, 372 (Wyo. 1998), *rev'd*, 526 U.S. 295 (1999).

44. *Id.*

45. *Houghton*, 526 U.S. at 307.

46. *Id.* at 301 (quoting *United States v. Ross*, 456 U. S. 798, 825 (1982)).

47. *Id.*

48. *See id.* at 302-03.

would likely lead to passenger-confederates claiming everything in the car as their own, resulting in a “bog of litigation.”⁴⁹

In *State v. Friedel*,⁵⁰ the Indiana Court of Appeals addressed the propriety of a similar search. In *Friedel*, police stopped a van to cite the driver, Ryan Underwood, for operating the vehicle with only one headlight. In addition to Underwood, the vehicle was occupied by Friedel and her child, and one or two male passengers.⁵¹ A computer check of the Underwood’s criminal record revealed prior charges but no outstanding warrants. Police sought and received Underwood’s permission to search the van for illegal drugs and weapons.⁵² All of the passengers then exited the van, and the police conducted a search. While searching the vehicle, police found a purse on the floor behind the driver’s seat where Friedel had been sitting. Police searched the purse and discovered a leather wallet and an eyeglasses case, both of which contained illegal drugs.⁵³ After searching the purse, police asked Friedel if it belonged to her. Friedel acknowledged that it was her purse, and police arrested her. Friedel was subsequently charged with possession of a controlled substance and possession of marijuana.⁵⁴ Friedel filed a motion to suppress the drugs found in her purse. The trial court granted her motion, resulting in dismissal of the charges, and the State appealed.⁵⁵

In addressing the propriety of the search, the court of appeals first concluded that Friedel had standing to challenge the search of her purse, stating “the question is not whether Friedel had standing to challenge the search of Underwood’s automobile, but rather whether she has standing to challenge the search of her purse which was in Underwood’s automobile. . . . [A]s the owner of the purse . . . [Friedel] has standing to challenge the constitutionality of the search of her purse.”⁵⁶

The court then addressed the State’s claim that the search was permissible under *Wyoming v. Houghton*.⁵⁷ The court found *Houghton* inapplicable because, unlike the police in this case, the officers in *Houghton* had probable cause to conduct the search.⁵⁸ The search in this case was based solely on Underwood’s consent to search the vehicle.⁵⁹ Thus, the court reasoned, the ultimate issue in this case was whether Underwood’s consent to the search of his vehicle constituted consent to search Friedel’s purse.⁶⁰

49. *Id.* at 305.

50. 714 N.E.2d 1231 (Ind. Ct. App. 1999).

51. *See id.* at 1234-35.

52. *See id.* at 1235.

53. *See id.*

54. *See id.*

55. *See id.*

56. *Id.* at 1236-37.

57. *See id.* at 1237-38.

58. *See id.* at 1238.

59. *See id.*

60. *See id.*

The court of appeals concluded that Underwood's consent did not extend to Friedel's purse.⁶¹ Citing the absence of evidence in the record showing Underwood jointly owned, possessed, or controlled the purse, the court found Underwood lacked actual authority to consent to a search of Friedel's purse.⁶² The court also determined that Underwood did not have apparent authority to consent to a search of Friedel's purse.⁶³ A search is valid under the apparent authority doctrine where the State can prove that the officers "reasonably believed that the person from whom they obtained consent had the actual authority to grant consent."⁶⁴ Noting that the purse was a woman's handbag, Friedel was the only woman in the car, and the purse was found where Friedel had been sitting, the court concluded that it was unreasonable for police to believe that Underwood had the authority to consent a search of the purse—"an object for which two or more persons [generally do not] share common use or authority."⁶⁵

In another case involving the rights of automobile passengers, the Indiana Court of Appeals held in *Walls v. State*⁶⁶ that the action of a passenger exiting and walking away from a vehicle that has been stopped by police for a minor traffic violation does not amount to reasonable suspicion to conduct an investigatory stop of that passenger. In *Walls*, a police officer stopped a car in a high drug-trafficking area after the driver made a left-hand turn without using his turn signal.⁶⁷ As the officer began to communicate his location and run a check of the car's license plate via police radio, Walls, a passenger, "jumped out of . . . the vehicle and shut the door and started to walk away."⁶⁸ The officer ordered Walls to stop and return and Walls complied. When asked if he had any weapons, Walls admitted that he had a knife in his pocket.⁶⁹ The officer conducted a pat-down search of Walls that produced two knives, one of which had crack-cocaine residue on the blade.⁷⁰ The State charged Walls with possession of cocaine.⁷¹ The trial court denied Walls' motion to suppress, and Walls was subsequently convicted as charged.⁷²

In a 2-1 decision, the court of appeals found there was a lack of specific evidence indicating that Walls posed a threat or had been engaging in or was

61. *See id.* at 1243.

62. *See id.* at 1240.

63. *See id.* at 1240-41.

64. *Id.* (quoting *United States v. Welch*, 4 F.3d 761, 764 (9th Cir. 1993)).

65. *Id.*

66. 714 N.E.2d 1266 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 316 (Ind. 1999) (mem.).

67. *See id.*

68. *Id.* at 1267.

69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.*

about to engage in criminal activity.⁷³ Thus, the officer had no basis to stop and pat-down Walls.⁷⁴ In the opinion authored by Judge, now Indiana Supreme Court Justice, Rucker, the court held that simply walking away from a stopped car in a high drug-trafficking area was not enough to create the suspicion which warranted detaining Walls.⁷⁵ The court also found that the need of law enforcement to control the scene of a traffic stop did not outweigh “[t]he liberty of a private citizen who has been observed engaging in no illegal activity, and whose only transgression is his untimely presence in a car that has been stopped for a minor traffic violation”⁷⁶ Judge Sullivan dissented from the majority decision, citing officer safety and cases from other jurisdictions that have found such stops permissible.⁷⁷

In *Knowles v. Iowa*,⁷⁸ the United States Supreme Court held that police may not conduct a search incident to the issuance of a traffic citation even when authorized by state law, and even when the officer could have made an arrest. Iowa law provides that Iowa peace officers having cause to believe that a person has violated any traffic or motor vehicle equipment law may arrest the person and immediately take the person before a magistrate.⁷⁹ Iowa law also authorizes the practice of issuing a citation in lieu of arrest or in lieu of continued custody after an initial arrest.⁸⁰ The Court found that the search in this case, as authorized by Iowa law, could not be sustained under the “search incident to arrest” exception recognized in *United States v. Robinson*.⁸¹ The Court found that the two historical rationales for the “search incident to arrest” exception announced in *Robinson*, the need to disarm the suspect in order to take him into custody, and the need to preserve evidence for later use at trial, were not at work in this case.⁸² Thus, the Court declined to extend *Robinson*’s bright line rule to the issuance of a citation.⁸³

73. See *id.* at 1268.

74. See *id.*

75. See *id.*

76. *Id.* Cf. *Webb v. State*, 714 N.E.2d 787 (Ind. Ct. App. 1999); *Stalling v. State*, 713 N.E.2d 922 (Ind. Ct. App. 1999) (both holding that a person who turns away from police in a high crime area and places an unknown item in his pants does not engage in suspicious activity that supports an investigatory stop).

77. See *Walls*, 714 N.E.2d at 1269 (Sullivan, J., dissenting). The continued vitality of *Walls* may be in question in light of the United States Supreme Court’s recent decision in *Illinois v. Wardlow*, 120 S. Ct. 673 (2000), which held that running away from police in an area of heavy narcotics trafficking gives rise to reasonable suspicion for police to investigate further.

78. 525 U.S. 113 (1998).

79. See IOWA CODE § 321.485(1)(a) (Supp. 1997).

80. See *id.* § 805.1(1).

81. See *Knowles*, 525 U.S. at 116-19 (citing *United States v. Robinson*, 414 U. S. 218, 234 (1973)).

82. See *id.* (citing *Robinson*, 414 U. S. at 234).

83. See *id.* at 118-19.

In *Jett v. State*,⁸⁴ the Indiana Court of Appeals also held that absent specific facts indicating an individual is armed or dangerous, police may not search a person stopped for a traffic violation. Police stopped Jett for speeding and improper passing.⁸⁵ Immediately after being stopped, Jett exited his vehicle. The police officer ordered Jett back into his car. Jett complied and made no furtive or threatening movements.⁸⁶ The officer then approached Jett's car, ordered Jett out, and performed a pat-down search of Jett that produced marijuana. A subsequent search of Jett's car produced additional marijuana⁸⁷ and the State charged Jett with possession of marijuana. The trial court denied Jett's motion to suppress the drugs, and Jett was convicted as charged.⁸⁸

The court of appeals found the search was illegal and reversed.⁸⁹ The court noted that, although exiting a vehicle during a traffic stop may in some cases be a sign that the person is dangerous or a threat, in this case Jett did not behave in a threatening manner when he got out of his car.⁹⁰ The court also stated that any threat that may have existed was alleviated when Jett complied with the officer's order to return to his car.⁹¹ The court found that a generalized suspicion of all drivers who exit their vehicles during a traffic stop does not authorize a pat-down search.⁹²

B. Confessions

In *State v. Linck*,⁹³ the Indiana Court of Appeals addressed whether physical evidence obtained as a result of statements given during a custodial interrogation, where the State failed to advise the defendant of his *Miranda* rights,⁹⁴ should be suppressed as fruit of the poisonous tree. In *Linck*, two police officers responded to a report of drug use in Linck's apartment. As the officers entered Linck's apartment building they smelled what they believed to be burning marijuana.⁹⁵ The officers knocked on Linck's door, and after a few seconds, Linck answered and allowed the officers inside. The officers told Linck they smelled marijuana

84. 716 N.E.2d 69 (Ind. Ct. App. 1999).

85. *See id.* at 70.

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.* at 71.

90. *See id.* at 70.

91. *See id.*

92. *See id.* (citing *Knowles v. Iowa*, 525 U.S. 113, 119 (1998)).

93. 708 N.E.2d 60 (Ind. Ct. App.), *trans. granted*, 714 N.E.2d 175 (Ind.), and *trans. dismissed*, 716 N.E.2d 897 (Ind. 1999).

94. *See Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966) (holding that before a person may be subject to custodial interrogation, he must be warned that "[h]e has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him.").

95. *See Linck*, 708 N.E.2d at 61.

and believed he had been using illegal drugs. The officers then asked Linck, “what the problem was?”⁹⁶ A surprisingly candid Linck responded that he had “just smoked a joint.”⁹⁷ The officers then asked Linck if there was any more marijuana in the apartment. Linck answered that there was and retrieved a bag containing 28.2 grams of marijuana from his refrigerator.⁹⁸ The officers asked if that was all. Linck responded that there was more marijuana in the bedroom, which the officers retrieved. During his exchange with police, Linck was never advised of his *Miranda* rights.⁹⁹ Linck was arrested and charged with possession of marijuana.¹⁰⁰ Linck filed a motion to suppress the marijuana and his statements arguing that they were unlawfully obtained because the officers failed to advise him of his *Miranda* rights prior to questioning him in his apartment.¹⁰¹ The trial court granted Linck’s motion, resulting in the dismissal of the charge, and the State appealed.¹⁰²

“*Miranda* warnings are based upon the Fifth Amendment Self-Incrimination Clause, and were designed to protect an individual from being compelled to testify against himself.”¹⁰³ The *Miranda* safeguards apply only when a person is subject to custodial interrogation.¹⁰⁴ An interrogation includes words or actions on the part of police “that the police should know are reasonably likely to elicit an incriminating response from the suspect.”¹⁰⁵ A person is in custody in situations where a reasonable person would not feel free to leave.¹⁰⁶ In this case, the court of appeals determined that Linck was being subjected to a custodial interrogation when the officers questioned him regarding the existence of additional marijuana after Linck stated that he had “just smoked a joint.”¹⁰⁷ Thus, the court held that officers violated *Miranda* when they failed to advise Linck of his rights before questioning him and upheld the trial court’s suppression of Linck’s statements.¹⁰⁸

The court then addressed whether the *Miranda* violation required suppression of the physical evidence seized as a result of Linck’s statements under the fruit of the poisonous tree doctrine.¹⁰⁹ The State argued that the fruit of the poisonous tree doctrine applies only to evidence seized following a constitutional violation and not a mere violation of *Miranda*’s prophylactic

96. *Id.*

97. *Id.*

98. *See id.* at 61-62.

99. *See id.*

100. *See id.*

101. *See id.*

102. *See id.* at 62.

103. *Id.* (citing *Curry v. State*, 643 N.E.2d 963, 976 (Ind. Ct. App. 1994)).

104. *See id.* (citing *Curry*, 643 N.E.2d at 976).

105. *Id.* (citing *Curry*, 643 N.E.2d at 977).

106. *See id.*

107. *Id.* at 62-63.

108. *See id.* at 63.

109. *See id.* at 63-66.

procedures; therefore, because Linck's confession was not the result of a constitutional violation, the physical evidence should not have been suppressed.¹¹⁰ The court of appeals observed that several circuits of the United States Courts of Appeals that had addressed the issue had concluded that physical evidence derived from a statement obtained in violation of *Miranda* is admissible absent evidence of coercion or other misconduct on the part of law enforcement officers sufficiently egregious to offend due process.¹¹¹ The court then noted that although the United States Supreme Court had not yet directly addressed the issue, most of the appellate court decisions cited *Oregon v. Elstad*¹¹² in support of their decisions.¹¹³ In *Elstad*, the Court determined that a defendant's initial statements made without *Miranda* warnings at the defendant's home did not render a subsequent written confession inadmissible.¹¹⁴ The Court found that because the defendant's initial statement was not coerced so as to violate the Fifth Amendment, the exclusionary rule did not require the subsequent written confession to be suppressed.¹¹⁵ The *Elstad* Court noted that the fruit of the poisonous tree doctrine prevents the State from offering evidence that has been tainted by a constitutional violation, and that *Miranda* warnings are not themselves rights protected by the Constitution.¹¹⁶ Thus, the Court reasoned that a violation of *Miranda* may occur even in the absence of a Fifth Amendment violation.¹¹⁷

While the Indiana Court of Appeals found *Elstad* to be persuasive authority, it reiterated that the United States Supreme Court had yet to directly address the issue presented in this case—the suppression of physical evidence obtained in violation of *Miranda*.¹¹⁸

The court then looked to *Hall v. State*,¹¹⁹ a pre-*Elstad* decision of the Indiana Supreme Court which specifically held that when a confession is unlawfully obtained, evidence which is inextricably bound to the confession must be suppressed.¹²⁰ The court recognized that *Hall* did not discuss the distinction between a *Miranda* violation and a violation of the Fifth Amendment right against self-incrimination, and stated that *Hall*'s validity may be in question.¹²¹ Nevertheless, the court of appeals held that it was bound by the decision of

110. See *id.* at 63-64.

111. See *id.* at 64 (citing *United States v. Elie*, 111 F.3d 1135 (4th Cir. 1997); *United States v. Crowder*, 62 F.3d 782, 786 (6th Cir. 1995); *United States v. Mendez*, 27 F.3d 126, 130 (5th Cir. 1994); *United States v. Gonzalez-Sandoval*, 894 F.2d 1043 (9th Cir. 1990)).

112. 470 U.S. 298 (1985).

113. See *Linck*, 708 N.E.2d at 64.

114. See *Elstad*, 470 U.S. at 318.

115. See *id.*

116. See *id.* at 305-06.

117. See *id.* at 306-07.

118. See *Linck*, 708 N.E.2d at 65.

119. 346 N.E.2d 584 (Ind. 1976).

120. See *Linck*, 708 N.E.2d at 66.

121. See *id.*

Indiana's highest court and affirmed the suppression of the marijuana recovered from Linck's apartment.¹²²

The State sought transfer to the Indiana Supreme Court.¹²³ After granting transfer and hearing oral argument, the supreme court set aside the order granting transfer and left the court of appeals' decision undisturbed.¹²⁴

In *A.A. v. State*,¹²⁵ the Indiana Court of Appeals held that a juvenile's noncustodial confession was obtained in violation of the Fourteenth Amendment's Due Process Clause. In this case, J.D. reported to police that his cousin, fifteen-year-old A.A., had placed his mouth on J.D.'s penis. A.A. and his mother voluntarily met twice with a detective to discuss the allegation. On both occasions, the detective informed A.A. and his mother that they were free to leave at any time.¹²⁶ During the first interview, A.A. told the detective that he had been molested over a five year period by his uncle, J.D.'s father. When A.A. returned for a second interview, the detective told A.A. that he would not be a credible witness in the State's molestation case against his uncle unless he confessed to what had occurred between him and J.D.¹²⁷ A.A. then confessed to performing oral sex on J.D.¹²⁸

Thereafter, the State brought delinquency proceedings against A.A.¹²⁹ At the fact-finding hearing, J.D. recanted the earlier allegation he made to police. The trial court did not permit the State to admit J.D.'s prior statement as substantive evidence.¹³⁰ The State then sought to introduce A.A.'s written confession. A.A.'s counsel objected, arguing that the detective coerced A.A. into confessing when she improperly used A.A.'s molestation allegations against his uncle to secure the confession.¹³¹ The trial court overruled the objection, admitted the confession, and subsequently adjudicated A.A. as a delinquent child.¹³² A.A. appealed.¹³³

The court of appeals first noted that when A.A. and his mother met with the detective, A.A. was free to leave and thus not subject to a custodial interrogation.¹³⁴ Therefore, the court concluded that neither the *Miranda* warnings nor the juvenile waiver statute¹³⁵ were implicated.¹³⁶ The court then

122. *See id.*

123. *See State v. Linck*, 714 N.E.2d 175 (Ind. 1999).

124. *See State v. Linck*, 716 N.E.2d 897 (Ind. 1999).

125. 706 N.E.2d 259 (Ind. Ct. App. 1999).

126. *See id.* at 260-61.

127. *See id.* at 261.

128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.*

132. *See id.*

133. *See id.*

134. *See id.* at 262.

135. *See* IND. CODE § 31-32-5-1 (1998).

136. *See A.A.*, 706 N.E.2d at 262.

addressed A.A.'s claim under the Due Process Clause of the Fourteenth Amendment. The court looked at the totality of the circumstances in which A.A. gave his confession to determine whether it was "the product of rational intellect," freely given, and not the result of improper interrogation tactics.¹³⁷ The court found the detective's "ultimatum" that A.A. must confess before his claims against his uncle would be taken seriously constituted police pressure amounting to an improper *quid pro quo* that rendered the confession involuntary.¹³⁸ The court stated:

[O]nly if A.A. confessed to a single incident of child molesting which occurred between him and another child would the State prosecute his uncle, an adult, who had allegedly victimized and sexually abused him over a five-year period. . . . Given the totality of the circumstances, we conclude that A.A.'s confession was not voluntary, that the police conduct in this case violates the Due Process Clause of the Fourteenth Amendment, and that the trial court erred when it admitted the confession into evidence.¹³⁹

The court of appeals reversed A.A.'s adjudication.¹⁴⁰

Although *A.A.* may cause police to rethink their use of *quid pro quo* bartering as an interrogation technique, the fact that A.A. was a juvenile and not represented by counsel may have been the key determinants in this case and thus *AA* will likely be limited to its specific facts.

C. Grand Jury

Grand jury proceedings are optional in Indiana.¹⁴¹ According to statute, and consistent with the federal and state constitutions, "Any crime may be charged by indictment or information."¹⁴² Not surprisingly, in the vast majority of cases¹⁴³ prosecutors elect the much easier procedure of charging by information rather than pursuing an indictment. "Nevertheless, when prosecutors elect to pursue an indictment before a grand jury, they must comply with the requirement of due process and the statutory requirements governing grand jury proceedings."¹⁴⁴ According to the United States Supreme Court, "[t]he fact that there is no constitutional requirement that States institute prosecutions by means of an indictment returned by a grand jury does not relieve those States that do employ grand juries from complying with the commands of the Fourteenth

137. *Id.*

138. *Id.* at 264.

139. *Id.*

140. *See id.* at 265.

141. *See* IND. CODE § 35-34-1-1(a) (1998).

142. *Id.*

143. *See generally* WAYNE R. LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 15.1(c), at 617 (1985).

144. *Wurster v. State*, 715 N.E.2d 341, 345 (Ind. 1999).

Amendment in the operation of those juries.”¹⁴⁵

In *Wurster v. State*,¹⁴⁶ the supreme court granted transfer to consider the propriety of a somewhat unusual grand jury procedure. In *Wurster*, after the prosecutor questioned a witness, the witness waited outside the jury room and the grand jurors then presented their questions to the prosecutor who posed the questions after the witness returned to the grand jury room.¹⁴⁷ No record was made of the conversations between the prosecutor and the grand jurors.¹⁴⁸ This procedure was challenged on appeal on two grounds: (1) grand jurors were not permitted to ask direct questions of the witnesses and (2) the absence of a record of the conversations between the prosecutor and grand jury about the questions to be asked.¹⁴⁹ The procedure was alleged to violate both the Due Process Clause of the Constitution and Indiana’s grand jury statute.¹⁵⁰

The supreme court held that neither claim presented a violation of the Due Process Clause as prosecutorial misconduct.¹⁵¹ Such a violation requires a showing that there was a “flagrant imposition of the grand jurors’ will or independent judgment.”¹⁵² The supreme court found no flagrant imposition and observed “because there was no record kept, we can only speculate as to the degree, if any, of imposition of will or impairment of independent judgment that occurred.”¹⁵³

However, the court reached a different conclusion in regard to the alleged statutory violation.¹⁵⁴ The supreme court observed that no statutory provision directly addresses the ability of grand jurors to question witnesses directly, but concluded that the combination of the grand jury statute, the decisional law interpreting it, and the “usual practice” in Indiana of required direct questioning by grand jurors.¹⁵⁵ However, the court observed that not every statutory violation is cause for dismissal of an indictment.¹⁵⁶ Because of the fact that there was no record of the exchanges between the prosecutor and the grand jurors, the court held in regard to the indirect questioning procedure, the defendant failed to make the required showing of prejudice required for dismissal of the indictment.¹⁵⁷

Finally, the supreme court also addressed the application of Indiana Code section 35-34-2-3(d), which provides in part:

145. *Rose v. Mitchell*, 443 U.S. 545, 557 n.7 (1979) (citation omitted).

146. 715 N.E.2d 341 (Ind. 1999).

147. *See id.* at 344.

148. *See id.*

149. *See id.*

150. *See* IND. CODE § 35-34-2 (1998).

151. *See Wurster*, 715 N.E.2d at 345.

152. *Id.* (quoting *Wurster v. State*, 708 N.E.2d 587, 592 (Ind. Ct. App.), *aff’d*, 715 N.E.2d 341 (Ind. 1999)).

153. *Id.*

154. *See id.* at 346.

155. *Id.*

156. *See id.*

157. *See id.*

The court shall supply a means for recording the evidence presented before the grand jury and all of the other proceedings that occur before the grand jury, except for the deliberations and voting of the grand jury and other discussions when the members of the grand jury are the only persons present in the grand jury room. The evidence and proceedings shall be recorded in the same manner as evidence and proceedings are recorded in the court that impaneled the grand jury. . . .¹⁵⁸

Unlike the violations of other statutory provisions, the supreme court held that the failure to record the exchanges between the prosecutor and grand jurors did not require a showing of prejudice in order to warrant dismissal of the indictment.¹⁵⁹ As the court put it, “the error itself renders it impossible for a reviewing court to evaluate what, if any, interference with or domination of the grand jurors occurred.”¹⁶⁰ However, because the defendant did not allege a violation of the statutory provision requiring recording of the proceedings in the trial court, the supreme court held that this new argument raised for the first time in the petition for transfer did not warrant reversal of the trial court.¹⁶¹

D. Non-mutual Collateral Estoppel

In *Jennings v. State*, the Indiana Court of Appeals applied the doctrine of non-mutual collateral estoppel in a criminal proceeding.¹⁶² Though not hailed as a case of first impression, it appears to be the first time an Indiana appellate court has held that the doctrine is applicable in the criminal context.

Collateral estoppel acts to bar relitigation of a claim or issue in a subsequent proceeding between the same parties.¹⁶³ In determining whether to apply collateral estoppel, the court must determine what issue or fact was decided by the first judgment and how that determination bears on the subsequent action.¹⁶⁴ In 1992, the Indiana Supreme Court sanctioned the use of non-mutual collateral estoppel in *Sullivan v. American Casualty Co.*,¹⁶⁵ holding that collateral estoppel no longer required that the party seeking to take advantage of the prior adjudication would have been bound had the prior judgment been decided differently (mutuality of estoppel), or that the party who is to be bound by the prior adjudication be the same as or in privity with the party in the prior action (identity of parties).¹⁶⁶ A stranger to a prior action may seek to invoke the collateral estoppel doctrine; therefore, it is referred to as non-mutual collateral

158. IND. CODE § 35-34-2-3(d) (1998).

159. *See id.*

160. *Id.* at 347.

161. *See id.* at 347-48.

162. 714 N.E.2d 730 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 306 (Ind. 1999) (mem.).

163. *See generally* Smith v. State, 670 N.E.2d 360, 362 (Ind. Ct. App. 1996).

164. *See id.*

165. 605 N.E.2d 134 (Ind. 1992).

166. *See id.* at 137.

estoppel. Although the court in *Sullivan* did not expressly limit its holding to civil cases, the use of collateral estoppel in the criminal context has generally been considered a part of the prohibition against double jeopardy and thus, involved an earlier prosecution of the same defendant by the same governmental entity.¹⁶⁷

In *Jennings*, the defendant and two passengers, Tina Lehr and Chad Pryor, were stopped by police in Jennings' car.¹⁶⁸ When Jennings got out of the car to show the officer his identification, the officer noticed a small knife in the car.¹⁶⁹ The officer asked Lehr and Pryor to exit the car so he could check for weapons. As Lehr got out of the car, she removed a plastic bag containing illegal drugs from her purse and hid it behind her back. When questioned by the officer, she said the bag belonged to Jennings.¹⁷⁰ The officer then requested and received permission to search Jennings and his car. However, the search of the car was not conducted at the scene. Instead, the car was towed to the police department where subsequent searches produced other illegal drugs.¹⁷¹

The State filed drug charges against Pryor in the Warrick Superior Court I. Pryor filed a motion to suppress the drugs¹⁷² which was granted after the superior court concluded that the officer had conducted an illegal search of Lehr's purse and consequently suppressed all evidence found in Jennings' car as the fruit of the poisonous tree.¹⁷³

The State filed charges against Jennings in the Warrick Circuit Court.¹⁷⁴ Jennings also filed a motion to suppress the drugs, invoking non-mutual collateral estoppel. Jennings argued that because the Warrick Superior Court in Pryor's case had previously determined that searches of Lehr's purse and the car were improper, the State was then estopped from relying on the searches and seized evidence in Jennings' case.¹⁷⁵ The trial court denied Jennings' motion, and the court of appeals reversed.¹⁷⁶

The court's decision to apply non-mutual collateral estoppel in the criminal context appears to be the minority position. Other jurisdictions that have considered this issue have declined to apply non-mutual collateral estoppel against a governmental entity in criminal cases.¹⁷⁷ Most jurisdictions that reject application of the doctrine in criminal cases cite the reasoning of the United

167. See, e.g., *Davis v. State*, 691 N.E.2d 1285, 1288 (Ind. Ct. App. 1998).

168. See *Jennings v. State*, 714 N.E.2d 730, 732 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 306 (Ind. 1999) (mem.).

169. See *id.*

170. See *id.*

171. See *id.*

172. See *id.*

173. See *id.* at 733.

174. See *id.*

175. See *id.* at 732.

176. See *id.* at 733-35.

177. See 50 C.J.S. *Judgments* § 919(b) (1997); 47 AM. JUR. 2D *Judgments* § 649 (1995).

States Supreme Court in *Standefer v. United States*.¹⁷⁸ In *Standefer*, the Court held that non-mutual collateral estoppel was not applicable in criminal cases to preclude the prosecution of an accomplice where a jury had already acquitted the principal.¹⁷⁹ The Court reasoned that several aspects of criminal law prevent the government from having a full and fair opportunity to litigate an issue, such as: the prosecution's limited discovery rights; the prohibition against a directed verdict for the prosecution no matter how clear the evidence in favor of guilt; and the prosecution's prohibition against seeking a new trial or appealing an acquittal.¹⁸⁰ The Court also found that application of non-mutual collateral estoppel is complicated by the rules of evidence and exclusion unique to criminal law, noting that the exclusionary rule may prohibit the government from introducing evidence against one defendant, but the same evidence may be admissible against another defendant whose Fourth Amendment rights were not implicated.¹⁸¹ Four months after *Jennings* was decided, another panel of the court of appeals, citing the reasoning in *Standefer*, held in *Reid v. State*,¹⁸² that non-mutual collateral estoppel should not apply in criminal cases.¹⁸³ The *Reid* decision was authored by then Judge Rucker.

It is worthy of note that the *Jennings* court declined to address the State's assertion that Jennings did not have standing to challenge the search of Lehr's purse.¹⁸⁴ In a footnote, the court stated that it was limiting its decision to application of the principles of collateral estoppel.¹⁸⁵ However, it seems that determining whether the Superior and Circuit courts were truly deciding the same issue would necessarily involve a determination of the defendants' standing to challenge the search. Fourth Amendment rights are personal in nature, and as the *Standefer* court observed, the same search may violate one person's rights yet not impinge upon another's.¹⁸⁶

E. Belated Addition of Habitual Offender Charge

Two panels of the Indiana Court of Appeals reached different conclusions when asked to determine whether a defendant must seek a continuance to preserve for appeal an alleged improper addition of an habitual offender charge

178. 447 U.S. 10 (1980).

179. *See id.* at 24.

180. *See id.* at 22-23. The State in *Jennings* conceded at trial that it had a full and fair opportunity to litigate the issue in Pryor's case. *See Jennings*, 714 N.E.2d at 734.

181. *See Standefer*, 477 U.S. at 23-24.

182. 719 N.E.2d 451 (Ind. Ct. App. 1999).

183. *See id.* at 456.

184. The court's decision also did not indicate how the Superior Court determined that the search of Lehr's purse infringed upon Pryor's right to be free from unreasonable search and seizure.

185. *See Jennings*, 714 N.E.2d at 734 n.3.

186. *See, e.g., Rakas v. Illinois*, 439 U.S. 128 (1978) (stating that a person must have a legitimate expectation of privacy in the place searched before their Fourth Amendment rights attach).

under section 35-34-1-5(e) of the Indiana Code. In *Attebury v. State*¹⁸⁷ and *Mitchell v. State*,¹⁸⁸ the defendants alleged on appeal that the trial court erred when it allowed the State to add an habitual offender charge more than ten days after the omnibus date.¹⁸⁹ The State argued in both cases that the defendants waived the issue for appeal by failing to seek a continuance after the trial court permitted the amendment.¹⁹⁰ The *Mitchell* court held that the defendant had waived the issue;¹⁹¹ the *Attebury* court held otherwise.¹⁹² The disagreement centers around the interpretation of language from the Indiana Supreme Court's decision in *Haymaker v. State*.¹⁹³

In *Haymaker*, the State sought to amend a habitual offender charge, substituting a confinement conviction for a possession of marijuana conviction.¹⁹⁴ On appeal, the defendant claimed that the amendment was outside the time period permitted by section 35-41-1-5(e) of the Indiana Code which provides:

An amendment of an indictment or information to include a habitual offender charge under IC 35-50-2-8 must be made not later than ten (10) days after the omnibus date. However, upon a showing of good cause, the court may permit the filing of a habitual offender charge at any time before the commencement of the trial.¹⁹⁵

The Indiana Supreme Court held that section 35-34-1-5(e) of the Indiana Code did not apply when the State merely amended an already existing habitual offender count.¹⁹⁶ Rather, the court found that section 35-34-1-5(c) controls in situations where the State seeks to amend, and not add, a habitual offender count.¹⁹⁷ Subsection (c) permits the State to amend an information at any time as long as the amendment does not prejudice the defendant's substantial rights.¹⁹⁸ After finding that the defendant failed to show prejudice, the court in *Haymaker* stated, "[E]ven if § 35-34-1-5(e) were to apply, defendant has waived the issue for appeal. Once defendant's objection [to the amendment] had been overruled, he should have requested a continuance"¹⁹⁹

Judge Robb, writing for the majority in *Attebury*, found the above quoted language from *Haymaker* to mean "if section 35-34-1-5(e) were to apply to *amending* habitual offender counts, a continuance must be requested to preserve

187. 703 N.E.2d 175 (Ind. Ct. App. 1998).

188. 712 N.E.2d 1050 (Ind. Ct. App. 1999).

189. See *Mitchell*, 712 N.E.2d at 1052; *Attebury*, 703 N.E.2d at 176.

190. See *Mitchell*, 712 N.E.2d at 1053; *Attebury*, 703 N.E.2d at 179.

191. See *Mitchell*, 712 N.E.2d at 1052-53.

192. See *Attebury*, 703 N.E.2d at 179-80.

193. 667 N.E.2d 1113 (Ind. 1996).

194. See *id.* at 1113.

195. IND. CODE § 35-41-5(e) (1998).

196. See *Haymaker*, 667 N.E.2d at 1114.

197. See *id.*

198. See IND. CODE § 35-41-5(c).

199. *Haymaker*, 667 N.E.2d at 1114.

the error, as the defendant must show that his rights have been prejudiced by the amendment. In this situation [where the amendment *added* the habitual offender charge], we do not believe it necessary.”²⁰⁰ Judge Robb reasoned that a continuance is an inadequate remedy when the State seeks to add an entirely new habitual offender count at the last minute because such an addition could significantly alter the defense’s strategy, not only as to the habitual count, but also as to the substantive counts.²⁰¹ Judge Robb found that the same considerations do not apply to an amendment of an already existing habitual offender charge.²⁰² Judge Staton concurred in Judge Robb’s opinion.²⁰³

Judge Kirsch dissented, concluding that the defendant had waived the issue.²⁰⁴ Judge Kirsch believed that in *Haymaker* the supreme court rejected any distinction between an amendment under section 35-34-1-5(c) of the Indiana Code and an addition of a new habitual count under subsection (e) for purposes of requesting a continuance to preserve the error.²⁰⁵

In *Mitchell*,²⁰⁶ Judge Najam, writing for a unanimous panel that included Judge Kirsch and Judge Garrard, found that *Attebury* “misinterpreted” the Indiana Supreme Court’s ruling in *Haymaker* and held that “once the trial court allows either an amendment to the habitual offender charge under subsection (c), or the addition of an habitual offender charge under subsection (e), the defendant must seek a continuance to preserve the alleged error for appeal.”²⁰⁷

F. Speedy Trial

The supreme court and court of appeals decided several cases during the survey period addressing a defendant’s right to a speedy trial. This right is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 12 of the Indiana Constitution.²⁰⁸ Few defendants raise a claim that these constitutional provisions have been violated;²⁰⁹ rather, they contend that their right to a speedy trial under Rule 4 of the Indiana Rules of Criminal

200. *Attebury v. State*, 703 N.E.2d 175, 180 (Ind. Ct. App. 1998) (emphasis added).

201. *See id.*

202. *See id.*

203. *See id.* at 175.

204. *See id.* at 181 (Kirsch, J., dissenting).

205. *See id.*

206. *Mitchell v. State*, 712 N.E.2d 1050 (Ind. Ct. App. 1999).

207. *Id.* at 1053.

208. *See Wooley v. State*, 716 N.E.2d 919, 923 & n.2 (Ind. 1999).

209. *See id.* But see *Sauerheber v. State*, 698 N.E.2d 796, 805 (Ind. 1998) (raising solely a Sixth Amendment claim). As explained in *Sauerheber*, an alleged violation of the Sixth Amendment requires a defendant to meet the somewhat demanding four factor test set forth by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). That test requires a court to balance “the length of the delay, the reason of the delay, the defendant’s assertion of his right, and the prejudice to the defendant.” *Sauerheber*, 698 N.E.2d at 805 (citing *Barker*, 407 U.S. at 530).

Procedure was violated. Criminal Rule 4 sets forth time limitations that must be met to protect the state constitutional right to a speedy trial.²¹⁰ Criminal Rule 4(A) provides that a defendant may not be detained in jail awaiting trial for more than six months unless the delay was caused by the defendant's motion or act or court congestion.²¹¹ Any defendant so detained is entitled to be released on his own recognizance.²¹² Rule 4(B) provides that a defendant held in jail awaiting trial is entitled to discharge if not brought to trial within seventy calendar days of his motion for a speedy trial.²¹³ Any delay caused by the defendant's act or court congestion is excluded from the seventy-day time period.²¹⁴ Finally, Criminal Rule 4(C), which applies to those defendants who have not requested a speedy trial pursuant to Rule 4(B), provides that they shall be entitled to discharge if not brought to trial within one year of their arrest or the filing of charges against them, whichever is later.²¹⁵ Again, delay caused by a defendant's act or court congestion is excluded from the one-year time period.²¹⁶ Although Criminal Rule 4 does not require a defendant to "push the matter to trial," a defendant whose trial is set outside the specified periods must object to the setting "at the earliest opportunity or be deemed to have waived his right to discharge under the rule."²¹⁷

In *Diederich v. State*,²¹⁸ the supreme court granted transfer to address the requirement that a defendant move for discharge "at the earliest opportunity" in

210. See *Wooley*, 716 N.E.2d at 923.

211. See IND. R. CRIM. P. 4(A).

212. See *id.*

213. See IND. R. CRIM. P. 4(B)(1). As the court of appeals reiterated in *State v. Kent*, 700 N.E.2d 1187 (Ind. Ct. App. 1998), "Only a defendant who is imprisoned on a pending charge may make a Crim. R. 4(B) motion. The fact that Kent may have been in jail for an unrelated conviction has no bearing on the present case because there is no evidence that he was in jail at the time he filed his Crim. R. 4(B) motion." *Id.* at 1188 (citation omitted).

214. See IND. R. CRIM. P. 4(B)(1).

215. See IND. R. CRIM. P. 4(C). If a summons is issued in lieu of an arrest warrant, the speedy trial clock of Criminal Rule 4(C) starts on the day the summons orders the defendant to appear in court. See *Johnson v. State*, 708 N.E.2d 912, 915 (Ind. Ct. App.), *trans. denied*, 714 N.E.2d 177 (Ind. 1999).

216. See IND. R. CRIM. P. 4(C).

217. *Diederich v. State*, 702 N.E.2d 1074, 1075 (Ind. 1998) (citation omitted); see also *Ford v. State*, 706 N.E.2d 265, 267 (Ind. Ct. App.) ("The [trial] court's entry indicates that, far from objecting to the resetting of trial to [a date beyond the one-year period under Rule 4(C)], Ford agreed that trial should be reset for that date. The record reflects that Ford never filed a motion for discharge on Crim. R. 4(C) grounds. Therefore, the issue is waived.") (emphasis added), *trans. denied*, 714 N.E.2d 173 (Ind. 1999). But cf. *Schwartz v. State*, 708 N.E.2d 34, 36 (Ind. Ct. App. 1999) ("However, 'a defendant has no duty to object to the setting of a belated trial when the setting of the date occurs after the time expires such that the court cannot reset the trial date within the time allotted by Crim. R. 4(C). All the defendant needs to do then is move for discharge.'" (quoting *Pearson v. State*, 619 N.E.2d 590, 592 (Ind. Ct. App. 1993))).

218. 702 N.E.2d 1074 (Ind. 1998).

order to avoid waiver of his speedy trial right under Criminal Rule 4(C). In *Diederich*, charges had been pending against the defendant for almost a year when the trial court set the trial for six months later.²¹⁹ The trial court sent notice by mail to defense counsel, who filed a written objection, sent by first-class mail a few days later. Diederich later moved for discharge, and the trial court denied the motion on the basis that because the one-year period was close at hand, his objection sent by first-class mail did not constitute an objection “at the earliest opportunity, such as by fax machine, telephone, or hand delivery.”²²⁰ A divided panel of the court appeals affirmed in an unpublished opinion, reasoning that “Diederich could have informed the court of his objection to the trial date in a more timely manner by use of fax or telephone.”²²¹

The supreme court disagreed and ordered the defendant discharged.²²² Although there was little time left to conduct a trial at the time of Diederich’s objection, “[T]he real reason for the shortness of time was not the defendant’s use of the U.S. Mail but the prosecutor’s decision much earlier in the game to let the matter pend in another court for 215 days before dismissing without prejudice.”²²³

In *Havvard v. State*,²²⁴ the court of appeals considered whether a last-minute waiver of jury trial constituted delay attributable to the defendant under Criminal Rule 4(C). Havvard was charged with three offenses in July 1996, and in September the trial court set his case for jury trial in May 1997. At a pretrial conference on the day before the jury trial was scheduled, Havvard filed a waiver of the jury trial but did not request a continuance.²²⁵ The trial court accepted the waiver and set the case for a bench trial in December 1997. In June, Havvard moved for discharge, and the motion was denied. Havvard again moved for discharge immediately before the December bench trial.²²⁶ The trial court denied the motion for discharge on the basis that “if you ask for a jury and the day comes for a jury and you waive a jury all of those days are attributable to you.”²²⁷ The trial court charged Havvard with 225 days of delay, from his September 1996 request for a jury trial until his May 1997 waiver.²²⁸

The court of appeals disagreed, and ordered Havvard discharged.²²⁹ It reasoned that Havvard’s “last minute waiver of a jury trial did not mean that the trial court could not try him as scheduled. It would merely have been a bench

219. *See id.* at 1075.

220. *Id.* (quotation omitted).

221. *Id.* (quoting *Diederich v. State*, 699 N.E.2d 799 (Ind. Ct. App. 1998), *vacated*, 702 N.E.2d 1074 (Ind. 1999)).

222. *See id.*

223. *Id.*

224. 703 N.E.2d 1118 (Ind. Ct. App. 1999).

225. *See id.* at 1119.

226. *See id.*

227. *Id.* at 1120 (citation omitted).

228. *See id.*

229. *See id.* at 1121.

trial rather than a jury trial.”²³⁰ Because the trial court gave no reason for not holding a bench trial on the day of the scheduled jury trial, the court of appeals concluded that the silent record prevented attributing the reason for delay to Havvard.²³¹ Judge Staton dissented, pointing out in part:

[T]rial courts often schedule alternate jury trials for the same date, anticipating that some may be pled out or waived. Alternate trial scheduling decreases the chance that a jury panel will be called for naught. Proceeding with a bench trial when a jury panel has already been told to appear would waste judicial resources.²³²

Finally, in *McKay v. State*,²³³ the court of appeals addressed the difficulty of reconciling a congested court calendar with a defendant’s right to a speedy trial under Criminal Rule 4(B). McKay and two other men were charged with robbery and related charges on April 28, 1998.²³⁴ McKay moved for a speedy trial pursuant to Criminal Rule 4(B) on June 5, and a jury trial was scheduled for all three defendants on July 27. At a pretrial conference on July 22, the trial court explained that an “older” case was set for trial on July 27 and there was a “[p]ossibility that [McKay’s] case is going to get moved because only one case can be tried.”²³⁵ McKay’s case was continued on July 27 because of a congested calendar. The trial court’s order listed the reason for congestion as “*State v. Smith & Braezel*,” which was the “first choice case” on that day.²³⁶ McKay’s trial was continued for two months. On July 28, McKay filed an objection to the continuance, stating that the court did not hear another trial on July 27; the September trial date was beyond the seventy-day period of Criminal Rule 4(B); and counsel was unavailable on the September trial date due to a previously scheduled trial.²³⁷ The trial court advanced McKay’s trial date to August 24; however, the seventy-day period expired on August 14.²³⁸ The August 24 trial was continued due to a court congestion order dated August 21, which cited the jury trial of *State v. Jackson*, the “first choice case” for August 24, as the reason for the continuance.²³⁹ The court reset McKay’s trial for October 5. On September 4, McKay moved for discharge, asserting that the delays in his case were not due to court congestion because no other trials were held on either July 27 or August 24.²⁴⁰ He also objected to the October 5 setting. The motion for

230. *Id.*

231. *See id.*

232. *Id.* at 1122 (Staton, J., dissenting).

233. 714 N.E.2d 1182 (Ind. Ct. App. 1999).

234. *See id.* at 1184.

235. *Id.* (citation omitted).

236. *Id.*

237. *See id.* at 1184-85.

238. *See id.* at 1185.

239. *Id.*

240. *See id.*

discharge was denied.²⁴¹ In response to a motion to reconsider, the trial court held a hearing on October 2.²⁴² At that hearing, one of the court's bailiffs testified that no case had gone to trial on either July 27 or August 24 and none of the defendants in the cases for which McKay's trial was continued had moved for a speedy trial.²⁴³ In denying McKay's motion, the trial court observed that "the record adequately establishes that we had other matters that were older matters that were before this court. . . . We have done everything we can to make sure these cases get tried as quickly as we possibly can considering the court's calendar."²⁴⁴ Later that day, McKay's trial was again continued due to a congested calendar. The court reset the trial for November 16. McKay filed a petition for a writ of habeas corpus on November 4, which the trial court denied on November 10, and the court of appeals accepted jurisdiction of that ruling as an interlocutory appeal on November 13.²⁴⁵

The court of appeals affirmed the trial court's denial of McKay's petition. First, it noted that appellate review of a trial court's finding of court congestion is well-established and requires a defendant to show that

at the time the trial court made its decision to postpone trial, the finding of congestion was factually or legally inaccurate. Such proof would be prima facie adequate for discharge, absent further trial court findings explaining the congestion and justifying the continuance. In the appellate review of such a case, the trial court's explanations will be accorded reasonable deference, and a defendant must establish his entitlement to relief by showing that the trial court was clearly erroneous.²⁴⁶

The court of appeals held that the trial court's findings of congestion on July 27, August 24, and October 5 were not clearly erroneous.²⁴⁷ Other cases were set for trial on those days, and there was no suggestion that the trial court knew at the time of the finding of congestion that these "first choice" cases would not be tried.²⁴⁸

McKay also asserted that the cases for which his was continued were not priority cases under Criminal Rule 4. As the supreme court observed in *Clark v. State*,²⁴⁹ a defendant's request for a speedy trial

must be assigned a meaningful trial date within the time prescribed by the rule, if necessary superseding trial dates previously designated for

241. *See id.*

242. *See id.*

243. *See id.*

244. *Id.* at 1186.

245. *See id.*

246. *Id.* at 1187 (quoting *Clark v. State*, 659 N.E.2d 548, 552 (Ind. 1995)).

247. *See id.* at 1188-90.

248. *Id.* at 1189.

249. 659 N.E.2d 548 (Ind. 1995).

civil cases and even criminal cases in which Criminal Rule 4 deadlines are not imminent. We recognize, however, that emergencies in either criminal or civil matters may occasionally interfere with this scheme. Similarly, there may be major, complex trials that have long been scheduled or that pose significant extenuating circumstances to litigants and witnesses, which will, on rare occasions, justify application of the court congestion or exigent circumstances exceptions.²⁵⁰

However, the court of appeals declined to adopt McKay's proposal of "[a] bright-line rule that all Crim. R. 4 cases must be tried before any other case that is not a Crim. R. 4 priority."²⁵¹ Finally, the court of appeals also found that McKay had abandoned his request for a speedy trial when he failed to object to the August 24 trial setting.²⁵²

Although the court of appeals explicitly rejected McKay's argument that his Criminal Rule 4(B) case should have been tried before cases without priority status under Criminal Rule 4, it remains unclear what a similarly-situated defendant should do in order to preserve his right to a speedy trial in the face of repeated continuances due to purported court congestion. The supreme court's language in *Clark*, while not unequivocal, requires a "meaningful trial date within the time prescribed by the rule"²⁵³ Thus, a defendant under the circumstances would be well-advised to object to any finding of congestion in which the "first choice" case is not a Criminal Rule 4(B) case or, for that matter, another Criminal Rule 4(B) case in which fewer days attributable to the State have elapsed. When the trial court announces its trial settings for a given day, a defendant might also wish to object if his or her case appears below cases in which Criminal Rule 4 deadlines are less imminent. A trial court faced with a defense motion that includes calculations clearly showing its case has a higher priority under Criminal Rule 4 may very well want to alter its trial settings accordingly.

G. Discovery Violations

In a pair of opinions issued on the same day, the supreme court rather pointedly expressed the importance of prosecutors making *timely* disclosures of agreements with witnesses.²⁵⁴ Both cases originated in Marion County.²⁵⁵

In *Goodner v. State*, the State revealed to defense counsel on the second day of trial that it had previously offered to recommend a bond reduction for the sole eyewitness of the shooting, who had already testified, in exchange for that

250. *Id.* at 551-52.

251. *McKay*, 714 N.E.2d at 1188.

252. *See id.* at 1189.

253. *Clark*, 659 N.E.2d at 551. Although the supreme court has not considered the application of *Clark* to these circumstances, McKay did not seek transfer.

254. *See Goodner v. State*, 714 N.E.2d 638 (Ind. 1999); *Williams v. State*, 714 N.E.2d 644 (Ind. 1999), *cert. denied*, 120 S. Ct. 1195 (2000).

255. *See Goodner*, 714 N.E.2d at 638; *Williams*, 714 N.E.2d at 644.

witness's testimony.²⁵⁶ Goodner contended on appeal that this belated disclosure constituted prosecutorial misconduct warranting reversal of his conviction.²⁵⁷ The supreme court reiterated the well-established principle that "[a] prosecutor must fully disclose 'express plea agreements or understandings between the State and witnesses, even where such agreements or understandings are not reduced to writing.'"²⁵⁸ The required disclosure is important because the jury's appraisal of "the truthfulness and reliability of a given witness may well be determinative of guilt or innocence."²⁵⁹ Although observing that reversal was not required under current doctrine, the unanimous opinion offered the following stern warning to prosecutors: "We cannot continue to tolerate late inning surprises later justified in the name of harmless error. Continued abuses of this sort may require a prophylactic rule requiring reversal."²⁶⁰ The court further noted that the Indiana Rules of Professional Conduct require prosecutors to "make *timely disclosure* to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."²⁶¹ It also reminded members of the bench and bar of "their obligation to report such misconduct to the appropriate authorities."²⁶²

In *Williams v. State*,²⁶³ the State called Ronald Rush to testify against the defendant. Almost a year after the murder at issue in *Williams*, Rush was arrested when police found drugs while executing a search warrant at Rush's aunt's house.²⁶⁴ Rush was taken to the police station and asked if he knew anything about the murder with which Williams was eventually charged. After being told that he was facing twenty to fifty years, Rush gave a statement to police that provided numerous details of the crime and Williams' alleged involvement in it.²⁶⁵ Although defense counsel knew that Rush would be called as a witness at trial, had received a copy of Rush's statement to police months prior to the trial, and had deposed Rush before trial, defense counsel did not know that a detective had made a "deal" with Rush not to file drug charges in exchange for his giving a statement to police.²⁶⁶ When the defendant learned of this deal mid-trial, he moved for a mistrial.²⁶⁷ The trial court denied the motion for mistrial but granted Williams' alternative request to strike Rush's testimony and admonish the jury to disregard it.²⁶⁸ Although the court found that the mid-

256. See *Goodner*, 714 N.E.2d at 640.

257. See *id.* at 641-42.

258. *Id.* at 642 (quoting *Wright v. State*, 690 N.E.2d 1098, 1113 (Ind. 1997)).

259. *Id.* (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

260. *Id.*

261. *Id.* at 643 (quoting IND. PROFESSIONAL CONDUCT Rule 3.8(d)).

262. *Id.* (citing IND. PROFESSIONAL CONDUCT Rule 8.3(a)).

263. 714 N.E.2d 644 (Ind. 1999).

264. See *id.* at 647.

265. See *id.* at 647-48.

266. *Id.* at 648.

267. See *id.*

268. See *id.*

trial disclosure of this deal did not violate *Brady v. Maryland*²⁶⁹ and its progeny,²⁷⁰ the supreme court held that the trial court's exclusion of Rush's testimony was sufficient and therefore the trial court properly denied the motion for mistrial.²⁷¹

H. Jury Instructions

In *Scisney v. State*,²⁷² the supreme court granted transfer "to address whether a party must tender an alternative instruction in order to preserve a claim of instruction error."²⁷³ In *Scisney*, the trial court proposed to combine separate instructions on the issue of constructive possession, and the defendant objected but did not tender an alternative instruction.²⁷⁴ The court of appeals, citing Indiana Supreme Court precedent, held that the failure to tender an alternative instruction waived the error on appeal.²⁷⁵ The supreme court observed, however, that in previous cases addressing waiver of instructional error, the outcome of the case "did not rest solely upon the failure to tender an alternative instruction but rather included other reasons," such as failing to make an objection, provide a basis for the objection, or include the instruction and objection in the defendant's appellate brief.²⁷⁶ The court found that the proper focus should be on "whether an instruction objection at trial was sufficiently clear and specific to inform the trial court of the claimed error and to prevent inadvertent error."²⁷⁷ Thus, the court held:

[A]ppellate review of a claim of error in the giving of a jury instruction requires a timely trial objection clearly identifying both the claimed objectionable matter and the grounds for the objection, but that the tender of a proposed alternative instruction is not necessarily required to

269. 373 U.S. 83 (1963).

270. See *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976).

271. *Williams*, 714 N.E.2d at 649. As noted in *Williams* and other cases, the standard for reversal based on a violation of a trial court's discovery order is a difficult one for defendants to meet: "Trial courts are given wide discretionary latitude in discovery matters and their rulings will be given deference on appeal. Absent clear error and resulting prejudice, the trial court's determination of violations and sanctions will be affirmed." *Id.* (citations omitted). However, the court of appeals found in *Lewis v. State*, 700 N.E.2d 485 (Ind. Ct. App. 1998), that this standard was met and the State's disclosure of fingerprint evidence two days before trial warranted reversal.

272. 701 N.E.2d 847 (Ind. 1998).

273. *Id.* at 847-48.

274. See *id.* at 848.

275. See *Scisney v. State*, 690 N.E.2d 342, 347 (Ind. Ct. App. 1997) (citing *Whittle v. State*, 542 N.E.2d 981 (Ind. 1989); *Springer v. State*, 463 N.E.2d 243 (Ind. 1984)), *aff'd in part and vacated in part*, 701 N.E.2d 847 (Ind. 1998).

276. *Scisney*, 701 N.E.2d at 848.

277. *Id.* (citing *Mitchem v. State*, 685 N.E.2d 671, 675 (Ind. 1997)).

preserve the claim of error.²⁷⁸

Because Scisney objected on the general ground that the instruction was an unclear statement of the law but failed to explain why the instruction was unclear or what could be done to correct it, the court found that his claim of instructional error was waived.²⁷⁹

In *Brown v. State*,²⁸⁰ the supreme court addressed the proper nature of counsel's objections and the trial court findings in cases involving lesser-included offense instructions. The supreme court's oft cited opinion in *Wright v. State*²⁸¹ sets forth a three-part test to be employed when a party requests a lesser-included offense instruction. The trial court must (1) determine whether the lesser-included offense is inherently included in the crime charged; if not, (2) determine whether the lesser-included offense is factually included in the crime charged; and, if either, (3) determine whether a serious evidentiary dispute exists whereby the jury could conclude that the lesser offense was committed but not the greater.²⁸² In *Champlain v. State*,²⁸³ the supreme court held that when a trial court makes a factual finding on the existence or lack of a serious evidentiary dispute, that finding is entitled to deference on appeal because of the trial court's proximity to the evidence.²⁸⁴ An appellate court reviews such a finding for an abuse of discretion.²⁸⁵ However, if the trial court makes no ruling as to the existence of a serious evidentiary dispute, appellate courts make the determination de novo based on their own review of the evidence.²⁸⁶

Behind the backdrop of these principles and precedent, the supreme court in *Brown* addressed the proper standard of review in cases in which the trial court failed to make a finding regarding the existence of a serious evidentiary dispute, and the defendant failed to argue the point.²⁸⁷ In cases in which counsel makes a clear objection regarding the existence of a serious evidentiary dispute, appellate courts "will undertake a de novo review of the record if the trial court fails to make a finding as to the existence vel non of the serious evidentiary dispute"²⁸⁸ However, if the trial court makes a finding of a serious evidentiary dispute—regardless of whether counsel argued it—the standard of review will be abuse of discretion.²⁸⁹ The stated purpose for this new layer of *Wright* is to encourage counsel to present the issue clearly to the trial court,

278. *Id.* at 849.

279. *See id.*

280. 703 N.E.2d 1010 (Ind. 1998).

281. 658 N.E.2d 563 (Ind. 1995).

282. *See id.* at 566-67.

283. 681 N.E.2d 696 (Ind. 1997).

284. *See id.* at 700.

285. *See id.*

286. *See id.*

287. *See Brown v. State*, 703 N.E.2d 1010, 1019 (Ind. 1998).

288. *Id.*

289. *See id.*

thereby assisting the trial court in reaching the correct ruling, which ideally will reduce the need for appeals.²⁹⁰

I. Jury Deliberations

As discussed in last year's survey,²⁹¹ the supreme court in *Bouye v. State*²⁹² resolved a court of appeals split regarding when Indiana Code section 34-1-21-6 is triggered. That statute, which now appears as Indiana Code section 34-36-1-6, provides:

If, after the jury retires for deliberation:

- (1) there is a disagreement among the jurors as to any part of the testimony; or
 - (2) the jury desires to be informed as to any point of law arising in the case;
- the jury may request the officer to conduct them into the court, where the information required shall be given in the presence of, or after notice to, the parties or the attorneys representing the parties.²⁹³

The *Bouye* court held that the statute applies only in those cases "in which the jury explicitly indicate[s] a disagreement."²⁹⁴ The question unanswered by *Bouye*, however, is what trial court confronted with a note from a deliberating jury that does not explicitly indicate a disagreement should do? A few cases from the survey period suggest that there is no clear answer.

In *Bouye*, the jury note read, "Deborah's testimony," and the trial court responded, "Deborah's testimony—no transcripts are available."²⁹⁵ The supreme court held the statute was not implicated because the note did not manifest a disagreement.²⁹⁶ It did not address whether any further inquiry should have taken place, thus, it would appear that a denial of a request that does not explicitly manifest a disagreement is at least an acceptable, if not the preferable approach under *Bouye*.

290. See *id.* In a concurring opinion, Chief Justice Shepard expressed skepticism of the likelihood that the new "system of shifting standards" would achieve its objections and stated his preference for "the plain old 'abuse of discretion'" standard. *Id.* at 1021-22 (Shepard, C.J., concurring in result).

291. See Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 32 IND. L. REV. 789, 802-03 (1999).

292. 699 N.E.2d 620 (Ind. 1998).

293. IND. CODE § 34-36-1-6 (Supp. 1999).

294. *Bouye*, 699 N.E.2d at 628. However, as highlighted by other cases, there remains a common law protection in determining whether materials may be sent to the jury room during deliberations. See, e.g., *Roberts v. State*, 712 N.E.2d 23, 36 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 302 (Ind. 1999); *Thacker v. State*, 709 N.E.2d 3 (Ind. 1999); *Robinson v. State*, 699 N.E.2d 1146, 1149 (Ind. 1998).

295. *Bouye*, 699 N.E.2d at 627.

296. See *id.*

However, some trial judges appear to read *Bouye* to encourage, if not require, a determination of whether a jury note, which on its face does not explicitly indicate a disagreement, was in fact motivated by such a disagreement.²⁹⁷ In *Petrie v. State*,²⁹⁸ the deliberating jury sent a note to the trial court that read, “[W]e would like to see the testimony of Ned Popovich, Thomas Goodin, James Fiscus, and then we would like to hear the 911 tape or written transcript of the tape.”²⁹⁹ The trial court responded by calling the jury back into open court along with the defendant, defense counsel, and prosecutor. The court then asked the foreperson whether there was a “dispute” or “disagreement” about the testimony and the 911 tape.³⁰⁰ After the foreperson responded affirmatively, the trial court replayed the testimony of the three witnesses and the 911 tape to the jury over Petrie’s objection.³⁰¹

Although the court of appeals found that the jury’s note did not, on its face, demonstrate an explicit disagreement, it rejected Petrie’s argument that the trial court was bound to deny the jury’s request without questioning the jurors.³⁰² Rather, the court held that it was within the trial court’s discretion to question the jury further to determine whether the jurors had a disagreement about the requested materials.³⁰³ It found no abuse of discretion in the procedure employed, noting that the trial court “[d]id not call undue emphasis to any part of the testimony nor did she suggest disagreement to the jury” before replaying the requested testimony and 911 tape in the presence of all parties as required by the statute.³⁰⁴

297. See, e.g., *Miller v. State*, 716 N.E.2d 367 (Ind. 1999). In *Miller*, the deliberating jury sent a note requesting to “review Sean Miller’s testimony on direct testimony and the transcript of the taped statements of Sean Miller’s March 1997 statement to Detective Frazier.” *Id.* at 370. The trial court discussed the note with both parties on the record and responded with a note that read:

The law does not permit me to allow you to review testimony unless you have a disagreement as to the testimony. If you simply cannot recall the testimony, then you are required to decide the case based on your memory of the witnesses’ testimony. If you do have a disagreement, please indicate that in writing on this paper and give it back to Candi [the bailiff] now.

Id. The State and defense counsel both agreed to the trial court’s response before it was sent to the jury. The jury replied, “We simply cannot recall. We understand your ruling.” *Id.* On appeal, Miller made the unusual argument that the trial court erred “in advising the Jury as to the question of ‘recall.’” *Id.* However, the supreme court noted that defense counsel concurred in the trial court’s handling of the matter and Miller cited no authority for the proposition that the trial court’s response was erroneous. See *id.*

298. 713 N.E.2d 910 (Ind. Ct. App. 1999).

299. *Id.* at 911.

300. *Id.* at 911-12.

301. See *id.* at 912.

302. See *id.* at 912-13.

303. See *id.* at 913.

304. *Id.*

J. Double Jeopardy Under the Indiana Constitution

On October 1, 1999, the Indiana Supreme Court issued several long-awaited opinions addressing the protection afforded criminal defendants under article I, section 14 of the Indiana Constitution.³⁰⁵ The lead opinion, *Richardson v. State*,³⁰⁶ began with the observation that the Indiana Double Jeopardy Clause is “distinct from its federal counterpart in the Fifth Amendment to the United States Constitution.”³⁰⁷ Prior to *Richardson*, there had been considerable confusion regarding whether the Indiana Constitution provided any additional protection beyond the federal protection as explained by the United States Supreme Court in *Blockburger v. United States*.³⁰⁸ The *Blockburger* test asks “whether each [statutory] provision requires proof of an additional fact which the other does not.”³⁰⁹ Beginning most notably with *Games v. State*,³¹⁰ the supreme court suggested that the *Blockburger* test may be the only double jeopardy protection available to defendants.³¹¹ According to a footnote in *Games*, “[T]he defendant does not provide Indiana authority, and we find none from this Court, establishing an independent state double jeopardy protection based upon an analysis of the Indiana Constitution.”³¹² In *Richardson*, the court referred to that sentence as “unfortunate” and made clear that the Double Jeopardy Clause of the Indiana Constitution does indeed provide a separate and more expansive protection than the Federal Constitution.³¹³

Article I, section 14 of the Indiana Constitution prohibits one from being placed twice in jeopardy for the “same offense.”³¹⁴ The court in *Richardson* described this protection as two-fold: a statutory elements test and an actual evidence test.³¹⁵

The statutory elements test compares the statutory elements of each offense, by looking to the charging instrument to identify those elements necessary for conviction under the statute, and asking “whether the elements of one of the challenged offenses could, hypothetically, be established by evidence that does

305. See *Collins v. State*, 717 N.E.2d 108 (Ind. 1999); *Guffey v. State*, 717 N.E.2d 103 (Ind. 1999); *McIntire v. State*, 717 N.E.2d 96 (Ind. 1999); *Taylor v. State*, 717 N.E.2d 90 (Ind. 1999); *Griffin v. State*, 717 N.E.2d 73 (Ind. 1999); *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999); see also *Emery v. State*, 717 N.E.2d 111 (Ind. 1999) (discussing the statutory provision that prohibits entry of judgment and sentence when a defendant is convicted of an offense and an included offense).

306. 717 N.E.2d 32 (Ind. 1999).

307. *Id.* at 37.

308. 284 U.S. 299 (1932).

309. *Id.* at 304.

310. 684 N.E.2d 466 (Ind.), modified on reh'g, 690 N.E.2d 211 (Ind. 1997).

311. See *id.* at 475.

312. *Id.* at 473 n.7.

313. *Richardson v. State*, 717 N.E.2d 32, 38 n.6 (Ind. 1999).

314. IND. CONST. art. I, § 14.

315. See *Richardson*, 717 N.E.2d at 49.

not also establish the essential elements of the other charged offense.”³¹⁶ There appears to be little, if any, difference between this test and that of *Blockburger*.³¹⁷ The same cannot be said, however, of the actual evidence test, which clearly provides greater protection to defendants.³¹⁸

As the court explained in *Richardson*, the actual evidence test requires examination of the evidence presented at trial

to determine whether each challenged offense was established by separate and distinct facts. To show that two challenged offenses constitute the “same offense” in a claim of double jeopardy, 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.³¹⁹

Richardson was charged with robbery and class A misdemeanor battery. The evidence presented at trial demonstrated that Richardson and others beat the victim and took his billfold, then pushed the victim off a bridge.³²⁰ Although the post-robbery pushing of the victim off the bridge “could potentially indicate a subsequent, factually separate battery justifying a separate conviction, there was no actual evidence to prove the element of resulting bodily injury from this separate conduct.”³²¹ Therefore, because Richardson demonstrated a reasonable possibility that the jury used the same facts to establish the essential elements of both offenses, the court found a violation of the Indiana Double Jeopardy Clause and ordered that the battery count be vacated.³²²

In *Taylor v. State*,³²³ the supreme court addressed the double jeopardy issue in the context of a petition for postconviction relief and made the following observation:

With our opinion today in *Richardson v. State*, 717 N.E.2d 32 (Ind.1999), this Court, confronting a body of case law characterized by substantial inconsistencies and seeking to synthesize common elements, formulated a new methodology for analysis of claims under the Indiana

316. *Id.* at 50.

317. *See Griffin v. State*, 717 N.E.2d 73, 78 (Ind. 1999) (“Having found that robbery and conspiracy to commit robbery are not the same offense under the federal *Blockburger* test, we likewise find that the offenses are not the same under Indiana’s analogous statutory elements test.”).

318. Indeed, in *Richardson* and two other cases issued on the same day, the supreme court found a violation of the actual evidence test but not the statutory elements test. *See Richardson*, 717 N.E.2d at 52-53; *McIntire v. State*, 717 N.E.2d 96 (Ind. 1999); *Guffy v. State*, 717 N.E.2d 103 (Ind. 1999).

319. *Richardson*, 717 N.E.2d at 53.

320. *See id.* at 54.

321. *Id.*

322. *See id.* at 54-55.

323. 717 N.E.2d 90 (Ind. 1999).

Double Jeopardy Clause. We find that this formulation constitutes a new constitutional rule of criminal procedure, and thus is not available for retroactive application in post-conviction proceedings.³²⁴

Thus, although the appellate courts have applied *Richardson* prospectively, even to cases in which the defendant did not raise a state double jeopardy claim,³²⁵ *Taylor* makes clear that the court will not allow the retroactive application of the *Richardson* formulation to cases on collateral review.

K. Ineffective Assistance of Counsel

In *Woods v. State*,³²⁶ the supreme court resolved long-standing confusion over when a defendant may raise an ineffective assistance of counsel claim. Before *Woods*, some opinions applied general waiver principles to claims of ineffective assistance of counsel that were raised in a postconviction petition on the basis that the claim had been available on direct appeal.³²⁷ On the other hand, if a claim of ineffective assistance was raised on direct appeal, the court had held that it was precluded from being raised in a postconviction proceeding.³²⁸

The supreme court posited three possible approaches to the issue. First, the court considered the State's approach "that the issue of trial counsel's effectiveness is known on direct appeal and therefore waived if not presented."³²⁹ The court rejected this approach because ineffectiveness claims often require record development, and this approach leaves no place for claims "not reasonably knowable until after direct appeal."³³⁰ Second, the court considered whether to allow the deferral of some claims until postconviction if the petitioner had a "valid reason" for the postponement.³³¹ However, the court rejected this approach as generating "more complexity and unpredictability than is desirable."³³² This approach would also require the postconviction court to

324. *Id.* at 95.

325. *See, e.g.,* *Marcum v. State*, 725 N.E.2d 852, 864 (Ind. 2000); *Wise v. State*, 719 N.E.2d 1192, 1200-01 (Ind. 1999).

326. 701 N.E.2d 1208 (Ind. 1998).

327. *See id.* at 1214 (citing *Williams v. State*, 464 N.E.2d 893 (Ind. 1984); *Hollonquest v. State*, 432 N.E.2d 37 (Ind. 1984)).

328. *See id.* at 1215 (citing *Bieghler v. State*, 690 N.E.2d 188, 200-01 (Ind. 1997); *Sawyer v. State*, 679 N.E.2d 1328 (Ind. 1997)).

329. *Id.* at 1216.

330. *Id.* The court also noted:

[E]xpecting appellate lawyers to look outside the record for error is unreasonable in light of the realities of appellate practice. Direct appeal counsel should not be forced to become a second trial counsel. Appellate lawyers may have neither the skills nor the resources nor the time to investigate extra-record claims, much less to present them coherently and persuasively to the trial court.

Id.

331. *Id.* at 1218.

332. *Id.* at 1219.

undertake “the difficult task of seeing the case through appellate counsel’s eyes, possibly long after the direct appeal was decided.”³³³

Finally, the court considered and adopted a “bright line rule that is understandable:” permitting all claims of ineffective assistance to be raised in a postconviction proceeding if the issue was not raised on direct appeal.³³⁴ It found this approach preferable because most claims require additional evidence to address their merits.³³⁵ In addition, an ineffectiveness claim requires consideration of counsel’s overall performance and the likelihood that the error(s) affected the outcome, both of which “rarely lend themselves to resolution in isolation.”³³⁶ The supreme court predicted that its holding in *Woods* would “likely deter all but the most confident appellants from asserting any claim of ineffectiveness on direct appeal.”³³⁷

Woods represents a significant clarification of existing law. Not surprisingly, its aftermath has been extended to other cases. For example, in *McIntire v. State*,³³⁸ the supreme court was confronted with a direct appeal brief, filed before *Woods*, that raised a claim of trial counsel ineffectiveness.³³⁹ The claim asserted that trial counsel “generally failed to prepare for trial (alleging specific omissions), failed to consult with the defendant and to present evidence at trial (including alibi witnesses after filing a notice of alibi) and sentencing, and failed to object to evidence and to a jury instruction.”³⁴⁰ In light of *Woods*, the supreme court declined to entertain the claim, observing that it would be “preferable for the defendant to adjudicate his claim of ineffective assistance of trial counsel in a post-conviction relief proceeding, which would allow the parties to develop and the reviewing court to consider facts outside the present trial record.”³⁴¹

In *Etienne v. State*,³⁴² the supreme court addressed a claim of ineffectiveness raised on direct appeal by the same attorney who represented the defendant at trial. The court began its analysis by observing that “[a]rguing one’s own ineffectiveness is not permissible under the Rules of Professional Conduct.”³⁴³ Although the court had previously entertained such a claim,³⁴⁴ it found that

333. *Id.*

334. *Id.* at 1220.

335. *See id.*

336. *Id.*

337. *Id.* Of course, direct appeal counsel may still develop a factual record in support of a claim through the so-called *Davis* procedure which allows a defendant to suspend a direct appeal to return to the trial court to pursue an immediate petition for postconviction relief. *See id.* at 1219.

338. 717 N.E.2d 96 (Ind. 1999).

339. *See id.* at 101.

340. *Id.*

341. *Id.* at 102.

342. 716 N.E.2d 457 (Ind. 1999).

343. *Id.* at 463 (citing IND. PROFESSIONAL CONDUCT Rule 1.7(b); *In re Sexson*, 666 N.E.2d 402, 403-04 (Ind. 1996)).

344. *See Cook v. State*, 675 N.E.2d 687, 691-92 (Ind. 1996).

Woods required a different response.³⁴⁵ “Because trial counsel are poorly positioned to critique their own performance or to proclaim it deficient, a defendant should not be foreclosed from ever having a fresh set of eyes consider and argue the effectiveness of his or her trial counsel.”³⁴⁶ The court held, “under most circumstances”³⁴⁷ it would not entertain ineffectiveness claims raised on direct appeal by trial counsel.³⁴⁸ Indeed, because Etienne’s claim was “little more than a rehashing of his other claims,” the supreme court declined to entertain it, thereby allowing him to raise a fully developed claim on postconviction.³⁴⁹

L. Exhaustion of State Remedies for Federal Collateral Review

In *O’Sullivan v. Boerckel*,³⁵⁰ the United States Supreme Court examined whether a petitioner seeking federal collateral review of his state conviction exhausted his available state court remedies when he failed to petition for discretionary review of the issues raised in his federal habeas corpus action.

A petitioner seeking to raise issues in a federal habeas corpus proceeding must first have given the state a full and fair opportunity to review those issues.³⁵¹ When he has done so, the petitioner has exhausted his available state court remedies and, as a general rule, may raise those claims in a federal collateral attack on his conviction. When no state court remedy remains available and a petitioner has failed to raise and exhaust a claim in the state courts, the claim is barred by procedural default and may not be raised in a federal habeas corpus proceeding.³⁵² In this case, the Supreme Court addressed whether exhaustion of state court remedies requires a criminal defendant to petition the state’s highest court for a discretionary review of issues later presented in a habeas proceeding.³⁵³

After his conviction at trial, Boerckel raised several claims on direct appeal as a matter of right in the Illinois intermediate appellate court without success. Boerckel then sought discretionary review of three claims in the Illinois Supreme Court. The Illinois Supreme Court denied Boerckel’s petition for discretionary review.³⁵⁴ Boerckel next filed a petition for habeas corpus relief in federal district court seeking to raise claims that were not included in his petition for

345. See *Etienne*, 716 N.E.2d at 463.

346. *Id.*

347. *Id.* The exception is when “[a]n ineffectiveness claim is sufficiently clear that immediate review is appropriate to avoid unnecessary delay in addressing it.” *Id.*

348. See *id.*

349. *Id.*

350. 119 S. Ct. 1728 (1999).

351. See 28 U.S.C. § 2254(b)(1), (c) (1994).

352. See *Coleman v. Thompson*, 501 U. S. 722, 731 (1991).

353. See *Boerckel*, 119 S. Ct. at 1730.

354. See *id.*

discretionary review to the Illinois Supreme Court.³⁵⁵ The district court held that Boerckel had procedurally defaulted on those claims.³⁵⁶ The United States Seventh Circuit Court of Appeals reversed, holding that exhaustion did not require a petitioner to seek discretionary review.³⁵⁷ The United States Supreme Court granted certiorari to resolve a conflict on the issue among the Courts of Appeals.³⁵⁸

In a 6-3 decision, the United States Supreme Court held that, although the petitioner had no right to review in the Illinois Supreme Court, he had a right to raise his claims before the court, which is all 28 U.S.C. § 2254(c) requires.³⁵⁹ Thus, the Court concluded that a federal habeas petitioner must seek available, discretionary review of his claims to satisfy the exhaustion requirement of 28 U.S.C. § 2254(b)(1) and (c).³⁶⁰

Like Illinois, Indiana has a two-tiered appellate system for most criminal appeals.³⁶¹ As such, under the holding of this case, before a federal habeas petitioner challenging an Indiana conviction can present a claim in a federal habeas proceeding, he must have sought discretionary review of the claim by raising it in a petition to transfer to the Indiana Supreme Court.³⁶² However, this may not always be the case. As pointed out by Justice Souter in his concurring opinion³⁶³ and Justice Stevens in his dissenting opinion,³⁶⁴ the majority opinion in *Boerckel* seems to leave open the possibility that a state with discretionary appellate review procedures may issue a statement to the effect that the failure to raise all issues at the discretionary appellate level will not result in procedural default of those issues in a federal habeas proceeding.³⁶⁵ Because the Indiana Supreme Court has not issued such a policy statement, criminal defendants would be well-advised to seek transfer of any claims they may later wish to raise in a federal habeas petition.

CONCLUSION

In sum, two opinions from the survey period, *Woods* and *Richardson*, are especially significant, and a few others touch upon issues worth watching in the future. *Richardson*³⁶⁶ is plainly the opinion that will have the widest impact.

355. See *id.* at 1730-31.

356. See *Boerckel v. O'Sullivan*, No. 94-3258 (C. D. Ill. Oct. 28, 1996).

357. See *Boerckel v. O'Sullivan*, 135 F. 3d 1194 (7th Cir. 1998), *rev'd*, 119 S. Ct. 1728 (1999).

358. See *Boerckel*, 119 S. Ct. at 1731.

359. See *id.* at 1733.

360. See *id.* at 1733-34.

361. See IND. CONST. art. VII, §§ 4, 6.

362. See IND. R. APP. P. 11(B).

363. See *Boerckel*, 119 S. Ct. at 1734-35 (Souter, J., concurring).

364. See *id.* at 1740 (Stevens, J., dissenting).

365. See *id.* at 1734 (Souter, J., concurring).

366. See *supra* Part II.J.

Defendants who believe their multiple convictions violate double jeopardy principles now have a much easier path to relief under the actual evidence test enunciated in *Richardson* than that previously available under the federal Double Jeopardy Clause. However, in response to *Richardson*, prosecutors will likely become more deliberative in their selection of charges and arguments at trial, thereby allowing at least some multiple convictions or enhancements of offenses to stand under the actual evidence test.

Woods resolved longstanding confusion as to when to raise a claim of ineffective assistance of counsel.³⁶⁷ Before *Woods*, direct appeal counsel faced the unpleasant dilemma of raising an often half-baked (record-based) claim that would then bar postconviction counsel from later raising a fully developed claim, or raising no claim at all and risk having the postconviction court find the claim waived because it was available, but not raised, on direct appeal. After *Woods*, only counsel who are confident they have discovered an error of reversible magnitude should raise an ineffectiveness claim on direct appeal. Most claims are likely to be saved for postconviction proceedings.

The problem with belated disclosures of discovery by the State led a unanimous supreme court in *Goodner*³⁶⁸ to threaten the adoption of a prophylactic rule of reversal if abuses continued. The court also observed that disciplinary sanctions may be imposed on prosecutors who fail to make timely disclosure of evidence beneficial to the defense. One would expect, in light of these significant threats of conviction reversal and disciplinary sanctions, that prosecutors will take heed and issues regarding the untimely disclosure of discovery will not surface in future cases.

Finally, panels of the court of appeals issued conflicting opinions on the issues of non-mutual collateral estoppel³⁶⁹ and the belated addition of habitual offender charges³⁷⁰ during the survey period. The supreme court will likely be called upon to resolve these splits in the upcoming months or years.

367. See *supra* Part II.K.

368. See *supra* Part II.G.

369. See *supra* Part II.D.

370. See *supra* Part II.E.