INDIANA CONSTITUTIONAL DEVELOPMENTS: CHANGES ON THE COURT

JON LARAMORE*

The survey period saw significant changes in the makeup of the Indiana Supreme Court, in addition to the change in membership that occurred in the prior year.[1] Chief Justice Randall T. Shepard, whom some credit with re-igniting interest in Indiana constitutional law with the publication of his 1989 article, *Second Wind for the Indiana Bill of Rights*, retired after twenty-seven years of service on the court.[2] Justice Frank Sullivan Jr. also retired after nineteen years of service to take a teaching position.[3]

Chief Justice Shepard was succeeded by Justice Brent T. Dickson, who has been on the court for twenty-eight years and has authored several important state constitutional decisions.[4] Justice Dickson's position as a justice was taken by Mark Massa, whose professional background includes time as a prosecutor, private practitioner, and government official.[5] Justice Sullivan, now a professor of law, was succeeded by trial court judge Loretta Rush.[6] It is uncertain what the

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* Partner, Faegre Baker Daniels LLP. Fellow, American Academy of Appellate Lawyers. Former chief counsel to Governors Frank O'Bannon and Joseph L. Kernan.

1. In 2010, Justice Theodore R. Boehm resigned and was succeeded by Justice Steven David. Press Release, Judge Steven David to be Sworn-In a 106th Indiana Supreme Court Justice (Sept. 17, 2010), *available at* http://www.in.gov/judiciary/press/2010/0917.html.

2. 22 IND. L. REV. 575 (1989). *See* Press Release, Chief Justice Shepard Will Retire from Supreme Court (Dec. 7, 2011), *available at* http://www.in.gov/activecalendar/EventList.aspx?fromdate=12/1/2011&todate=12/31/2011&display=Year,Month&type=public&eventidn=46011&view=EventDetails&information_id=92248.

3. Brandon Smith, *Indiana Supreme Court Justice Sullivan Is Retiring*, IND. PUB. MEDIA (Apr. 2, 2012), *available at* http://indianapublicmedia.org/news/indiana-supreme-court-justice-sullivan-retiring-28675/.

4. Press Release, Commission Selects Brent E. Dickson as Chief Justice of Indiana (May 15, 2012), *available at* http://www.in.gov/activecalendar/EventList.aspx?fromdate=1/1/2012&todate=12/31/2012&display=Year,Month&type=public&eventidn=55981&view=EventDetails&information_id=112401. Justice Dickson's important Indiana constitutional decisions include *Embry v. O'Bannon*, 798 N.E.2d 157 (Ind. 2003) (religion clauses); *Cittadine v. Indiana Department of Transportation*, 790 N.E.2d 978 (Ind. 2003) (standing); *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999) (double jeopardy); *State Board of Tax Commissioners v. Town of St. John*, 702 N.E.2d 1034 (Ind. 1998) (uniform and equal property taxation); and *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994) (equal privileges and immunities).

5. Press Release, Mark Massa to Be Sworn-In as 107th Indiana Supreme Court Justice (March 28, 2012), *available at* http://www.in.gov/activecalendar/EventList.aspx?fromdate=1/1/2012&todate=12/31/2012&display=Year,Month&type=public&eventidn=54849&view=EventDetails& information_id=110078.

6. Press Release, Loretta Rush to Be Sworn-In as 108th Indiana Supreme Court Justice (Nov. 2, 2012), *available at* http://www.in.gov/activecalendar/EventList.aspx?fromdate=1/1/2012&todate=12/31/2012&display=Year,Month&type=public&eventidn=60017&view=Event Details&information_id=121110.

new membership of the Indiana Supreme Court will mean for Indiana constitutional jurisprudence, but with turnover in three-fifths of the court's members over the last two years, changes certainly are afoot.

The year 2012 saw another groundbreaking development when groups associated with the "Tea Party" faction mounted a campaign to defeat Justice Steven H. David in a judicial retention election.[7] While there have been some prior efforts to defeat a judge seeking retention, this was the first one focused on a specific decision: Justice David's majority opinion in *Barnes v. State*.[8] *Barnes* held that, in Indiana, there is no right to forcibly resist police entry into one's home, even if the entry is unlawful.[9] Some opponents of Justice David's retention argued that *Barnes* improperly curtailed Fourth Amendment rights.[10]

The attempt to defeat retention included social media, yard signs, and radio advertising in some parts of the State.[11] The effort was wholly unsuccessful, however. Justice David won retention by a vote of 1,295,077 to 578,971, meaning 69% of voters favored retention.[12] Justice Robert D. Rucker also stood for retention but faced no organized opposition.[13] He won retention by 1,325,792 to 526,500, obtaining just over 71% of the votes.[14] If the difference between the two justices' retention totals is attributable to the campaign against Justice David, it generated only about 30,000 votes or about two percent of the total.[15]

The survey period featured no sea changes in Indiana constitutional law, perhaps because new justices were settling into their positions. There were

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7. Brandon Smith, *Opposition to Retaining State Supreme Court Justice Mounts*, IND. PUB. BROADCASTING SERVICE (NOV. 5, 2012), http://indiana publicmedia.org/news/supreme-court-justices-retention-uncertain-39364/. Examples of "Tea Party" materials criticizing Justice David may be found at multiple sites on the Internet—*e.g.*, *Justice Steven David Retention Vote Information,* IND. TEA PARTY, http://www.indianapolisteaparty.com/events/2012-10-29/justice-steven-david-retention-vote-information-my-house-campaign (last visited Aug. 31, 2013) [hereinafter Tea Party Website]; and *Remove Justice Steven H. David in 2012*, FACEBOOK, http://www.facebook.com/NOinNOvember (last visited Aug. 31, 2012).

8. 946 N.E.2d 572, *aff'd on reh'g*, 953 N.E.2d 473 (Ind. 2011). *See also* Jon Laramore, *Ind. Constitutional Developments: Debtors, Placements, and the Castle Doctrine*, 45 IND. L. REV. 1043, 1049-51 (2012).

9. *Barnes*, 946 N.E.2d at 576 ("We believe however that a right to resist an unlawful police entry into a home is against public policy and is incompatible with modern Fourth Amendment jurisprudence."). Query whether the decision would have received the notoriety it did if it had been written in more legalistic, less understandable language.

10. *See* Tea Party Website, *supra* note 7.

11. *See* Dave Stafford, *Signs of Dissent in Retention Vote*, IND. LAW. (Oct. 24, 2012), http://www.theindianalawyer.com/signs-of-dissent-in-retention-vote/PARAMS/ article/29938.

12. *Election Results,* Ind. Secretary of State, http://www.in.gov/apps/sos/election/general/general2012?page=office&countyID=-1&officeID=26&districtID=-1&candidate= (last visited Aug. 31, 2013). .

13. *See* Stafford, *supra* note 11.

14. *Id.*

15. *Id.*

notable decisions addressing election law and free expression, as well as a quirky cases applying the single subject matter clause of article 4, section 19 of the Indiana Constitution. Indiana's appellate courts also continued development of state constitutional jurisprudence in the areas of the *ex post facto* clause, double jeopardy, sentencing, and other aspects of criminal defendants' rights.

I. ARTICLE 2—VOTING AND ELECTIONS

The Indiana Supreme Court decided two cases during the survey period that addressed voting and elections. In *Snyder v. King*,[16] David Snyder, who had been recently released from prison, challenged the cancellation of his voter registration while he was imprisoned.[17] He argued that the State lacked authority to revoke his registration because the Indiana Constitution allows the General Assembly to disenfranchise only "person[s] convicted of an infamous crime."[18] He contended that his conviction for misdemeanor battery did not constitute an "infamous crime" and, therefore, did not justify cancelling his voter registration.[19] The Indiana Supreme Court's decision in the case came on a question certified by the United States District Court for the Southern District of Indiana.[20]

It was undisputed that Snyder could have re-registered to vote after he completed his sentence, but he chose, instead, to challenge cancellation of his registration.[21] The Indiana Supreme Court clarified that it was addressing only whether convicted prisoners in Snyder's situation could be disenfranchised during their incarceration.[22]

Reviewing past decisions on this topic, the court determined that in the past only felonies had been considered infamous crimes.[23] But it concluded that felony and infamous crime are not synonymous for purposes of article 2, section 8.[24] The court acknowledged that, historically, the courts had generally allowed the General Assembly to determine which offenses were infamous crimes by imposing disenfranchisement as a punishment for those crimes, but the court concluded that this approach would fail to give effect to the constitutional term "infamous," so it could not be the proper approach.[25]

The court took the approach that whether a crime is infamous depends upon the nature of the crime itself.[26] The court recognized that this approach departed from precedent, and justified its deviation from stare decisis because the prior

16. 958 N.E.2d 764 (Ind. 2011).
17. *Id.* at 768.
18. *Id*. at 769-70 (citing IND. CONST. art. 2, § 8).
19. *Id.* at 771.
20. *Id*. at 769.
21. *Id*. at 768.
22. *Id*. at 770.
23. *Id*. at 770-71.
24. *Id*. at 771.
25. *Id*.
26. *Id*. at 773.

doctrine was mistaken, and it rested on federal jurisprudence—which is not binding when construing the Indiana Constitution—addressing a federal constitutional provisions dealing with witness testimony rather than voting.[27]

In determining what constitutes an infamous crime, the court also rejected the categorical approach used at common law, which classified treason, felonies, and "any species of *crimen falsi*" as infamous, noting that this approach was never the law in Indiana.[28] The court's analysis of historical practice showed that in 1851, when the current constitution was adopted, the only crimes punishable by disenfranchisement were grand and petit larceny, receipt of stolen property, altering brands or marks on animals with intent to steal, professional gambling, malicious prosecution, voting or attempting to vote twice, and making threats or offering rewards to procure election.[29] Using this list and contemporaneous dictionaries, the court concluded that only the "most vile" crimes were considered infamous by those who framed and adopted the Indiana Constitution.[30]

The court used this evidence to determine that the clause permitting disenfranchisement for infamous crimes was not primarily punitive in purpose, but rather was regulatory.[31] It bolstered this conclusion with the language of article 1, section 18, which states "that [t]he penal code shall be founded on the principles of reformation, and not of vindictive justice," reasoning that the framers would not have deprived someone of the right to vote solely as punishment.[32]

The court concluded that the regulatory purpose of the constitutional provision was to protect the integrity of elections.[33] It based that conclusion on the reasoning of decisions from other jurisdictions and on the placement of the constitutional provision in article 2, which governs suffrage and elections.[34] The court stated that crimes typically considered infamous under this standard would include treason, perjury, malicious prosecution, and election fraud.[35] Snyder's crime of misdemeanor assault would not be considered infamous under this standard.[36]

But Snyder did not ultimately win the day. After determining that he could not be deprived of the right to vote solely because of his conviction for misdemeanor assault, the court addressed whether disenfranchising him while he was incarcerated violated the Indiana Constitution.[37] This question was not certified by the federal court, but the Indiana Supreme Court addressed it

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27. *Id*. at 776-77.
28. *Id*. at 778.
29. *Id*. at 779.
30. *Id*. at 780.
31. *Id*. at 781.
32. *Id*. (quoting IND. CONST. art. 1, § 18).
33. *Id*.
34. *Id*. at 781-82.
35. *Id*. at 782.
36. *Id*.
37. *Id*. at 783.

nonetheless. The court concluded that Snyder was not disenfranchised under the infamous crimes clause.[38] Rather, the court ruled that disenfranchisement during incarceration "is simply an incident to or a collateral consequence of . . . incarceration."[39] "The General Assembly's police power permits it to affix terms of incarceration for violating our criminal laws. We think it also permits the General Assembly to disenfranchise an incarcerated convict as a collateral consequence of imprisonment."[40] The court concluded that this exercise of police power did not violate Snyder's rights under the Indiana Constitution.[41] It reported to the federal district court that Snyder's disenfranchisement during the term of his sentence did not violate the Indiana Constitution.[42]

In its second elections case, *White v. Indiana Democratic Party*,[43] the Indiana Supreme Court construed the statute under which the Indiana Democratic Party sought to disqualify Charlie White as a candidate for secretary of state.[44] By the time the court decided the case, White had forfeited the office after being convicted of fraudulent voter registration, casting a fraudulent ballot, and other charges because he listed an address other than his true home address on certain voting records.[45] The reason the Democratic Party sued, however, is that if courts determined that White had not properly been placed on the ballot in the first place, the office would be awarded to the second-place vote-getter in the election, in this case the Democratic candidate;[46] if White forfeited his office upon conviction, in contrast, the Governor—like White, a Republican—would name White's successor.[47]

The Democrats' petition alleged that White was not eligible to be a candidate because he was not registered to vote at the place he resided on July 15, 2010, the date his party delivered his certificate of nomination.[48] The Democrats sued in late November 2010, *after* the election had been held and White had won.[49] The Democrats' petition contested White's election under Indiana Code section 3-12-

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38. *Id*. at 784.

39. *Id*.

40. *Id*.

41. *Id*. at 784-85.

42. *Id*. at 788. The court criticized Snyder for raising his state constitutional claim in federal court. *Id.* at 787. He sued in federal court and asked the federal district judge to certify his Indiana claim to the Indiana Supreme Court. *Id.* This posture of the case, the court stated, made it difficult to rule on the Indiana constitutional issue because the facts were not fully developed in the federal proceeding. *Id.* at 788. The court expressed its reluctance to rule on the certified question in this posture. *Id*. (citing Randall T. Shepard, *Is Making State Constitutional Law Through Certified Questions a Good Idea or a Bad Idea?*, 38 VAL. U. L. REV. 327, 336-51 (2004)).

43. 963 N.E.2d 481 (Ind. 2012).

44. *Id.* at 486.

45. *Id*. at 484 n.1.

46. *Id.* at 485 (citing IND. CODE § 3-12-11-25 (2013)).

47. *Id.* at 485 n.4 (citing IND. CODE § 3-12-11-25 (2013)).

48. *Id.* at 484.

49. *Id*.

11-3, arguing that White did not "comply with a specific statutory or constitutional requirement set forth in the petition that is applicable to a candidate for the office"[50]; that requirement being that "the person is registered to vote in the election district the person seeks to represent not later than the deadline for filing . . . the certificate of nomination."[51]

The court rejected the Democrats' challenge, ruling that it had come too late under the applicable statutory framework.[52] The court stated that the relevant statutory language, "does not comply," is written in the present tense, suggesting that the claim is to be analyzed as of the time it is brought—in this case, after the election.[53] And in this case, "when the challenge was filed post-election White *was* correctly registered at his place of residence."[54] The court ruled that anyone seeking to challenge White's residency should have done so before the election and that several avenues for such challenges were available.[55] The statutes, the court wrote, were written to give incentives for these challenges to be brought before the election, so that the voters could be informed of potential problems pertaining to candidates' residency or compliance with other requirements.[56]

While the result of this case was dictated by statutory language, both the majority opinion and concurrence relied on Indiana constitutional principles. The majority's position was heavily influenced by article 2, which guarantees that "all elections shall be free and fair."[57] The majority admitted its reluctance to interfere with the will of the voters and that it would not lightly "judicially nullify the votes of the hundreds of thousands of Indiana citizens who cast their ballots for White."[58]

Concurring, Justice Dickson found a different reason to rule in White's favor. Justice Dickson concluded that the statutes regarding residency should not apply to White because the General Assembly lacked authority to add additional qualifications to the sole qualification for secretary of state set forth in the constitution itself, which is only that no person may serve in the office for more than eight years of any twelve-year period.[59] He concluded that the fact that the constitution mandates varied qualifications for various offices shows that the framers carefully considered the issue, and he pointed out that there is no explicit provision allowing the legislature to expand upon those qualifications.[60] Under the constitution, a candidate for secretary of state need not be a registered voter, and Justice Dickson concluded that the addition of that qualification by statute

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50. *Id.* at 485 (internal quotation marks omitted) (quoting IND. CODE § 3-12-11-3(a), (b)(4)).
51. *Id*. at 486 (citing IND. CODE §§ 3-8-1-1(b)).
52. *Id.* at 488. .
53. *Id*. at 488-89.
54. *Id*. at 489.
55. *Id*.
56. *Id*.
57. *See id*. at 486-87.
58. *Id*. at 487.
59. *Id*. at 491 (Dickson, J., concurring).
60. *Id*. at 491-92.

went beyond the legislative power.[61]

II. ARTICLE 1, SECTION 9—FREE EXPRESSION

Both the Indiana Supreme Court and Indiana Court of Appeals addressed issues under article 1, section 9 pertaining to rights of free expression during the survey period. The Indiana Supreme Court's case, *State v. Economic Freedom Fund*,[62] dealt with Indiana's Autodialer Law, which regulates the use of automatic dialing devices to deliver pre-recorded telephone messages.[63] The plaintiff challenging the law in this case distributed pre-recorded political messages, including political polls, and political advocacy messages.[64]

Under Indiana's statute, however, these political messages could not be delivered unless a live caller spoke individually with each recipient of a call to determine whether that recipient was willing to listen to the recorded message.[65] The court concluded that the plaintiffs were unlikely to succeed on their claim that this provision violated article 1, section 9.[66] The court repeated the standard from *Price v. State* that article 1, section 9 embodies a freedom-and-responsibility standard that prohibits the legislature from impairing the flow of ideas, but allows it to sanction those who commit abuse of the right.[67] Additionally, under *Price*, if a statute affects political speech the court must determine whether it "materially burdens" speech.[68] The court determined that it was appropriate to examine both the magnitude of the impairment created by the Autodialer Law—that is, whether there is a substantial obstacle to engaging in political speech—and a "particularized harm" analysis, determining whether the speaker's actions are analogous to conduct that would sustain tort liability against the speaker.[69] The court resolved the case applying only the first step of the analysis—magnitude of

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61. *Id*. at 493.

62. 959 N.E.2d 794 (Ind. 2011), *cert. denied*, FreeEats.com v. Indiana, 133 S. Ct. 218 (2012).

63. Id. at 797.

64. *Id*.

65. *Id*. at 800. The Indiana Supreme Court declined to rule on the First Amendment claim in this case because the trial court did not address that claim, finding in a preliminary injunction proceeding that the plaintiffs had a reasonable likelihood of prevailing on their state constitutional claim and, therefore, not reaching the federal constitutional claim. It held that "review of the grant or denial of a preliminary injunction should be confined to the law applied by the trial court, and this Court should evaluate only the merits arguments reached by the trial court." *Id*. at 801. It cited no authority for this principle, which appears to change Indiana law. Nevertheless, the court "briefly stated why, based on the record before us, [plaintiffs'] First Amendment claim is likely to fail." *Id*. It concluded that the statute is content neutral and narrowly tailored to serve a significant governmental interest. *Id*. at 802.

66. *Id*. at 807.

67. *Id*. at 804-05.

68. *Id.* at 805.

69. *Id*. at 806.

the impairment.[70]

The court concluded that the Autodialer Law did not present a substantial obstacle to political speech.[71] The court concluded that it does not prohibit political speech, and the speaker may continue to make automatically dialed calls as long as they use live operators to obtain prior permission.[72] The court also noted that the plaintiffs have other methods for disseminating their messages.[73] The court rejected plaintiffs' arguments that the significant additional cost imposed by the use of live operators constituted a significant obstacle to political speech.[74]

Justice Sullivan dissented,[75] concluding that the majority incorrectly shifted the burden under Indiana's test to require plaintiffs to show that their right to engage in political speech was materially burdened by Indiana's law, whereas, before, the State had the burden to show that the statute is not a material burden.[76] He also argued that the majority's opinion significantly curtailed speech protections under *Price* by rejecting the argument that the economic burdens imposed by the Autodialer Law materially burdened speech.[77] He stated that the high cost of using live operators—raising the cost per call from $0.15 to $2.25 per call, a 1500% increase—would preclude the use of automatically dialed calls altogether.[78] He emphasized the importance of this method of communication, which "can contact 1.7 million Indiana voters in 7 hours . . . allowing political speakers to deliver their messages during the timeframes in which speech is most effective."[79] He said automatically dialed calls "enable[] candidates to respond to attack ads right before an election when no TV or radio airtime is available, providing candidates what might well be otherwise unavailable opportunities to defend themselves."[80] He said the court's decision "operates to shut down the entire automated political-call industry."[81]

The Indiana Court of Appeals addressed Indiana's press shield law and the constitutional right to comment anonymously in *In re Indiana Newspapers, Inc.*,[82] an interlocutory appeal of a non-party request for production of documents sent

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70. *Id*.

71. *Id*.

72. *Id*.

73. *Id*.

74. *Id*. at 807.

75. *Id*. at 807-19 (Sullivan, J., dissenting). Justice Sullivan also would have ruled that the Autodialer Law violated the First Amendment because it does not meet the requirement for narrow tailoring. *Id*. at 816-17.

76. *Id*. at 809.

77. *Id*.

78. *Id.* at 810.

79. *Id*.

80. *Id*.

81. *Id*.

82. 963 N.E.2d 534 (Ind. Ct. App.), *aff'd on reh'g*, Ind. Newspapers, Inc. v. Miller, 980 N.E.2d 852 (Ind. Ct. App. 2012).

to the *Indianapolis Star*.[83] The case arose from a defamation action by a former executive of a non-profit enterprise alleging that certain others had made statements to the effect that the former executive, Jeffrey Miller, was dishonest in his treatment of certain grant funds received by the non-profit.[84] The *Star* wrote newspaper articles on the dispute, some of which were posted on its website and were subject to posting of anonymous comments.[85] Miller sought production of the identity of certain anonymous commenters who purported to have information relevant to Miller's claim.[86] The court ruled that Indiana's broad press shield law, which protects anonymous sources, did not apply in this case because the anonymous commenters did not provide any source materials for the *Star* articles and, therefore, could not be classified as a source protected by the statute.[87]

The court then examined how to appropriately protect the commenters' rights to anonymous speech, analyzing the claim primarily under the First Amendment, but also under the Indiana Constitution. The court recognized that, under the First Amendment, anonymous speech enjoys a qualified privilege that is balanced against other rights, which in this case meant Miller's right to redress for alleged defamation.[88] The court looked at tests applied in other jurisdictions, ultimately adopting the *Dendrite* test from New Jersey, modified to take into account Indiana's requirement to prove actual malice: the plaintiff must (1) notify the anonymous commenter via the website on which the comment was made and allow the commenter to oppose disclosure; (2) identify the exact statements alleged to be defamatory; (3) produce prima facie evidence to support each element of the defamation claim (except those dependent upon the defamer's identity); and the trial court must then (4) balance the defendant's First Amendment right to anonymous speech against the strength of the prima facie case and the plaintiff's need for the commenter's identity.[89] The court recognized that the Indiana Constitution provides free speech protection that goes beyond the First Amendment.[90] The court noted that the test it promulgated has been described as the most speech protective standard available in cases such as this one, and it determined that the test is congruent with the protections of the Indiana Constitution.[91]

The Indiana Court of Appeals also addressed a claim of violation of article

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83. *Id.* at 537.

84. *Id*. at 537-38.

85. *Id*. at 539.

86. *Id*. at 541.

87. *Id*. at 544-45, 547.

88. *Id*. at 549.

89. *Id*. at 552 (citing Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) (cited for standard); Mobilisa, Inc. v. Doe, 170 P.2d 712, 720 (Ariz. Ct. App. 2007) (cited for modification relating to actual malice)).

90. *Id*. at 553.

91. *Id*.

1, section 9 made by a government employee in *Ogden v. Robertson*.[92] Ogden was an official of the Indiana Department of Insurance.[93] He received mild discipline for taking actions that were not authorized by his supervisor, although he believed they were authorized by the agency's commissioner.[94] Ogden filed an internal complaint, and he asked that his division of the department be given a different supervisor (listing thirty-five reasons).[95] After taking these actions, Ogden was given the choice to resign or be terminated, and after resigning, he sued the agency claiming violation of his First Amendment rights, article 1, section 9, and whistleblower protections.[96] In relation to his Indiana constitutional claim, the court ruled that the content of Ogden's speech was political because it commented on the organization of a governmental agency.[97] But it also ruled that the request that Ogden resign or be terminated did not materially burden his constitutional rights because the purpose of his speech was personal, not political.[98] "[I]t is clear that he was acting within the scope of his employment because he requested a change or an improvement in his employment situation, which served a strictly private purpose."[99] Because his motivation was personal, the State's action did not violate article 1, section 9.[100]

III. ARTICLE 1, SECTION 20—JURY TRIAL IN CIVIL CASES

In *Lucas v. U.S. Bank, N.A.*,[101] the Indiana Supreme Court refined the standard to determine which portions of lawsuits containing both legal and equitable claims may be tried before a jury.[102] The right to jury trial in civil cases is governed by state constitutions because the Seventh Amendment has not been applied to the states.[103] In this foreclosure case, the bank presented the equitable claim of foreclosure, and the homeowners presented several statutory and common law defenses.[104] In cases of mixed claims such as this one, the Indiana standard appears in Trial Rule 38(A) and was most recently explained in 2002 in *Songer v. Civitas Bank*.[105] This case further refines that standard.

Songer stated that "when both equitable and legal causes of action or defenses

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92. 962 N.E.2d 134, 138 (Ind. Ct. App.), *trans. denied*, 970 N.E.2d 665 (Ind. 2012).

93. *Id*.

94. *Id.*

95. *Id*. at 138-39.

96. *Id*. at 139-40.

97. *Id*. at 141.

98. *Id*. at 142.

99. *Id*.

100. *Id*.

101. 953 N.E.2d 457 (Ind.), *reh'g denied*, 953 N.E.2d 457 (Ind. 2011). This case was decided during the prior survey period and was inadvertently omitted from the prior developments article.

102. *Id.* at 459-60.

103. *See, e.g.*, Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359, 367 (1952).

104. *Lucas*, 953 N.E.2d at 459, 461-63.

105. *Id*. at 460 (citing Songer v. Civitas Bank, 771 N.E.2d 61 (Ind. 2002)).

are joined in a single case, the equitable causes of action or defenses are to be tried by the court while the legal causes of action or defenses are to be tried by a jury."[106] *Songer* held that if the "essential features of a suit" are equitable, and the legal causes of action are not distinct and severable, then there is no right to a jury trial because equity subsumes the legal causes of action; this is the so-called "equitable clean-up" doctrine.[107] On the other hand, *Songer* said, if a multi-count case contains equitable causes of action and legal causes of action that are distinct and severable, the legal claims require trial by jury.[108]

The court rejected the bank's claim that all foreclosure cases should be deemed equitable, thus, subsequently should draw all defenses and counterclaims into equity.[109] The court then engaged in a more detailed analysis, looking at "whether the legal claims are related enough to the foreclosure action to be drawn into equity or are sufficiently distinct and severable to require a jury trial."[110] The court posited that this inquiry mandates determining "how closely tied together are the questions presented by the equitable and legal claims and whether more final and effectual relief can be obtained by invoking the equitable clean-up doctrine."[111] This inquiry also requires determining whether the legal claims significantly overlap with the subject matter that invokes the court's equitable jurisdiction.[112] If there is significant overlap, the equitable clean-up doctrine draws all the claims into equity.[113] Applying these tests to this case, the court found that several of the defenses—including improper assignment of the promissory note and mortgage and statutory defenses under the Truth in Lending Act and Fair Debt Collection Practices Act—significantly overlapped with the foreclosure action, invoking equitable clean-up.[114] The court's decision seemed to depend in large part on the identity of factual issues necessary to resolve the legal and equitable claims.[115]

Justice Dickson dissented, joined by Justice Rucker, who wrote *Songer*.[116] They wrote that the majority's opinion "appears to dilute the teachings of *Songer* and its cautious respect for the right to jury trial for purely legal claims that are distinct and severable."[117] They rejected the significant overlap test as being inconsistent with proper respect for the right to jury trial.[118]

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106. *Id.* at 460 (internal quotation marks omitted) (quoting *Songer*, 771 N.E.2d at 64).
107. *Id*. at 460-61 (citing *Songer*, 771 N.E.2d at 62).
108. *Id*.
109. *Id*. at 464.
110. *Id*. at 465.
111. *Id*.
112. *Id*. at 465-66.
113. *Id*.
114. *Id*. at 466.
115. *Id*.
116. *Id*. at 467 (Dickson, J., dissenting).
117. *Id*.
118. *Id*.

IV. ARTICLE 4, SECTION 19—SINGLE SUBJECT MATTER

The Indiana Supreme Court decided a quirky case involving the single subject matter requirement in article 4, section 19, *Loparex, LLC v. MIP Release Technologies, LLC*,[119] another case that came before the court on questions certified from the United States District Court for the Southern District of Indiana.[120] The underlying federal lawsuit included claims under Indiana's Blacklisting Statute, which gives a discharged employee a cause of action for damages if a corporation or other employer black-lists that employee or in any other way precludes that employee from obtaining other employment.[121]

In 1904, the Indiana Supreme Court found that the Blacklisting Statute was unconstitutional under the version of article 4, section 19 then in effect.[122] That section of the constitution contained the single subject matter provision, the heart of which is still in the constitution—"Every act shall embrace but one subject and matters properly connected therewith"—but also required that all the subjects of the act be expressed in the title.[123] The court in 1904 invalidated the Blacklisting Law because its subject matter was not properly reflected in the title of the act as passed by the General Assembly.[124] Article 4, section 19, has since been amended on two different occasions, and the current version contains no reference to what must be contained in the titles of acts. It states only that "[a]n act, except an act for codification, revision or rearrangement of law, shall be confined to one subject and matters properly connected therewith."[125]

The question presented to the supreme court by *Loparex* is whether, given the change in constitutional language, the Blacklisting Statute (which was never repealed) is now valid law.[126] After analyzing more recent case law applying the single subject matter clause, the court concluded that the Blacklisting Statute passed muster under the current constitutional language.[127] It contained one subject and matters properly connected with that subject.[128] The court unanimously answered the certified question by stating that the 1904 decision invalidating the Blacklisting Statute is no longer good law.[129]

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119. 964 N.E.2d 806 (Ind. 2012), *abrogating* Wabash R.R. Co. v. Young, 69 N.E. 1003 (Ind. 1904).

120. *Id.* at 809.

121. *Id*. at 810-11 (citing IND. CODE § 22-5-3-2).

122. Wabash R.R. Co. v. Young, 69 N.E. 1003 (Ind. 1904), *abrograted by Laparex, LLC*, 964 N.E.2d at 806.

123. *Id.* at 1004 (citing IND. CONST. art. 4, § 19 (1851)).

124. *Id.* at 1005.

125. *See* IND. CONST. art. 4, § 19.

126. *Loparex*, 964 N.E.2d at 809.

127. *Id*. at 812-13.

128. *Id*.

129. *Id.* at 825. The court also answered two other questions of statutory interpretation certified by the district court. *Id*. at 813-25.

V. ARTICLE 1, SECTION 17—RIGHT TO BAIL

The Indiana Court of Appeals analyzed the constitutional right to bail in *Shuai v. State*.[130] In that case, the defendant was charged with feticide as a result of her attempted suicide by ingesting poison.[131] The trial court denied bail.[132] Article 1, section 17 states, "[o]ffenses, other than murder and treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong."[133]

Shuai attempted to rebut the evidence that her baby (who was delivered alive) died as a result of her ingestion of poison, an event Shuai admitted in a suicide note.[134] She presented evidence that one of the drugs given during birth could have led to the baby's death, and a number of other conditions could have caused it.[135] She also presented evidence calling into question the results of the autopsy, which concluded that the baby's death resulted from ingesting the poison.[136] The court of appeals concluded that this evidence was sufficient to rebut the presumption of guilt, so the trial court should set conditions of bail.[137]

VI. ARTICLE 1, SECTION 13—DEFENDANTS' RIGHTS

In *Jewell v. State*, the Indiana Supreme Court adopted the federal standard for when law enforcement may question a suspect about a crime although the suspect has counsel in connection with another criminal charge.[138] Counsel had been appointed for Jewell on a charge of tattooing a minor.[139] Police were investigating Jewell in connection with potential sexual misconduct with a minor, and they monitored and recorded conversations between Jewell and the minor in which Jewell made incriminating statements.[140] After Jewell was charged, he sought to suppress the evidence of his conversations, claiming that the evidence was gathered in violation of his right to counsel.[141]

The court adopted the standard formerly used by most federal courts, which is that if a person has counsel on one charge, he is entitled to counsel when questioned on a second charge, but only if the second charge is "inextricably intertwined" with the first charge.[142] This test "focuses on the nature of the

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130. 966 N.E.2d 619, 622 (Ind. Ct. App. 2012).

131. *Id*. at 622-23.

132. *Id*. at 623.

133. *Id.* (internal quotation marks omitted) (quoting IND. CONST. art. 1, § 17).

134. *Id.* at 624.

135. *Id*.

136. *Id*.

137. *Id*. at 625. The court of appeals affirmed the trial court's denial of Shuai's motion to dismiss the charges. *Id*. at 625-32.

138. 957 N.E.2d 625 (Ind. 2011).

139. *Id*. at 627.

140. *Id*. at 627-28.

141. *Id*. at 628.

142. *Id*. at 629 (citing United States v. Covarrubias, 179 F.3d 1219, 1233 (9th Cir. 1999)

conduct involved [in the two offenses] rather than on the elements of the offense itself."[143] The United States Supreme Court has rejected this test in favor of an even narrower one, but the Indiana Supreme Court adopted the "inextricably linked" test, as have many other states, acknowledging that the right to counsel is broader under the Indiana Constitution than under the Federal Constitution.[144] The test "properly reflects the balance we seek to maintain between society's legitimate law enforcement needs and a defendant's right to counsel."[145] The court ruled that Jewell's rights were not violated because the second offense was not "inextricably intertwined" with the first, although both involved the same victim.[146]

The Indiana Supreme Court also addressed article 1, section 13 in *Hopper v. State*,[147] which raised a right to counsel issue, specifically what warnings a defendant must be given before being allowed to plea bargain without counsel.[148] Several years after his operating-while-intoxicated conviction, Hopper initiated a collateral attack, claiming that the trial judge had not adequately warned him of the consequences of plea bargaining without being represented by counsel.[149] Importantly, the court stated that plea bargaining is not a "critical stage" of a criminal proceeding at which a defendant must have counsel or validly waive counsel.[150] A few months after this decision, the United States Supreme Court ruled to the contrary in *Lafler v. Cooper*, holding that a defendant has a right to effective assistance of counsel during plea bargaining.[151]

The Indiana Supreme Court went on to hold that Hopper validly waived his right to counsel at the time the trial court accepted his plea bargain.[152] The court ruled that no specific form of warning of the dangers of plea bargaining without counsel is mandated by the Indiana or federal constitutions, so long as it can be determined that a defendant has "freely and knowingly waived his right to counsel."[153] The court ruled that the totality of circumstances in this case showed that Hopper's waiver met that standard.[154]

Justice Rucker dissented in an opinion joined by Justice Sullivan.[155] They stated that the court should require a specific advisement, along the lines of "an

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(stating former federal standard), *overruled by* Texas v. Cobb, 532 U.S. 612 (2001)).

143. *Id.* at 630 (quoting *Covarrubias*, 179 F.3d at 1225).

144. *Id*. at 632-34.

145. *Id*. at 635.

146. *Id*. at 636.

147. Hopper v. State, 957 N.E.2d 613 (Ind. 2011). This Article discusses only the Indiana Supreme Court's opinion on rehearing, which changed the holding in its original opinion.

148. *Id*. at 615.

149. *Id*. at 615-16.

150. *Id*. at 616-17.

151. 132 S. Ct. 1376, 1384 (2012).

152. *Hopper,* 957 N.E.2d at 621.

153. *Id*. at 620 (quoting IND. CODE § 35-35-1-1).

154. *Id*. at 621.

155. *Id*. at 624 (Rucker, J., dissenting).

attorney is usually more experienced in plea negotiations and better able to identify and evaluate any potential defenses and evidentiary or procedural problems in the prosecution's case" before allowing an unrepresented defendant to bargain over a plea; they did not, however, argue that either the Indiana or federal constitution requires such an advisement.[156]

The Indiana Supreme Court also addressed a right-to-counsel issue in *Hill v. State*,[157] which involved a complex procedural tangle arising from failure to file a timely notice of appeal from a judgment of conviction.[158] Skipping some of the details, Hill filed four different post-conviction petitions in an effort to obtain review of the initial judgment, including petitions alleging that prior counsel provided ineffective assistance by failing to timely appeal various court decisions.[159] The trial court found at least once that Hill did not lack fault for failure to file a timely notice of appeal.[160] The supreme court ruled that Hill's counsel's performance should be reviewed under the low standard of *Baum v. State*, and it concluded that Hill's counsel met that standard because he "appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court."[161] The court applied this low standard because there is no right to counsel in post-conviction matters, even though in this case Hill's conviction had never been subject to a direct appeal.[162] It affirmed the trial court's denial of post-conviction relief.[163]

Justice Sullivan concurred in result.[164] He disagreed that the *Baum* standard should apply in a proceeding addressing whether a belated appeal may be pursued.[165] He asserted that the Fourteenth Amendment provides a right to counsel in a proceeding about whether a convicted person is entitled to a first appeal of right.[166] He also noted that article 7, section 6 of the Indiana Constitution provides "an absolute right to one appeal," and that right should attach when failing to file a timely appeal is not the party's fault and the party diligently requests permission to file the appeal late.[167] He then analyzed Hill's counsel's performance using the stricter standard of *Strickland v. Washington* and concluded that counsel was deficient for failing to file a timely appeal, but Hill was not prejudiced because he was not diligent in pursuing a belated appeal and, therefore, would not have prevailed as a matter of law.[168] Justice Rucker

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156. *Id*. at 616.
157. 960 N.E.2d 141 (Ind. 2012).
158. *Id.* at 143.
159. *Id*. at 143-44.
160. *Id*. at 143.
161. *Id.* at 145.
162. *Id.* at 146-47.
163. *Id*. at 147-50.
164. *Id*. at 151-52 (Sullivan, J., concurring).
165. *Id*. at 151.
166. *Id*. at 151-52.
167. *Id*. at 152.
168. *Id*.

dissented, arguing that these rules should not be applied so rigorously as to deny Hill what he had sought all along—one appeal of his fifty-two-year sentence.[169]

Fonner v. State,[170] by the Indiana Court of Appeals, addressed the portion of article 1, section 13 regarding an unrepresented defendant's right at trial "to be heard by himself and counsel."[171] Fonner represented himself at trial and was found guilty of theft and criminal trespass.[172] On appeal, he argued that he was not properly advised of his right to testify on his own behalf.[173] Because he did not preserve this argument at trial, the court analyzed the issue for fundamental error.[174] The court concluded that "the trial court's failure to properly and clearly advise Fonner of his right to testify resulted in the loss of Fonner's ability to make that waiver knowingly and intelligently."[175] Because Fonner did not show how he was prejudiced by this violation of his rights, however, the court did not disturb his conviction.[176]

Article 1, section 13 also contains Indiana's right to confrontation, and the Indiana Court of Appeals applied that language in *Hutcherson v. State*.[177] Article 1, section 13 gives defendant the right "to meet the witnesses [against him] face to face."[178] This case presented the unusual circumstance of refreshing the recollection of a witness using a written document, although the witness could not read.[179] The trial court allowed the document to be read aloud to the witness in front of the jury; Hutcherson argued on appeal that his right to confront the out-of-court statements in the document was violated by that procedure, although he did cross-examine the witness.[180] The witness's recollection was only partially refreshed, so he did not adopt all of the contents of the document that was read aloud.[181] The court of appeals instructed that the "preferred methodology" would be to read the document to the witness outside the jury's presence, but it concluded that everything in the statement read aloud was cumulative of other evidence, so any error in reading the document aloud was harmless.[182] The court affirmed Hutcherson's conviction.[183]

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169. *Id*. at 153 (Rucker, J., dissenting).

170. 955 N.E.2d 241 (Ind. Ct. App. 2011), *trans. denied*, 963 N.E.2d 1115 (Ind.), *cert. denied*, 132 S. Ct. 2778 (2012).

171. *Id.* at 243-44.

172. *Id*. at 243.

173. *Id*. at 243-44.

174. *Id*. at 244.

175. *Id*. at 246.

176. *Id*.

177. 966 N.E.2d 766, 770 (Ind. Ct. App.), *trans. denied*, 970 N.E.2d 665 (Ind. 2012).

178. *Id.* at 771 (citing IND. CONST. art. 1, § 13).

179. *Id.* at 768.

180. *Id*. at 768-69.

181. *Id*. at 771.

182. *Id*. at 772-73.

183. *Id*. at 772.

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

As in most recent years, Indiana's appellate courts have addressed *ex post facto* clause issues, frequently in the context of Indiana's often-amended Sex and Violent Offender Registry statute.[184] During the survey period, the Indiana Court of Appeals addressed two such cases, both raising issues about whether changes in the registry could be applied to persons who were convicted before the changes were enacted. In *Healey v. State*,[185] Healey was charged with violating the registry statute by failing to register and by using social networking websites that are forbidden under the registry law.[186] He had been convicted of child molesting in 1995, and the registry law was amended after he committed his offense to require him to register for ten additional years.[187]

The court analyzed the issue using the "intent-effects" test set forth in *Jensen v. State*, which looks to whether the General Assembly intended the statutory changes to be punitive or whether they have a punitive effect.[188] The courts apply a seven-part test under *Jensen*, looking at

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether [the reporting requirement] has historically been regarded as punishment; (3) whether [the post-conduct amendment] comes into play only on a finding of *scienter*; (4) whether [the statute's] operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which [the statute] applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.[189]

In Healey's case, the court concluded that the first three factors made the amendments to the registry statute appear punitive, but the last four made the changes appear to promote public safety and, therefore, non-punitive.[190] Because the first six factors were a wash, the seventh factor proved determinative.[191] The court concluded that merely extending the registration time could not be seen as punitive, but rather furthered the public safety purpose of offender registration.[192] The court ruled that Healey had failed to meet his burden to show that the changes in the registry statute enacted after he committed his offense were punitive, so the changes did not violate his rights under the *ex post facto* clause.[193]

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184. *See, e.g.*, Laramore, *supra* note 8, at 1054-55.

185. 969 N.E.2d 607 (Ind. Ct. App.), *trans. denied*, 974 N.E.2d 475 (Ind. 2012).

186. *Id.* at 610-11.

187. *Id*. at 612 (citing IND. CODE § 11-8-8-19).

188. *Id.* (citing Jensen v. State, 905 N.E.2d 384, 390 (Ind. 2009)).

189. *Id*. at 613 (quoting Lemmon v. Harris, 949 N.E.2d 803, 810 (Ind. 2011)).

190. *Id.* at 613-16.

191. *Id*. at 616.

192. *Id.*

193. *Id*. The court of appeals applied the same test, and reached the opposite conclusion, in

Another Indiana Court of Appeals case applied the *ex post facto* clause. In *Simmons v. State*,[194] the defendant argued that he was being punished unconstitutionally because his conviction for operating while intoxicated was enhanced based on his conviction several years earlier of operating while intoxicated causing death, and the enhancement statute had been enacted after his first conviction.[195] The court rejected this argument, concluding that he was not being subjected to additional punishment for his prior crime but, rather, was receiving an enhanced punishment for the crime he committed *after* the change in the enhancement statute.[196] "He is simply being punished as a recidivist based upon his most recent act of OWI."[197]

VIII. ARTICLE 1, SECTION 14—DOUBLE JEOPARDY

Indiana's test for double jeopardy in so-called "multiple punishments" situations—where a defendant contends he is being punished more than once for the same conduct—is more generous to defendants than the federal test. Indiana's test includes the "same elements" test in federal law, assessing whether one offense for which the defendant is convicted has exactly the same elements as another offense for which he is convicted.[198] But Indiana's test goes further, asking whether each offense is proved by at least one item of evidence that is not used to prove any other offense—the "same evidence" test.[199]

Several decisions during the survey period show that Indiana's prosecutors have come to understand how to avoid multiple-punishment double-jeopardy problems by carefully distinguishing which evidence is being used to prove which offenses. In *Estrada v. State*,[200] the defendant claimed that the same evidence was used to prove both robbery and conspiracy.[201] The court of appeals concluded, however, that through jury instructions and closing arguments the State established that the act Estrada committed, driving the robbers to the scenes of their crimes, was not the act used to prove the agreement element of conspiracy, avoiding any double jeopardy problems.[202] Similarly, in *Rexroat v. State*,[203] the defendant claimed that his convictions on two counts of child molesting violated double jeopardy because the same evidence was used to prove

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Gonzales v. State, 966 N.E.2d 648 (Ind. Ct. App. 2012), *trans. granted*. The Indiana Supreme Court may resolve this conflict on transfer.

194. 962 N.E.2d 86 (Ind. Ct. App. 2011).

195. *Id.* at 88.

196. *Id*. at 90.

197. *Id*.

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

199. *Id*.

200. 969 N.E.2d 1032 (Ind. Ct. App.), *trans. denied*, 974 N.E.2d 475 (Ind. 2012).

201. Id. at 1044.

202. *Id*. at 1044-46.

203. 966 N.E.2d 165 (Ind. Ct. App.), *trans. denied*, 969 N.E.2d 86 (Ind. 2012).

both counts.[204] Again the court of appeals disagreed, concluding that the witness against Rexroat testified to separate incidents of molestation, avoiding a double-jeopardy problem.[205] And in *Mendenhall v. State*,[206] the prosecution clarified in closing argument which evidence supported convicting the defendant of attempted murder and which different evidence supported his criminal confinement conviction, ensuring no double jeopardy problem.[207] The exception that proves the rule, however, is *Cole v. State*,[208] in which the court of appeals concluded that the State failed to sufficiently show that separate evidence supported convictions for both robbery and theft, requiring remand to vacate the theft conviction.[209] And in *Chappell v. State*,[210] the court of appeals sua sponte vacated a burglary conviction, finding that it was supported by exactly the same evidence as the same defendant's robbery conviction and, therefore, violated the "same evidence" standard for double jeopardy.[211]

IX. PUNISHMENTS AND SENTENCING

During the survey period, Indiana's appellate courts had several opportunities to apply the constitutional prohibition against cruel and unusual punishments, the constitutional requirement of proportional punishment, and their plenary power to review and revise criminal sentences.

The Indiana Supreme Court split in its review of a life-without-parole sentence of an individual who was seventeen years old at the time he murdered his ten-year-old brother.[212] In *Conley v. State*, the defendant claimed that the sentence violated the prohibition against cruel and unusual punishments in article 1, section 16, and the sentence was not appropriate in light of the circumstances of the offense and the character of the offender, seeking a sentence revision under the courts' article 7, section 4 power.[213]

The majority opinion, written by Justice David, acknowledged that the United

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204. *Id.* at 167.

205. *Id*. at 170-71.

206. 963 N.E.2d 553 (Ind. Ct. App.), *trans. denied*, 967 N.E.2d 1035 (Ind. 2012).

207. *Id.* at 571.. The court of appeals reduced another of Mendenhall's convictions from Class A felony robbery to Class C robbery because the same evidence was used to enhance the robbery conviction as was used to enhance another conviction, violating double-jeopardy principles. *Id*. at 572. Similarly, in *Boss v. State*, the court of appeals reduced a conviction for harboring a non-immunized dog as a B misdemeanor to C misdemeanor status, finding that the enhancement was based on the same bodily injury used to enhance a different crime of which the same defendant had been convicted. 964 N.E.2d 931, 937-38 (Ind. Ct. App. 2012).

208. 967 N.E.2d 1044 (Ind. Ct. App. 2012).

209. *Id.* at 1051.. The court of appeals concluded, in contrast, that the State adequately showed that different evidence supported Cole's convictions for robbery and confinement. *Id*.

210. 966 N.E.2d 124 (Ind. Ct. App.)., *trans. denied*, 969 N.E.2d 606 (Ind. 2012).

211. *Id.* at 131-32.

212. Conley v. State, 972 N.E.2d 864 (Ind. 2012).

213. *Id*. at 871.

States Supreme Court had ruled that life without parole constitutes cruel and unusual punishment for a juvenile who has committed a non-homicide crime; a mandatory life without parole sentence for a juvenile also violates the same provision.[214] The majority also noted that many states prescribe life without parole as a possible punishment for juvenile killers, and the sentence has been upheld in other jurisdictions.[215] The court acknowledged its authority to extend Indiana constitutional protections more broadly than federal protections, but declined to do so in this case; the court ruled that "life without parole is not an unconstitutional sentence under the Indiana constitution under these circumstances."[216]

To exercise its sentence revision authority, the court looked at aggravating and mitigating factors.[217] The court found that the victim's young age was an aggravating factor recognized by the statute justifying imposition of the life without parole sentence.[218] It also discussed the following mitigators: Conley's age of seventeen at the time of the crime; his lack of criminal history; his emotional disturbance at the time of the crime and past suicidal gestures (although he understood the wrongfulness of his actions); and his cooperation with authorities.[219] In weighing the sentence, the majority opinion discussed the brutal nature of the crime and Conley's mental health.[220] The opinion also noted that the life without parole sentence had been given to only three other juveniles in state history, tending to show that the penalty was reserved for the worst cases.[221] The majority concluded that the life without parole sentence "was appropriate in light of the defendant's character and the nature of this offense."[222]

Justice Rucker dissented in an opinion joined by Justice Sullivan.[223] The dissent reviewed the evidence showing that juveniles lack maturity and developed judgment, are more vulnerable to negative influences, and do not have characters that are as well formed as adults, so they are more capable of reformation.[224] The opinion also reviewed the history of limitations imposed on juvenile sentences by the U.S. Supreme Court and by other nations.[225] But the dissent did not conclude that the life without parole punishment was unconstitutional as to Conley or in general and focused instead on the court's authority to revise sentences.[226] It noted his unstable upbringing, history of suicide attempts and self-mutilation, and

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214. *Id*. at 877.
215. *Id*. at 878-79.
216. *Id*. at 879, 880.
217. *Id*. at 873-76.
218. *Id*. at 873.
219. *Id*. at 873-76.
220. *Id*. at 876.
221. *Id*. at 880.
222. *Id*. at 877.
223. *Id*. at 880-88 (Rucker, J., dissenting).
224. *Id*. at 883-84.
225. *Id*. at 881-83.
226. *Id*. at 886.

lack of prior criminal record.[227] All of the medical experts testified that Conley suffered from some mental disease at the time of the crime.[228] The dissenters would have revised Conley's sentence to sixty-five years.[229]

The Indiana Supreme Court did revise a sentence in *Hamilton v. State*,[230] decreasing a fifty-year sentence for child molesting to thirty-five years on the principle that the harshest sentences should be reserved for the "worst of the worst."[231] The court followed that precept in its review of the sentencing factors: although the defendant had a criminal history, it was remote and did not involve sexual misconduct; although the victim was young, she was not among the youngest victims; although the defendant violated a position of trust (he was the victim's step-grandfather), he was not in one of the closest positions of trust.[232] Balancing these factors, the court reduced the sentence to thirty-five years, which is above the advisory sentence of thirty years but below the maximum of fifty years.[233] Justice Dickson dissented.[234]

The supreme court also revised downward a sentence for murder in *Castillo v. State*,[235] in which the defendant and her boyfriend were both convicted of murder in relation to the death of defendant's cousin's two-year-old child, who was in their care.[236] Analyzing the record in detail, the court concluded that Castillo could have been convicted only as an accomplice because of the lack of evidence that she was directly involved in the death.[237] In light of all the circumstances, including the fifty-year plea agreement given to her boyfriend, who was likely more responsible for the crime, the court revised her sentence to sixty-five years.[238] Justice David concurred (citing different reasons for the reduction), and Justice Massa dissented.[239]

The court of appeals rejected a claim of cruel and unusual punishment in *D.A. v. State*,[240] in which the juvenile defendant complained of his placement in an inpatient sex offender treatment program.[241] The court concluded that the placement was consistent with D.A.'s rehabilitation and well within the trial

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227. *Id.* at 887.

228. *Id*. at 888.

229. *Id*.

230. 955 N.E.2d 723 (Ind. 2011).

231. *Id.* at 727-28.

232. *Id*.

233. *Id*. at 728.

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

235. 974 N.E.2d 458 (Ind. 2012).

236. *Id.* at 461-62.

237. *Id*. at 463.

238. *Id*. at 466-67.

239. *Id*. at 470-74. The Indiana Court of Appeals also used its authority to revise sentences in other cases during the survey period. *See, e.g.*, Griffin v. State, 963 N.E.2d 685 (Ind. Ct. App. 2012); Laster v. State, 956 N.E.2d 187 (Ind. Ct. App. 2011).

240. 967 N.E.2d 59 (Ind. Ct. App. 2012).

241. *Id.* at 61.

court's discretion.[242] It also rejected a minor defendant's cruel and unusual punishment claim in *Phelps v. State*,[243] reviewing a thirty-five-year sentence for attempted murder.[244] The court found no violation, noting the trial court's careful review of mitigating and aggravating factors and prior cases in which similar sentences had been approved in similar circumstances.[245]

The court of appeals also rejected an argument that a sentence was disproportional in violation of article 1, section 16 in *Murrell v. State*.[246] Murrell was convicted of trafficking cellular telephones and tobacco to an inmate, and she argued that her sentence for trafficking was more severe than the inmate could have received for possessing the contraband.[247] The court ruled that the punishment was not disproportional because the legislature could reasonably conclude that trafficking would be better deterred by the imposition of significant penalties on the trafficker as opposed to the inmate.[248]

X. ARTICLE 1, SECTION 11—SEARCH AND SEIZURE

As in all recent years, the appellate courts had multiple opportunities to apply article 1, section 11, Indiana's prohibition against unreasonable searches.[249] Indiana's standard addresses the reasonableness of law enforcement conduct, generally calling upon courts to balance three factors: (1) the likelihood that a

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242. *Id*. at 65.

243. 969 N.E.2d 1009 (Ind. Ct. App.), *trans. denied*, 971 N.E.2d 1214 (Ind. 2012).

244. *Id.* at 1020-21.

245. *Id.*

246. 960 N.E.2d 854, 859 (Ind. Ct. App. 2012).

247. *Id*.

248. *Id*.

249. The Indiana Court of Appeals found no constitutional violations as to searches in *Woodson v. State*, 966 N.E.2d 780 (Ind. Ct. App.) (occupants of automobile gave officers cause to suspect a crime justifying request to search car, which uncovered drugs), *trans. denied*, 970 N.E.2d 665 (Ind. 2012); *Harper v. State*, 963 N.E.2d 653 (Ind. Ct. App.) (search of hotel room with permission of owner did not violate Indiana Constitution), *aff'd on reh'g*, 968 N.E.2d 843 (Ind. Ct. App. 2012);; *Anderson v. State*, 961 N.E.2d 19 (Ind. Ct. App.) (Indiana Constitution did not mandate excluding DNA evidence that had been collected in error), *trans. denied*, 967 N.E.2d 1033 (Ind. 2012); *Stark v. State*, 960 N.E.2d 887 (Ind. Ct. App.) (evidence found when officer retrieved coat of individual arrested for public intoxication was admissible), *trans. denied*, 967 N.E.2d 1032 (Ind. 2012); *Carpenter v. State*, 974 N.E.2d 569 (Ind. Ct. App. 2012) (evidence found when officers were serving an arrest warrant at an erroneous address did not have to be excluded), *trans. denied*, 980 N.E.2d 322 (Ind. 2012); *Bryant v. State*, 959 N.E.2d 315 (Ind. Ct. App. 2011) (based on totality of circumstances, strip search of individual arrested for resisting law enforcement was constitutional and drugs found in search were admissible); *Pattison v. State*, 958 N.E.2d 11 (Ind. Ct. App. 2011) (evidence in affidavit supported issuance of search warrant), *trans. denied*, 963 N.E.2d 1118 (Ind. 2012); *Dora v. State*, 957 N.E.2d 1049 (Ind. Ct. App. 2011) (evidence in plain view of officers investigating report of battery was admissible), *trans. denied*, 967 N.E.2d 1033 (Ind. 2012).

crime has taken place, (2) the degree of intrusion the method of search imposes on the citizen's ordinary activities, and (3) law enforcement needs.[250]

In *State v. Renzulli*,[251] the Indiana Supreme Court addressed the validity of a search based on a telephone tip.[252] The tipster, who provided his name, stated that a blue Volkswagen that had been driving erratically had just pulled into a certain service station.[253] Police investigated and found a car fitting that description at the service station.[254] Upon questioning, the driver showed signs of intoxication, and he was ultimately charged with operating while intoxicated.[255] He challenged the investigatory stop, stating that police lacked a reasonably articulable suspicion of criminal activity.[256] The court disagreed, ruling that the tip, which was confirmed by finding a car fitting the tipster's description at the site where the tipster said it would be, was sufficient to justify investigation, and it reversed the trial court's order suppressing evidence.[257] Justice Rucker dissented, concluding that there was insufficient evidence to corroborate the tip.[258]

The court of appeals addressed a search of the contents of a cell phone in *Kirk v. State*.[259] Kirk was arrested for public intoxication and neglect of a dependent, his son who was with him at the time of his arrest.[260] Police took Kirk's cell phone and immediately looked through several past text messages, finding some evidence of drug sales.[261] Based on the text messages, police obtained a warrant and searched Kirk's residence, finding weapons and drugs.[262] The court found that the State had articulated no reason officers needed to search the content of Kirk's phone without a warrant.[263] The court rejected the State's belated contention that Kirk might be able to erase the contents of the phone remotely, after police had the phone, because the State submitted no evidence to prove that contention.[264] The court found no law enforcement need to examine the contents of the phone without a warrant and ruled that searching the phone without a warrant violated article 1, section 11.[265] As a result, the court invalidated one of Kirk's convictions, although it allowed certain other convictions to stand, finding

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250. Litchfield v. State, 824 N.E.2d 356, 361 (Ind. 2005).
251. 958 N.E.2d 1143 (Ind. 2011).
252. *Id.* at 1144-45.
253. *Id*. at 1145.
254. *Id*.
255. *Id*.
256. *Id*. at 1146.
257. *Id*. at 1147-50.
258. *Id*. at 1151 (Rucker, J., dissenting).
259. 974 N.E.2d 1059, 1064 (Ind. Ct. App.), *trans. denied*, 980 N.E.2d 323 (Ind. 2012).
260. *Id*. at 1065.
261. *Id*.
262. *Id*.
263. *Id*. at 1071.
264. *Id*.
265. *Id*.

that evidence of the text messages was harmless error as to those convictions.[266]

The court also found a search invalid in *Yanez v. State*,[267] which began with an informal conversation between an officer and Yanez at a flea market.[268] At some point, another officer approached the two and asked Yanez for permission to search him.[269] Yanez agreed, and the search discovered marijuana.[270] The court found the search invalid, and suppressed its results, because "there was absolutely no evidence of a concern or suspicion that a violation of law had occurred" justifying the search.[271] Neither officer could articulate any basis for suspicion, so the State failed to meet its burden under the Indiana Constitution to show that the search was reasonable.[272]

XI. ARTICLE 1, SECTION 23—EQUAL PRIVILEGES AND IMMUNITIES

In *Robertson v. Gene B. Glick Co.*,[273] the Indiana Court of Appeals rejected a challenge under article 1, section 23 to the lack of a tolling provision in the Indiana General Wrongful Death Act.[274] Plaintiffs claimed that they were treated differently under this act than were plaintiffs under the Child Wrongful Death Act, which has a tolling provision.[275] Under article 1, section 23, courts must determine (1) whether disparate treatment accorded by a statute is reasonably related to inherent characteristics that distinguish the differently treated classes and (2) whether the preferential treatment is uniformly applicable and equally available to all persons similarly situated.[276] The court of appeals pointed out several differences between plaintiffs under the General Wrongful Death Act and those under the Child Wrongful Death Act that justify different treatment or, in the words of the applicable standard, show that the different treatment is "reasonably related to inherent characteristics" of the two groups.[277] These differences include that a parent or guardian must be a plaintiff under the Child Wrongful Death Act, while a personal representative must bring the General Wrongful Death Act action.[278] The court concluded that the differences in the statutes do not violate article 1, section 23.[279]

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266. *Id*. at 1076-78.
267. 963 N.E.2d 530 (Ind. Ct. App. 2012).
268. *Id.* at 531-32.
269. *Id*. at 531.
270. *Id*.
271. *Id.* at 532.
272. *Id*.
273. 960 N.E.2d 179 (Ind. Ct. App. 2011).
274. *Id.* at 186.
275. *Id*. at 183, 186.
276. *Id*. at 185-86 (citing Collins v. Day, 644 N.E.2d 72 (Ind. 1994)).
277. *Id.* at 186.
278. *Id.*
279. *Id.*