INDIANA CONSTITUTIONAL DEVELOPMENTS: SMALL STEPS

JON LARAMORE*
DANIEL E. PULLIAM**

This survey period is the first in the last four years that saw no change in the composition of the Indiana Supreme Court. The development of Indiana constitutional jurisprudence continues as they work together to both address new issues under the Indiana Constitution and incrementally advance legal rules and analysis in more-developed areas. During the survey period, the justices applied justiciability doctrines to avoid ruling on a contentious dispute within the legislative branch, and they continued their line of rulings providing few if any enforceable rights under the Indiana Constitution's education article.[1] In criminal law, in contrast, the court unanimously shifted a burden of proof that had been in place for more than 150 years.[2] The court also continued incremental development of unique Indiana constitutional rules addressing search and seizure, double jeopardy, and *ex post facto* legislation.[3]

I. SEPARATION OF POWERS—ARTICLE 3

The Indiana Supreme Court declined to adjudicate most of a long-running dispute created when the Indiana House of Representatives imposed fines on members of the minority party who did not attend legislative sessions to purposely deprive the body of a quorum.[4] The House then collected the fines by deducting them from minority members' legislative salaries.[5] The focus of the case, called *Berry v. Crawford*, was not on the majority's authority to impose the fines, but rather on its ability to collect by ordering the State Auditor to withhold funds from the minority legislators' paychecks.[6] The minority argued that this approach violated the Indiana Constitution and the Wage Payment Statute, Indiana Code chapter 22-2-5.[7] The trial court ruled that it lacked authority to

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* Partner and co-leader of the appellate advocacy group at Faegre Baker Daniels, LLP, in Indianapolis. Former chief counsel to Indiana Governors Frank O'Bannon and Joe Kernan. Former instructor in Indiana constitutional law at Indiana University McKinney School of Law for five years. This is Mr. Laramore's tenth developments article on Indiana constitutional law.

** Associate in the business litigation group at Faegre Baker Daniels, LLP. B.A., 2004, Butler University, Indianapolis; J.D., 2010, *magna cum laude*, Indiana University Robert H. McKinney School of Law. Former Editor-in-Chief of the Indiana Law Review and former law clerk for John Daniel Tinder on the United States Court of Appeals for the Seventh Circuit.

1. *See infra* Parts I and II.
2. *See infra* Part III.
3. *See infra* Parts IX, XI, XIII.
4. Berry v. Crawford, 990 N.E.2d 410, 413 (Ind. 2013).
5. *Id*. The Indiana Supreme Court transferred jurisdiction from the court of appeals using Appellate Rule 56(A).
6. *Id*. at 418-21.
7. *Id*.

enforce the constitutional provisions because to do so would interfere with the internal affairs of the legislative branch, but it ruled that the directive to withhold pay violated the Wage Payment Statute.[8]

The Indiana Supreme Court majority, in a decision by the Chief Justice, agreed that the courts could not address any issues involving the right of a legislative body to compel the attendance of its members or to determine fines because doing so would "amount to the type of 'constitutionally impermissible judicial interference with the internal operations of the legislative branch' which we have rejected in the past."[9] The court repeated that Indiana respects strict separation of powers.[10] Article 4, section 10 gives the legislative branch authority to determine its own rules, and "the constitutional grant of jurisdiction to the legislature over its internal proceedings and the discipline of its members is exclusive."[11]

The court rejected the minority's argument of a violation of article 4, section 26—"[a]ny member of either House shall have the right to protest, and to have his protest, with his reasons for dissent, entered on the journal."[12] The court interpreted this provision to allow dissent, including by the tactic of quorum-breaking, but not to preclude the legislative branch from punishing that conduct.[13] It also rejected the argument based on article 4, section 29, which states that legislators "shall receive for their services" compensation in an amount fixed by law.[14] The minority members argued that this provision gives them a property right in their salaries that invokes the takings clause; the court concluded that the collection of fines "did not impinge upon legislative compensation for services, but rather were predicated on the absent legislators' *lack* of services."[15] The court concluded that neither of these sections diluted the legislature's power to make its own rules and compel its members' attendance, and it ruled that neither provision precludes the legislature from decreasing its own members' salaries while they are in office.[16]

The court also rejected the argument based on the Wage Payment Statute, reasoning that the House of Representatives had the constitutional power to compel attendance and punish members who did not attend, and the Wage Payment Statute could not limit that constitutional authority.[17] "The purported *statutory* limitation cannot serve as a means for the courts to consider challenges to legislative action to compel attendance and punish disorderly members when there exists no *constitutional* limitation on the House's express constitutional

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8. *Id*. at 413-14.
9. *Id*. at 414.
10. *Id*. at 415.
11. *Id*. at 418.
12. *Id*. at 419.
13. *Id.*
14. *Id*.
15. *Id*. (emphasis in original).
16. *Id*. at 419-20.
17. *Id*. at 420.

power to take such action."[18] The court directed the trial court to enter summary judgment in favor of the defendants on all issues in the case.[19]

Justice Rucker dissented, joined in part by Justice Rush.[20] He expressed his understanding that the Court's decision not to consider the minority's claim was prudential rather than jurisdictional and stated that the Court should rule unless barred from doing so by a specific constitutional provision.[21] In this case, he said, the justices should have examined and enforced article 4, section 29, protecting legislative pay, because the issue is justiciable and conveys an enforceable right.[22] Citing article 4, sections 1 and 29, he would have ruled that the minority's pay could not be decreased in the manner used in this case because a pay decrease must be accomplished by statute.[23] He also would have ruled that the majority's enforcement of the fines violated the Wage Payment Statute. Justice Rush joined the portions of this dissent applying article 4, sections 1 and 29, and the Wage Payment Statute, but not the portion criticizing the majority's justiciability discussion.[24]

II. RELIGION CLAUSES—ARTICLE 1, SECTIONS 4 AND 6

The Indiana Supreme Court affirmed the constitutionality of Indiana's broad school voucher program in *Meredith v. Pence*, a unanimous opinion authored by the Chief Justice.[25] This program, called the Choice Scholarship Program, offers vouchers that students who meet certain family income guidelines may use to attend private schools.[26] The vouchers could be used only at accredited private schools that administer the statewide graduation qualification test.[27] *Meredith* was a facial challenge, meaning the plaintiffs assumed the burden to show that there is no set of circumstances in which the statute could be applied constitutionally.[28]

The court rejected the argument that the program violates article 1, section 1, which requires the General Assembly to provide by law for a uniform system

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18. *Id*. (emphasis in original).

19. *Id*. at 422.

20. The voting in this case did not break down entirely on partisan lines, that is, the lines defined by the party of the governor appointing the justice. Justice Rucker is the only member of the Indiana Supreme Court appointed by a Democratic governor, and the plaintiffs in this case were Democratic minority members of the House of Representatives. His dissent was joined in part, however, by Justice Rush, appointed by a Republican governor.

21. *Id*. at 422-23.

22. *Id*. at 424.

23. *Id*. at 426-28.

24. *Id*. at 422.

25. 984 N.E.2d 1213 (Ind. 2013).

26. *Id*. at 1217.

27. *Id*. at 1219.

28. *Id*. at 1217-18.

of common schools.[29] The court previously held that this section gives the legislature broad discretion in creating a uniform common school system, and the court rejected the argument that the voucher program violated this section.[30] Plaintiffs argued that up to sixty percent of Indiana children could qualify for the program, meaning that a majority of children could receive state funds to pay for education outside the uniform system of common schools, but the court ruled that this possibility would not support a facial challenge to the law.[31] "The school voucher program does not replace the public school system, which remains in place and available to all Indiana schoolchildren in accordance with the dictates of the Education Clause."[32] The court distinguished authority invalidating voucher programs in other states because their state constitutions contained different language.[33]

The court also rejected the argument that the program violated article 1, section 4, which states that "no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent,"[34] invoking this clause because the vast majority of vouchers are used at religious schools.[35] The court ruled that this section of the constitution is directed at preventing the compelled payment of taxes to be used for religious purposes.[36] In other words, it is directed not at the expenditure of state funds (which is the subject of article 1, section 6), but at the compulsion of taxpayers.[37] The court therefore ruled that article 1, section 4, does not restrict the voucher program.[38]

Finally, the court rejected the argument about government spending, which contended that the voucher program violates article 1, section 6—"No money shall be drawn from the treasury, for the benefit of any religious or theological institution."[39] First, clarifying language in *Embry v. O'Bannon*, the court concluded that the test to be applied under this clause is not whether a religious institution substantially benefits from a public expenditure, but instead whether the expenditure directly benefits the religious institution.[40] The court found that the voucher program passes this test.[41] The purpose of the program, it held, is to benefit children and their families.[42] They are the direct beneficiaries.[43] The

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29. *Id*. at 1220.
30. *Id*. at 1221-22 (citing Bonner v. Daniels, 907 N.E.2d 516, 520 (Ind. 2009)).
31. *Id*. at 1222-23.
32. *Id*. at 1223.
33. *Id*. at 1223-24.
34. *Id.* at 1225.
35. *Id*. at 1225-26.
36. *Id*. at 1226.
37. *Id*.
38. *Id*.
39. *Id*. at 1227.
40. *Id*. at 1227-28 (citing Embry v. O'Bannon, 798 N.E.2d 157 (Ind. 2003)).
41. *Id*. at 1228-29.
42. *Id*. at 1229.
43. *Id*.

religious schools are mere indirect or ancillary beneficiaries.[44] This analysis is bolstered by the fact that the State does not choose which schools receive money through the vouchers; that decision is made by the families receiving the vouchers.[45]

The court went on to conclude that religious schools are not contained in the definition of "religious or theological institution" in article 1, section 6.[46] This analysis may be viewed as dictum. Once the court decided the case on the basis that the schools receipt of voucher funds does not violate section 6 because they are not direct beneficiaries, the additional analysis described in this paragraph is not necessary to the holding in the case. This portion of the opinion relied heavily upon history, as dictated by the principle that the Indiana Constitution is construed to effectuate the intent of the framers and ratifiers.[47] The court concluded that most children who were receiving education at the time of the 1850 constitutional convention attended religious or private schools and that "[i]t was generally accepted that the teaching of religious subject matter was an essential component of . . . general education."[48] The court concluded, "the framers did not manifest an intent to exclude religious teaching from such publicly financed schools," leading to the conclusion that section 6 does not "apply to preclude government expenditures for functions, programs, and institutions providing primary and secondary education."[49]

III. BAIL—ARTICLE 1, SECTION 17

The Indiana Supreme Court put a new gloss on the bail clause in *Fry v. State*, a murder case.[50] The clause provides that "[o]ffenses, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong."[51] In *Fry*, the supreme court changed a 150-year-old practice by switching the burden of proof to the State on bail in murder cases, requiring the State to show that "proof is evident, or the presumption strong," to preclude bail.[52]

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44. *Id*.

45. *Id*.

46. *Id*. at 1230.

47. *Id.* at 1229-30.

48. *Id*. at 1230.

49. *Id*. The First Amendment precludes some such expenditures. Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985). It does not preclude school vouchers, at least in some settings. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

50. 990 N.E.2d 429 (Ind. 2013).

51. *Id*. at 453.

52. *Id*. at 433. Although the constitutional provision refers to murder and treason, this description focuses only on murder because treason is almost always prosecuted federally. There is no reason to assume that any different burden-of-proof analysis would apply in treason cases than is discussed in *Fry* for murder.

Fry was arrested and charged with murder.[53] He sought bail, claiming that the evidence against him was circumstantial, making the presumption not strong.[54] He also sought a declaration from the trial court that the statute placing the burden on the defendant to prove bailability in murder cases was contrary to article 1, section 17.[55] The trial court required the State to present proof that proof was evident or the presumption strong, and he denied bail to Fry after hearing that evidence.[56] Fry's appeal went directly to the Indiana Supreme Court because the trial court's order denying bail found the statute, Indiana Code section 35-33-8-2(b) unconstitutional on its face.[57]

In its discussion, the supreme court described the historic importance of bail in the American system as a bulwark against unconstitutional pre-trial punishment; the court said bail allowed a defendant to participate in preparing his defense and should be used only to ensure a defendant's availability for trial.[58] The court concluded, however, that it is proper to deny bail in a category of the most serious cases—where murder is charged—if certain prerequisites are met.[59]

The court also explained that since at least 1866, Indiana courts have placed the burden on murder defendants to show that their offenses are bailable because the proof is not evident or the presumption not strong, requiring the defendant to prove that he should be admitted to bail.[60] That presumption was enacted in Indiana Code section 35-33-8-2 in 1981.[61] This allocation of the burden, the court said, arose almost entirely from case law before the statute was enacted.[62]

The court discussed the history behind this allocation of the burden, concluding that it developed from a time when most murder charges arose from grand jury indictments, on which judges often placed great weight.[63] The court also determined that, when the burden was first allocated, defendants had to seek bail in habeas corpus proceedings in which they had the burden to file the petition to seek pre-trial release and, generally, to prove that they should be released from custody on bail before trial.[64]

The court also looked at other states, finding similar language about the proof and the presumption in the state constitutions of thirty-nine other states.[65] The court determined that these states allocated the burden of proof in a variety of

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53. *Id*.
54. *Id*.
55. *Id*.
56. *Id*. at 433-34.
57. *Id*. at 434 (citing IND. APP. R. 4(A)(1)(b)).
58. *Id*.
59. *Id*. at 434-35.
60. *Id*. at 435 (citing *Ex Parte* Heffren, 27 Ind. 87, 88 (1866)).
61. *Id*.
62. *Id*.
63. *Id*. at 436.
64. *Id*. at 436-37.
65. *Id*. at 438 n.10.

ways.[66] The Indiana court drew certain themes from other states' case law on burden allocation. First, the cases highlighted the presumption of innocence and its link to bail.[67] Second, other states placed weight upon a defendant's likelihood of appearing at trial.[68]

The court's conclusion—that the burden should be on the State—was drawn from these and other factors. The court stated that the language regarding murder is an exception to the basic constitutional right to bail and, because it is an exception, the burden more properly falls on the State to show that the exception should apply.[69] The court also noted that the State is more likely to have relevant facts and evidence in its possession, especially because, by definition, the defendant has been incarcerated and has had no opportunity to assemble facts or evidence.[70] As Justice David's opinion states, if the burden is placed on the defendant, "we are in effect requiring him, while hampered by incarceration, to disprove the State's case *pre*-trial in order to earn the right to be unhampered by incarceration as he prepares to disprove the State's case *at* trial."[71] The court also noted that grand juries are used in murder cases far less often than they were in the 1860s, when this rule arose, eliminating one of the reasons the burden was placed on the defendant in the first place.[72]

After deciding that the burden must be shifted to the State, the court analyzed exactly what is meant by the "proof [being] evident" or the "presumption strong."[73] As to this portion of the analysis as well, the court determined that other states with similar constitutional language applied a variety of standards.[74] The court determined that the standard must "lie somewhere in the middle" between reasonable suspicion, which justifies arrest, and beyond a reasonable doubt, which equals conviction.[75] The court ultimately adopted this standard from Arizona: "The State's burden is met if all of the evidence, fully considered by the court, makes it plain and clear to the understanding, and satisfactory and apparent to the well-guarded, dispassionate judgment of the court that the accused committed" the charged offense.[76] After reviewing the record, the court then ruled that the trial court properly denied bail to Fry under this standard.[77]

Justice David wrote only for himself, although two other justices agreed with the decision to shift the burden of proof and three other justices agreed to affirm

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66. *Id*. at 439-40.

67. *Id*. at 440.

68. *Id*.

69. *Id*. at 441.

70. *Id*.

71. *Id*. at 442. (emphasis in original)

72. *Id*. at 442-43.

73. *Id.* at 444.

74. *Id*. at 446-48 (citing examples from New Jersey, Oregon, Rhode Island, Florida, Arizona, Texas, and Utah).

75. *Id*. at 445.

76. *Id*. at 447 (quoting Simpson v. Owens, 85 P.3d 478, 491 (Ariz. Ct. App. 2004)).

77. *Id.* at 450.

the trial court's order denying bail.[78] Concurring, the Chief Justice, joined by Justice Rush, focused on the language of the constitution, concluding that the constitutional language itself placed the burden on the State to prove the existence of a prerequisite to denying bail.[79] Justice Massa dissented from the new constitutional rule but concurred in the decision affirming the order denying bail.[80] He discussed the remarks of various delegates to the 1850 constitutional convention and cited appellate decisions issued shortly after the constitution was adopted, concluding that the framers intended the burden to be on the defendant in a murder case to prove that he satisfied a precondition for bail.[81] Justice Rucker also dissented, stating that because the trial court placed the burden on the State and the State met its burden (as agreed by the trial court and the supreme court), as a matter of stare decisis and judicial restraint this was not a proper case in which to analyze where the burden of proof should lie.[82]

IV. CONTRACT CLAUSE—ARTICLE 1, SECTION 25

The Indiana Supreme Court found a statute unconstitutional as applied in *Girl Scouts of Southern Illinois v. Vincennes Indiana Girls, Inc.* because the law unconstitutionally impaired a contract.[83] One scouting organization deeded a campground to another scouting organization on the condition that the campground revert to the grantor if the property was not used for scouting for forty-nine years.[84] When the donee decided to sell the property after forty-four years, the donor sought return of the property.[85] The donee then requested relief under an Indiana statute that limits reversionary clauses to a maximum of thirty years.[86]

The donor maintained that the statute was constitutional because the Indiana Constitution allows retroactive impairment of possibilities of reverter—which are not vested rights.[87] The court disagreed. The court found that the contract was for the continued use of the property for scouting purposes for forty-nine years with the possibility of reverter as simply one enforcement mechanism.[88] The donor's "bundle of rights" went beyond just the reverter.[89] The charitable use requirement, along with the reverter, created a valid condition subsequent. And

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78. *See id.* at 451-56 (discussing, in Justice David's separate opinion, the decision to shift the burden of proof and deny bail).

79. *Id.* at 451-52.

80. *Id.* at 452-54.

81. *Id*.

82. *Id*. at 454-56.

83. 988 N.E.2d 250 (Ind. 2013).

84. *Id.* at 252.

85. *Id.* at 253.

86. *Id.* at 252.

87. *Id*. at 253-54.

88. *Id*. at 255-256.

89. *Id.* at 256.

the Contract Clause prohibits statutory impairments of such contractual provisions.[90]

The court also considered whether the state could limit the restriction under the "general" police power. The General Assembly has authority to limit parties' prospective ability to contract, but the constitution allows impairment of existing contracts only through the more limited "necessary" police power.[91] The statute intended to secure marketable title and eliminate "naked possibilities of reverter" that rest on chance or speculation and do not touch and concern the land.[92] Because the court found that the reverter in this case touched and concerned the land and provided social utility, the law was not within the legislature's "necessary" police power and was unconstitutional as applied in this case.[93]

V. RIGHT TO BEAR ARMS—ARTICLE 1, SECTION 32

The Indiana constitutional provision guarding the right to bear arms appears near the end of article 1's Bill of Rights. The provision states that the "people shall have a right to bear arms, for the defense of themselves and the State."[94] Like other provisions in the Bill of Rights, the right to bear arms limits the State's police power. In *Price v. State*, the Indiana Supreme Court established that the State's police power may not "materially burden" the "preserves of human endeavor" embodied in the Bill of Rights.[95] The General Assembly may qualify the "cluster of essential values" provided in Indiana's Bill of Rights but it may not entirely alienate those rights.

In *Redington v. State*, the court addressed whether an Indiana statute allowing the seizure of an individual's firearms was constitutional as applied.[96] After a hearing, the trial court found that the State proved by clear and convincing evidence that Redington was dangerous as defined by the statute and ordered the police to retain Redington's fifty-one firearms.[97] The provision defines dangerousness in two general categories. A person is dangerous if she presents "an imminent risk of personal injury to the individual or to another individual."[98] Alternatively, the individual is dangerous if he presents not an imminent risk, but a general risk the same injury and either (A) has a statutorily defined mental illness that medication cannot effectively control or (B) evidence gives "rise to a reasonable belief that the individual has a propensity for violent or emotionally unstable conduct."[99]

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90. *Id.* at 257.
91. *Id.*
92. *Id.* at 257-58.
93. *Id.* at 258.
94. IND. CONST. art. 1, § 21.
95. 622 N.E.2d 954, 960 (Ind. 1993).
96. 992 N.E.2d 823 (Ind. Ct. App.), *trans. denied*, 997 N.E.2d 356 (Ind. 2013).
97. *Id*. at 828.
98. IND. CODE § 35-47-14-1(a)(1) (West 2011).
99. *Id.* § 35-47-14-1(a)(2).

Redington maintained that although the statute was facially valid, it was not a rational or valid exercise of the police power as applied to him.[100] Redington was never convicted of a crime.[101] He did not have a mental illness as defined by the law.[102] And he dutifully took his medications.[103] Rather, Redington maintained that the trial court concluded that he was dangerous based on hypothetical concerns about future potential conduct.[104] Thus, the law not only materially burdened his right to bear arms in self-defense, it eviscerated his right to bear firearms.[105]

The Indiana Court of Appeals assumed that the firearms law implicated a core value.[106] Relying on *Lacy v. State*,[107] it refused to weigh the burden placed on Redington or allow the state action's social utility to influence whether the burden was material.[108] Rather, the court of appeals looked at the impairment's magnitude—whether the impaired right no longer served its designed purpose.[109] The right to bear arms is not absolute.[110] The legislature may provide "reasonable regulations for the use of firearms" in the interest of public safety and welfare.[111] And state action does not materially burden that right if the impairment's magnitude is "slight" or the exercise of the right "threatens to inflict 'particularized harm' analogous to tortious injury on readily identifiable private interests."[112]

The court of appeals recognized that the legislature may limit the right to bear arms just as it may prescribe punishment for expression that constitutes a tort.[113] The court of appeals relied on the Indiana Supreme Court's recent analysis in *State v. Economic Freedom Fund*,[114] which addressed the constitutionality of Indiana's "Autodialer Law," to determine the materiality of Redington's impairment.[115] First, the material burden must establish a "substantial obstacle." And if a substantial obstacle exists, the court must look at whether the actions the

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100. *Redington*, 992 N.E.2d at 831.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* Redington also challenged his conviction under the Indiana Constitution's Takings Clause in article 1, section 21, which the court analyzed with the U.S. Constitution's Fifth Amendment Takings Clause. *See id.* at 835.

106. *Id.* at 833.

107. 903 N.E.2d 486, 490 (Ind. Ct. App. 2009).

108. *Redington*, 992 N.E.2d at 833.

109. *Id.*

110. *Id.*

111. *Id.* (quoting *Lacy,* 903 N.E.2d at 490-91).

112. *Id.* (quoting State v. Econ. Freedom Fund, 959 N.E.2d 794, 805 (Ind. 2011)).

113. *Id.* at 834-35.

114. 959 N.E.2d 794, 805 (Ind. 2011).

115. *Redington*, 992 N.E.2d at 833-34.

state seeks to prohibit or limit causes a "particularized harm."[116]

Within that framework, the court of appeals found that the law did not materially burden Redington's right to bear arms.[117] Redington could regain his right to carry a handgun under the statute by petitioning for the return of the firearms 180 days after the trial court's order.[118] If he did not succeed, he could petition every 180 days thereafter.[119] Upon the filing of each petition, the trial court would hold a hearing and give Redington an opportunity to prove by a preponderance of the evidence that he was no longer dangerous.[120] Redington could possess other weapons for the purpose of self-defense.[121] Even if Redington's impairment was substantial, the court of appeals found that Redington's continued ownership of firearms threatened to inflict a "particularized harm" analogous to a tortious injury on readily identifiable parties.[122] Whether that threat was real was subject to the trial court's determination that the State satisfied the clear and convincing evidence standard of proving Redington's status as a "dangerous" individual.[123] The court of appeals then found that the government presented sufficient evidence to justify confiscating Redington's firearms under the statute.

VI. PUNITIVE DAMAGES CAP—ARTICLE 3

In *State v. Doe*, the Indiana Supreme Court analyzed an attack on the State's punitive damage cap statute, which caps punitive damages at three times the amount of compensatory damages or $50,000, whichever is greater, and which requires punitive damages to be paid to the appropriate clerk of court, who forwards one-quarter of the amount to the plaintiff and three-quarters to the State of Indiana for the violent crime victims compensation fund.[124] The case in which the issue arose involved a $150,000 punitive damage judgment against a priest who committed sexual abuse.[125] The trial court found the punitive damage cap to violate constitutional separation of powers and the jury trial guarantee in the Indiana Constitution.[126]

The Indiana Supreme Court reversed unanimously.[127] It ruled that the punitive damages cap did not violate the right to jury trial because the jury is still allowed to determine the appropriate level of damages; the trial court must reduce

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116. *Id.*
117. *Id.* at 834.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 835.
124. 987 N.E.2d 1066 (Ind. 2013); *see* IND. CODE § 34-51-3-4, 34-51-3-6 (West 2011).
125. *Doe*, 987 N.E.2d at 1070.
126. *Id*.
127. *Id*. at 1073.

that level if necessary to comply with the statute.[128] The supreme court also ruled that the allocation of three-quarters of the punitive award to the State does not violate the jury trial right because it does not impinge on any fact-finding by the jury.[129] The allocation of the damage award is "not a 'finding of fact' for constitutional purposes."[130]

The court also ruled that the cap and allocation do not offend separation of powers principles.[131] The court ruled that although courts have the power to punish quasi-criminal conduct through punitive damages, the legislature has authority to set boundaries on that power.[132] The plaintiff argued that the courts have the sole right to limit damages (through remittitur), but the Indiana Supreme Court disagreed.[133] The courts have exclusive power to apply rules—including rules limiting punitive damages—in specific cases, but the legislature has authority to set those rules.[134] The court found the statute constitutional in all respects.[135]

In a related matter, *Plank v. Community Hospitals of Indiana, Inc.*, the Indiana Supreme Court was presented an opportunity to re-examine the constitutionality of statutory caps on damages for medical malpractice.[136] After receiving a verdict of $8.5 million, reduced to $1.25 million because of the caps, Plank asked for an evidentiary hearing to show that "the factual underpinnings that led this Court to find the statutory cap constitutional over thirty years ago … no longer exist today."[137] The trial court denied the request for evidentiary hearing, and the Indiana Court of Appeals reversed in a 2-1 decision.[138] The Indiana Supreme Court unanimously rejected the challenge on procedural grounds because the plaintiff gave no notice or warning before trial that he questioned the statutory caps.[139] The supreme court therefore found the claim forfeited because it was not timely raised.[140] The plaintiff argued that he could not know until the jury rendered its verdict that he would be subject to the cap, but the court countered that the plaintiff's compensatory damages were greater than the cap, as he knew before trial, so he should have raised the issue of the cap's constitutionality in advance of trial.[141]

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128. *Id*. at 1071 (citing Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 602 (Ind. 1980)).
129. *Id*.
130. *Id*.
131. *Id.* at 1072.
132. *Id*. at 1071-72.
133. *Id*.
134. *Id*. at 1072.
135. *Id*. at 1072-73.
136. 981 N.E.2d 49 (Ind. 2013).
137. *Id*. at 50, 52.
138. *Id*. at 51.
139. *Id*. at 54-55.
140. *Id*. at 55.
141. *Id*. at 54-55.

VII. RIGHT TO ONE APPEAL—ARTICLE 7, SECTION 6

In *In re the Adoption of Minor Children*, the Indiana Supreme Court ruled that an adoption had to be vacated because the court of appeals had reversed the judgment terminating the biological mother's rights.[142] The court based its unanimous decision primarily on the biological parent's constitutional right to be the parent to his or her children absent a finding of unfitness.[143] But it also focused on the right to appeal "in all cases" contained in article 7, section 6 of the Indiana Constitution, noting that "Indiana is particularly solicitous of the right to appeal."[144] The court concluded that the biological mother's "appellate right would mean little if it could be short-circuited by an adoption judgment being issued before her appeal is complete."[145] The court emphasized the importance of speedy processing of cases involving children and ruled that the trial court was required to set aside the judgment of adoption under Trial Rule 60(B)(7) once the underlying judgment terminating parental rights—a prerequisite to adoption—was reversed on appeal.[146]

VIII. JURY TRIAL—ARTICLE 1, SECTION 13

The Indiana Supreme Court addressed an aspect of the jury trial right in a death-penalty case, *Wilkes v. State*.[147] In an application for post-conviction relief, Wilkes noted that one juror refused to answer portions of two questions in the jury questionnaire, one relating to drug abuse and the other relating to counseling for drug or mental health issues.[148] Neither Wilkes nor the State timely objected to seating this juror.[149] The court noted that other answers in the questionnaire indicated that this juror had contact with substance abuse and mental illness through family members and the juror's responses revealed the juror's view that "social factors and the particular details of a crime are each relevant to determining punishment."[150] The court ruled that trial counsel was not ineffective for failing to question or object to this juror.[151] Wilkes made a separate claim that the juror's failure to fully complete the questionnaire deprived him of an impartial jury because a complete response would have supported the juror's exclusion for cause.[152] The supreme court ruled that the juror's action failed to support a showing of misconduct because, although he should have filled out the

142. *In re* Adoption of C.B.M., 992 N.E.2d 687, 691 (Ind. 2013).
143. *Id*. at 692.
144. *Id*.
145. *Id*.
146. *Id*. at 694-67.
147. 984 N.E.2d 1236 (Ind. 2013).
148. *Id*. at 1246.
149. *Id*. at 1247.
150. *Id*.
151. *Id*. at 1247-48.
152. *Id*. at 1249.

questionnaire, his failure to do so was not gross misconduct.[153] Also, Wilkes could not show that he was harmed by the juror's action because the juror was not untruthful and his answers showed that the juror had exposure to the issues that Wilkes was concerned about and did not indicate the juror lacked impartiality.[154]

The court of appeals reversed another conviction based on a jury issue in *Sowers v. State*, in which a criminal defendant raised a defense of mental disease or defect.[155] After the jury was charged and it was apparent deliberations would extend after 5 p.m., "the foreperson asked the bailiff if they were to stay and deliberate until they reached 100 percent agreement with the counts."[156] The bailiff responded, "yes as the Judge stated in there you have to be 100 percent in agreement."[157] "The jury found Sowers not responsible by reason of insanity" on one count and guilty but mentally ill on two others.[158] Upon polling the jury, one said, "I have a conscience about it but yes" when asked if the verdict was her true verdict.[159] After the verdict, one juror learned that it would have been possible for a jury not to agree, and she expressed unhappiness at having been told by the bailiff that the jury was required to reach a verdict.[160] Sowers did not request a mistrial at the time, but the court of appeals nonetheless reversed because the bailiff's conduct was fundamental error.[161] He should not have communicated with a juror outside the defendant's presence, especially when the communication was that the jury must reach a verdict.[162] The court of appeals presumed prejudice from the nature of the communication and reversed.[163] Judge Bradford dissented, disagreeing that the bailiff's communication necessarily had to be understood to require the jury to reach a verdict.[164]

The court of appeals also addressed jury trial rights in *Gates v. City of Indianapolis*, in which the defendant was charged with violating animal control ordinance, which are infractions.[165] Gates sought a jury trial, and the trial court denied the request.[166] The court of appeals reviewed the constitutional requirement that a jury be available on issues of fact in all causes of action where a jury was available before June 18, 1852 and in cases predominantly at law rather than equity.[167] The ordinances at issue in this case did not exist before

153. *Id*. at 1250.
154. *Id*.
155. 988 N.E.2d 360, 364 (Ind. Ct. App.), *on reh'g*, 996 N.E.2d 1280 (Ind. Ct. App. 2013).
156. *Id*. at 365.
157. *Id.*
158. *Id*.
159. *Id*.
160. *Id*. at 365-66.
161. *Id*. at 368.
162. *Id*.
163. *Id*. at 369-70.
164. *Id*. at 371-72.
165. 991 N.E.2d 592 (Ind. Ct. App.), *trans. denied*, 996 N.E.2d 1278 (Ind. 2013).
166. *Id*. at 592-93.
167. *Id*. at 593-94.

1852, so the question is whether the claim against Gates was legal or equitable.[168] The court found the claims "quasi-criminal [in nature] because they are enforced by the Indianapolis Department of Public Safety, complaints are initiated and litigated by a prosecuting attorney . . . and violators are fined by the government."[169] The "mandatory fines . . . are akin to claims for money damages, which were 'exclusively legal actions in 1852.'"[170] As a result, a jury trial should have been available to Gates, and the court of appeals reversed his conviction.[171] The holding occurred despite the City's statement that it will in the future include equitable claims (requests for injunctions) in all similar cases, so they may no longer be predominantly legal.[172]

IX. SEARCH AND SEIZURE—ARTICLE 1, SECTION 11

The degree to which the government may intrude on the lives of individuals has drawn increased scrutiny. Everyday human activity is subject to increasing systematic electronic chronicling, and government agencies expand their ability to maintain vast databases of information. This new world of persistent information gathering and storage raises new circumstances in which courts must apply constitutional principles governing searches and seizures by government officials. The courts' decisions on these issues help shape the manner in which the government interacts with its citizens.

Article 1, section 11 of the Indiana Constitution contains language substantively identical to that found in the Fourth Amendment of the U.S. Constitution.[173] Yet Indiana courts use a separate analytical framework for determining how article 1, section 11 applies to government actions.[174] Using this separate analysis, Indiana courts have at times found protections of individual liberty in article 1, section 11 greater than those found in the Fourth Amendment.[175] This survey period was no exception.

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168. *Id*. at 594.

169. *Id*. at 595.

170. *Id*.

171. *Id*. at 595-96.

172. *Id*. at 595.

173. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); IND. CONST. art. 1, § 11 ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.").

174. *See* Litchfield v. State, 824 N.E.2d 356, 361 (Ind. 2005))

175. S*ee, e.g.*, Pirtle v. State, 323 N.E.2d 634 (Ind. 1975) (holding that state constitution requires police to inform an individual in custody that the individual has a right to consult with counsel before consenting to a search).

In *Maryland v. King*, the U.S. Supreme Court held that a brief swab of the cheek for DNA identification purposes does not offend the expectation of privacy of a validly arrested individual.[176] This result stemmed from the Court's analysis of whether the "search" of the individual by means of a buccal swab was "reasonable in its scope and manner of execution."[177] Yet just two months earlier, the Indiana Court of Appeals held in *Guilmette v. State*[178] that the DNA testing of what appeared to be blood spots on a suspect's shoe violated the protections provided in article 1, section 11.[179] Thus, while the Fourth Amendment reasonableness analysis allows government officials to subject suspected individuals to routine DNA collection, Indiana's constitution, as currently interpreted, requires the government provide a relevant and meaningful justification before collecting and analyzing a suspect's DNA.[180]

The result in *Guilmette* stemmed from the totality of circumstances test established in *Litchfield v. State*.[181] *Litchfield* turned on balancing three factors: (1) the law enforcement officer's degree of concern, suspicion, or knowledge of a crime; (2) the intrusiveness of the method used by the law enforcement officer; and (3) the extent of the law enforcement need.[182] The police had taken Guilmette's shoes incident to his arrest for theft, a permissible jail booking procedure.[183] At that particular time, the police knew that Guilmette was with the victim the night he was brutally murdered, maintained a degree of animosity toward the victim, and had lied about taking the victim's keys, money, and car.[184] The police thus had a "high degree" of suspicion that Guilmette participated in the murder. And the intrusion was slight—the police had already removed his shoes incident to the arrest.[185]

Despite the two factors weighing in the government's favor, the court found that the lack of an exigent police need tipped the scales in Guilmette's favor.[186] The police arrested Guilmette for theft, not murder. Once Guilmette was in police custody, the evidence's contamination or destruction was unlikely.[187] Using the opportunity presented by taking an inmate's clothing for inventory and

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176. 133 S. Ct. 1958, 1980 (2013).

177. *Id.* at 1970.

178. 986 N.E.2d 335 (Ind. Ct. App.), *trans. granted*, 996 N.E.2d 327 (Ind. 2013).

179. *Id.* at 341.

180. The court in *Guilmette* did not address the suggestion from the Indiana Supreme Court in 2011 that a warrant is unnecessary for police to obtain a cheek swab to test DNA. *See* Jon Laramore, *Indiana Constitutional Developments: Debtors, Placements, and the Castle Doctrine*, 45 IND. L. REV. 1043, 1057-58 (2012) (discussing Garcia-Torres v. State, 949 N.E.2d 1229 (Ind. 2011)).

181. 824 N.E.2d 356, 359 (Ind. 2005).

182. *Id.* at 361.

183. *Guilmette*, 986 N.E.2d 335, 338 (Ind. Ct. App. 2013).

184. *Id.* at 341.

185. *Id.*

186. *Id.*

187. *Id.*

safekeeping during his incarceration to "investigate and test the clothing regarding an unrelated and uncharged crime triggers the constitutional protection of needing to obtain a warrant to do so."[188] The Court went on to find that the DNA evidence was not the State's strongest evidence and thus admitting it was harmless error.[189]

In another highly publicized area of search and seizure law, the Indiana Court of Appeals addressed warrantless searches of a cell phone's contents in *Kirk v. State*.[190] The amount of information law enforcement can gather by searching an individual's cell phones continues to grow with increasingly prevalent use of "smart phones"[191] often storing bank account data, health records, and GPS tracking data.[192]

The Indiana Court of Appeals held in *Kirk* that under the Indiana Constitution police cannot routinely search the contents of an arrestee's cell phone.[193] The court skipped analyzing the question under the Fourth Amendment based on the U.S. Supreme Court's caution in *City of Ontario v. Quon*[194] to avoid elaborating on Fourth Amendment implications of emerging technology before its role in society becomes clear.[195] Instead, the court found the search unreasonable under the *Litchfield* factors.[196]

The officers found marijuana, a pipe, and a cell phone in a search incident to Kirk's arrest.[197] The officer immediately opened the cell phone's inbox and looked at six to eight text messages.[198] Although the officer could unquestionably

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188. *Id.*

189. *Id.*

190. 974 N.E.2d 1059 (Ind. Ct. App.), *trans. denied*, 980 N.E.2d 323 (Ind. 2012). Kirk was addressed briefly in the 2012 survey issue. *See* Jon Laramore, *Indiana Constitutional Developments: Changes on the Court*, 46 IND. L. REV. 1010, 1031-32 (2012).

191. *Smartphone Users Worldwide Will Total 1.75 Billion in 2014*, E-MARKETER (Jan. 16, 2014), http://www.emarketer.com/Article/Smartphone-Users-Worldwide-Will-Total-175-Billion-2014/1010536, *archived at* http://perma.cc/3LVQ-8VGW.

192. *See, e.g.*, Jacob Fenston, *Smart Phone Banking On The Rise, But Is It Safe?,* NAT'L PUB. RADIO (Jan. 4, 2011), http://www.npr.org/2011/01/04/132657646/Smart-Phone-Banking-On-The-Rise-But-Is-It-Safe, *archived at* http://perma.cc/M444-BWGB; Michael B. Farrell, *Good Health & Fitness Apps for Your Smartphone*, BOS. GLOBE (Nov. 17, 2013), https://www.bostonglobe.com/business/2013/11/17/apps-for-living-longer-living-better/iKC85ggLGkwlXWnuXU0K0J/story.html, *archived at* http://perma.cc/RBQ2-XULA; Stephen Lawson, *Ten Ways Your Smartphone Knows Where You Ar*e, PCWORLD (Apr. 6, 2012), http://www.pcworld.com/article/253354/ten_ways_your_smartphone_knows_where_you_are.html, *archived at* http://perma.cc/3ESA-VMXQ.

193. *Kirk*, 974 N.E.2d at 1071.

194. 560 U.S. 746 (2010).

195. *Kirk*, 974 N.E.2d at 1070.

196. *Id.* The U.S. Supreme Court decided this question in substantially the same manner several months later. Riley v. California, 134 S. Ct. 2473 (2014).

197. *Kirk*, 974 N.E.2d at 1070-71.

198. *Id.* at 1070.

confiscate the cell phone, there was no real police need to open the cell phone and read the text messages.[199] The court rejected a justification for the search on the basis that the intrusion was minimal and police needs were significant.[200] There was no reasonable concern that the phone's contents could be remotely erased, and even if these were such a risk, the officer could have used less intrusive means to manage it by removing the SIM card or turning the cell phone off.[201] The court also questioned the State's claim that the phone's contents were important because neither party accessed the device again for three months.[202] The court found the text message evidence was harmless as to three of Kirk's convictions but not harmless as to his conviction for conspiracy to commit dealing in a controlled substance, so it reversed the conspiracy conviction.[203]

The justification police officers use to stop motorists affects anyone who drives an automobile. Generally, observing a violation of the laws governing the operation of motor vehicles on the public streets is sufficient to justify a stop.[204] But there are wrinkles to this general rule.

In *Johnson v. State*, the court of appeals found a traffic stop justified even though the basis of the stop was an officer's incorrect belief that a minivan's rear window tint was darker than allowed by Indiana law.[205] The decision turned on the provisions in the Indiana's Window Tint Statute.[206] That law prohibits a person from driving a motor vehicle with windows tinted to a degree that the vehicle's occupants cannot be "easily identified or recognized" from the outside.[207] The statute hedges this subjective standard by allowing a defense if it turns out that the tint's actual solar reflectance is no more than twenty-five percent and the light transmittance is at least thirty percent.[208] The State did not contest Johnson's assertion that the windows on his Dodge minivan were factory standard, and the court assumed the manufacturer did not mass-produce minivans with illegally dark windows, so there was no statutory violation.[209]

Yet under article 1, section 11, the court found that the police officer's conduct was reasonable under *Litchfield*'s totality of the circumstances test.[210] The officer's degree of suspicion, concern, or knowledge that Johnson was committing a traffic violation was "not overwhelming."[211] Compared to running

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199. *Id.* at 1071.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 1071-72.

204. 992 N.E.2d 955, 957-58 (Ind. Ct. App.), *trans. denied*, 999 N.E.2d 417 (Ind. 2013) (citing Sanders v. State, 989 N.E.2d 332, 335 (Ind. 2013)).

205. *Id.*

206. IND. CODE § 9-19-19-4 (2013).

207. *Id.*

208. *Id.*

209. *Johnson*, 922 N.E.2d at 958 n.4.

210. *Id.* at 959 (quoting Litchfield v. State, 824 N.E.2d 356, 361 (Ind. 2005)).

211. *Id.*

a red light, turning without signaling, or speeding, the court recognized "there is much subjectivity that goes into deciding whether a window of a moving car is too dark."[212] And the State's interest in enforcing the statute "is not an overwhelmingly pressing public safety concern," especially compared to the "inherently dangerous" acts of running red lights, failing to signal, and speeding.[213] Yet the officer still had some degree of suspicion, the State's interests were legitimate, and the intrusion on Johnson was not excessively high.[214] And that was sufficient to justify the stop.[215]

By contrast, the court of appeals strictly construed Indiana's vehicle tail lamp law in *Kroft v. State*.[216] Indiana law requires a vehicle to have two taillights that must emit a red light plainly visible from a distance of at least 500 feet.[217] The State Trooper stopped Kroft because of a crack in the tail light's plastic covering causing the emission of "a white light," although apparently just a tiny bit of white light.[218]

Although a good faith belief that a driver committed a traffic violation will justify a stop, the court emphasized that a mistaken belief about what constitutes a violation will not amount to good faith.[219] And the Trooper's understanding of the tail light requirements of Indiana law was mistaken.[220] The statute did not require the visibility of "only" red light.[221] Rather, the tail lamp merely had to emit "a red light."[222] The court rejected the argument that the hole placed Kroft's vehicle in an unsafe condition, concluding that a motorist approaching Kroft's car would have no difficulty discerning the light's color, which was mostly red.[223]

The results reached in *Kroft* and *Johnson* rested on the nature of the statutory provision.[224] In *Johnson*, the court recognized that the law allowed for subjective determinations that could be wrong.[225] By contrast, an officer's belief that a tiny bead of white light emitting from tail lamp constitutes illegal operation of a vehicle was simply incorrect.[226] This incorrect interpretation of the statute could

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212. *Id.*

213. *Id.*

214. *Id.*

215. Similarly, a month earlier in *Herron v. State*, 991 N.E.2d 165, 171 (Ind. Ct. App.), *trans. denied* 995 N.E.2d 620 (Ind. 2013), the court found that the officers could stop a car based on their belief that the window tint was illegal.

216. 992 N.E.2d 818 (Ind. Ct. App. 2013).

217. IND. CODE § 9-19-6-4(a) (2013).

218. *Kroft*, 992 N.E.2d at 820.

219. *Id.* at 821.

220. *Id.*

221. IND. CODE § 9-19-6-4(a) (2013).

222. *Kroft*, 992 N.E.2d at 821.

223. *Id.* at 822.

224. *Id.*; *see also* Johnson v. State, 992 N.E.2d 955 (Ind. Ct. App.), *trans. denied*, 999 N.E.2d 417 (Ind. 2013).

225. *Johnson*, 992 N.E.2d at 960.

226. *Kroft*, 992 N.E.2d at 821.

never be reasonable whereas an incorrect belief as to window tint could be reasonable under article 1, section 11.[227]

X. RIGHT TO COUNSEL—ARTICLE 1, SECTION 13

The right to counsel may be relinquished only by knowing, voluntary, and intelligent waiver.[228] The Indiana Supreme Court enforced this principle in *Hawkins v. State* by reversing a conviction of a defendant tried in absentia and without counsel.[229] The defendant lived out of state.[230] He participated by telephone in certain pretrial proceedings.[231] But he did not participate in the final pretrial proceeding where his counsel's motion to withdraw was granted—just before trial.[232] As Hawkins' trial began, he was on a bus heading to Indiana.[233] He informed the deputy prosecutor, who informed the court, of his whereabouts.[234] Upon arriving at the courthouse later that same day, Hawkins was told that he had been convicted in absentia.[235]

The court found that Hawkins had not been properly advised of his right to an attorney.[236] The court noted that Hawkins claimed he was never told that his public defender was allowed to withdraw and he had not been informed of his right to counsel.[237] Thus, the mere failure to appear could not function as a waiver of his right to counsel.[238] The court emphasized that Hawkins could have done more, such as contacting the court to find out if he was still represented.[239] But Hawkins did not demonstrate conduct consistent with efforts manipulate the system for his personal gain.[240]

XI. DOUBLE JEOPARDY—ARTICLE 1, SECTION 14

Indiana's test for double jeopardy under article 1, section 14 goes beyond the federal "same elements" test.[241] In addition to the federal test, the government may not use the "same evidence" to convict a defendant of more than one offense.[242] This additional test—also dubbed the "actual evidence" test—asks

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227. *See Johnson*, 992 N.E.2d at 960; *Kroft*, 992 N.E.2d at 821.
228. Jones v. State, 783 N.E.2d 1132, 1138 (Ind. 2003).
229. 982 N.E.2d 997 (Ind. 2013).
230. *Id.* at 998.
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.* at 1002.
237. *Id.* at 1001.
238. *Id.* at 1002.
239. *Id.* at 1001.
240. *Id.*
241. Richardson v. State, 717 N.E.2d 32 (Ind. 1999).
242. *Id.* at 52.

whether the government proved each offense by at least one item of evidence not used to prove any of the other offenses.[243] This test originated in the fifteen-year-old *Richardson v. State* case authored by then-Justice Dickson.[244]

Garrett v. State addressed whether the "actual evidence" test applies after a jury acquits on one charge and the State retries the defendant on a related charge on which the jury did not reach a verdict.[245] The Double Jeopardy Clause assures that the State will not be able to repeatedly attempt to convict an accused of the same offense.[246] The notion of "risk" is at the core of the "jeopardy" to which a defendant may not face twice.[247] The constitutional provision protects against the risk of a trial and conviction, not of punishment.[248] Thus, double jeopardy occurs where a defendant shows that he might have been acquitted or convicted in the first trial of the charge for which he was convicted at the second trial.[249] Therefore, the court held that there is no reason the *Richardson* actual evidence test would not apply when there are, on the same facts, multiple verdicts as opposed to multiple convictions.[250]

In *Garrett*, the State charged two identical counts of rape.[251] And at trial, the prosecutor presented two separate sequential rape incidents.[252] Neither the information, the evidence, nor the argument at trial specifically linked either count with a particular incident.[253] The first jury acquitted Garrett on Count I but could not reach a verdict on Count II.[254] The State then retried and convicted Garrett on Count II in a bench trial.[255] Garrett maintained that it was impossible to know whether the first jury's decision on Count I acquitted Garrett of the first or second rape. The Indiana Supreme Court, in opinion by Justice Rucker, agreed with the State that it was reasonable to infer that Count I was the first-in-time alleged offense and that Count II was the second.[256] Both counts were felonies, one occurred before the other, the parties' attorneys understood this, the victim's testimony was presented in this order, and the deputy prosecutor referred to the alleged rapes in that order.[257]

But the court went on to find that essentially the same evidence was presented

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243. *Id.* at 52-3.
244. *Id.*
245. 992 N.E.2d 710 (Ind. 2013).
246. *Id.* at 721.
247. *Id.*
248. *Id.*
249. *Id.* (citing Brinkman v. State, 57 Ind. 76, 79 (1877)).
250. *Id.*
251. *Id.* at 721-22.
252. *Id.* at 722.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id*.
257. *Id.*

at both trials.[258] In fact, the evidence of the second rape was more extensive at the first trial than at retrial.[259] Thus, under the actual evidence test, the court held that there was a reasonable possibility that the evidentiary facts used by the fact finder to establish the elements of the one offense may have been used to establish the essential elements of the second offense.[260] The court noted that its holding modified the *Richardson* test, but only "slightly."[261]

Justice Massa argued in a separate opinion that the trial court should be trusted to "separate wheat from chaff" despite "being exposed to inadmissible evidence that would irreparably taint a lay jury."[262] Justice Rucker responded that the *Richardson* violation does not require an actual mistake to trigger double jeopardy concerns—just a "reasonable possibility" of a mistake.[263]

In *Jones v. State*, the court of appeals vacated two misdemeanor battery convictions because there was a reasonable possibility they were proved with the same evidence as a third conviction for felony domestic battery, thereby violating double jeopardy principles.[264] The court found that the "actual evidence" test required the convictions' invalidation because the evidence presented supported only a single domestic battery offense.[265]

The State claimed that the difference in proof of the three charges was whether the battery occurred in front of the children in the bedroom or outside the children's presence in the living room.[266] But under the law announced in *True v. State*,[267] it did not matter whether the children saw the battery.[268] What mattered was whether there was a possibility that the children might see or hear it.[269] Because the children could have perceived any of the three offenses, this argument did not differentiate the three counts from one another and did not save the two misdemeanor convictions from invalidity under the "same evidence" test.[270]

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258. *Id.* at 723.

259. *Id.* at 722.

260. *Id.* at 723.

261. *Id.*

262. *Id.* at 725 (Massa, J. concurring in result).

263. *Id.* at 723 n.3 (Rucker, J., for the court).

264. 976 N.E.2d 1271 (Ind. Ct. App. 2012), *trans. denied*, 983 (N.E.2d 1157 (Ind. 2013).

265. *Id.* at 1278.

266. *Id.* at 1276.

267. 954 N.E.2d 1105, 1110-11 (Ind. Ct. App. 2011).

268. *Jones*, 976 N.E.2d at 1277 (citing *True*, 954 N.E.2d at 1110-11.).

269. *Id.*

270. *Id.* The court also addressed whether Jones' criminal confinement conviction violated the same actual evidence test. Jones maintained that the evidence established the essential evidence of felony domestic battery and strangulation but without a degree of confinement greater than required to commit just those crimes. The court disagreed. In addition to evidence of choking, slapping, and biting, there was evidence that Jones pushed the victim onto a couch, sat on her, told her not to get up or leave, and kept her in the home until he left the next morning.

In *Brewington v. State*,[271] the court of appeals held that there was a reasonable possibility that the jury used the same facts to establish both intimidation and attempted obstruction of justice. The indictment alleged that Brewington committed intimidation and attempted obstruction of justice by threatening the same individual starting on August 1, 2007.[272] By incorporating this language into the jury instructions, the trial court allowed the jury to consider the same harassing conduct in support of both convictions. The court also found that the evidence supporting the intimidation conviction also supported obstruction of justice. The State presented the same faxed letters and Internet postings—all of which were threatening—to support both charges. In closing arguments, the prosecutor asked the jury to consider essentially the same acts for both charges.[273]

In *Kovats v. State*, the court of appeals found that a defendant's conviction for both Class B felony neglect of a dependent resulting in serious bodily injury, Class D felony OWI causing serious bodily injury, and Class D felony criminal reckless for inflicting serious bodily injury were all based on the same serious bodily injury.[274] Thus, the court reversed the conviction for criminal recklessness but reduced Kovats's conviction for Class D felony OWI causing serious bodily injury to a Class A misdemeanor OWI because the element of serious bodily injury simply enhanced the underlying OWI conviction to a felony.[275]

XII. RIGHT AGAINST SELF-INCRIMINATION—ARTICLE 1, SECTION 14

The Indiana Court of Appeals addressed whether Indiana's self-incrimination provision, in article 1, section 14, provides protection broader than the Fifth Amendment in *Wilson v. State*.[276] Wilson was charged based on her alleged membership in a burglary and theft ring, and after pleading guilty, she was given use immunity and asked to testify against another alleged member of the ring.[277] She claimed that the Indiana Constitution entitled her to transactional immunity, a right broader than that conveyed by the Fifth Amendment.[278]

The United States Supreme Court has ruled that the Fourteenth Amendment requires that a target witness must receive both use immunity and derivative use immunity when the witness's testimony is compelled, but that the federal

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271. 981 N.E.2d 585 (Ind. Ct. App. 2013).

272. *Id.* at 954.

273. *Id.* at 595.

274. 982 N.E.2d 409 (Ind. Ct. App. 2013).

275. *Id.* at 414.

276. 988 N.E.2d 1211 (Ind. Ct. App. 2013).

277. *Id.* at 1214.

278. *Id.* at 1216. Use immunity prohibits use at a subsequent criminal prosecution of testimony compelled of the witness (other than perjury for false testimony). Derivative use immunity prohibits admission against a witness in a subsequent criminal prosecution of evidence obtained as a result of the witness's compelled testimony. Transactional immunity prohibits the State from criminally prosecuting the witness for any transaction concerning that to which the witness testifies. *Id.* at 1219.

constitution does not require transactional immunity.[279] The court of appeals concluded that the trial court gave Wilson both use and derivative use immunity before finding her in contempt for declining to testify.[280] The court of appeals looked to *In re Caito*, a 1984 Indiana Supreme Court case, for guidance on the application of the Indiana Constitution to these immunity issues.[281] The court of appeals noted that the Indiana Supreme Court referred to "constitutions" in the plural when ruling that compelled testimony need be accompanied by only use and derivative use immunity to adequately protect witnesses, concluding "[b]ased upon *Caito* . . . we cannot say that the Indiana Constitution requires transactional immunity or that the trial court's finding of contempt was an abuse of discretion."[282]

XIII. EX POST FACTO—ARTICLE 1, SECTION 24

As in the past several years, Indiana's appellate courts have reviewed cases applying the ex post facto clause of the Indiana Constitution, mostly in the context of the sex offender registry, which gives rise to claims involving the retrospective application of statutory amendments.[283] In *Gonzalez v. State*, an offender's ten-year registration period was extended to lifetime registration by an amendment enacted after he was convicted.[284] The Indiana Supreme Court ruled unanimously that the amendment was unconstitutional as applied to Gonzalez.[285]

As in past cases, a key factor in determining unconstitutionality was that the statute provided Gonzalez no mechanism for a court to review of his future dangerousness or complete rehabilitation.[286] The supreme court, per its precedent, applied a seven-factor test to determine whether the effects of the amendment are so punitive in nature as to constitute a criminal penalty that would violate the ex post facto clause if imposed retroactively.[287] The court found that three factors weighed in favor of finding the amendment punitive and three weighed on the side of finding it non-punitive, making the decisive factor whether the statute appears excessive in relation to the alternative purposes assigned.[288] The court reasoned that when a sex offender has no method to show that he is rehabilitated, the effects of lifetime registration are excessive in relation to protecting the public from repeat sex offenders, which is the alternative purpose assigned by the State

279. *Id.* at 1220 (citing Kastigar v. United States, 406 U.S. 441, 453 (1972)).

280. *Id.* at 1221.

281. *Id.* (citing *In re* Caito, 459 N.E.2d 1179, 1181-84 (Ind. 1984)).

282. *Id.*

283. *See*, *e.g.*, Hevner v. State, 919 N.E.2d 109 (Ind. 2010); State v. Pollard, 908 N.E.2d 1145 (Ind. 2009); Jensen v. State, 905 N.E.2d 384 (Ind. 2009); Wallace v. State, 905 N.E.2d 371 (Ind. 2009).

284. 980 N.E.2d 312, 315 (Ind. 2013).

285. *Id*. at 315.

286. *Id*. at 320.

287. *Id*. at 317 (citing *Wallace*, 905 N.E.2d at 379).

288. *Id*. at 317-20.

in its argument.[289] Because the lifetime registration requirement was excessive for this registrant given his inability to show that he is no longer dangerous, the court ordered him to be exempted from the lifetime registration requirement.[290]

The Indiana Court of Appeals also addressed several cases raising ex post facto issues in connection with the sex offender registry. In *Andrews v. State*, the petitioner was convicted in another state and petitioned that his name be removed from Indiana's sex offender registry.[291] Based on a law enacted long after his offense, he was required to register for life because of a thirty-year-old conviction, despite having become a business owner with no record of subsequent offenses.[292] Applying *Wallace v. State*,[293] the court ruled that requiring Andrews to register violated the ex post facto clause.[294] The State conceded that Andrews would not have to register if he had been convicted in Indiana and argued that because Andrews was convicted elsewhere, the protections of the Indiana Constitution did not apply to him.[295] The court rejected this position as well as an argument that Andrews was required to register by federal law.[296] The same Indiana Court of Appeals panel reached the same result in *Hough v. State*, another case involving an out-of-state conviction and similar circumstances.[297] The court of appeals addressed another out-of-state conviction in *Burton v. State*, in which the defendant was required to register in the state of his conviction.[298] Had he been convicted in Indiana, however, *Wallace* would have dictated that registration was unconstitutionally *ex post facto*.[299] The court ruled that the defendant was protected by the provisions of Indiana's constitution and therefore did not have to register.[300]

XIV. BANKRUPTCY EXEMPTIONS—ARTICLE 1, SECTION 22

In a civil forfeiture matter, *Sargent v. State*, the Indiana Court of Appeals examined whether the debtor protections mandated by article 1, section 22 of the Indiana Constitution precluded the forfeiture of the automobile at issue in this case.[301] The forfeiture arose because Sargent stole some electronic equipment from a store and drove away in the vehicle, which was then subjected to

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289. *Id*. at 321.

290. *Id*. The Indiana Court of Appeals followed *Gonzalez* in a factually similar case, *Healey v. State*, 986 N.E.2d 825 (Ind. Ct. App. 2013).

291. 978 N.E.2d 494 (Ind. Ct. App. 2012), *trans. denied*, 985 N.E.2d 339 (Ind. 2013).

292. *Id.* at 495.

293. 905 N.E.2d 371 (Ind. 2009).

294. *Andrews*, 978 N.E.2d at 497-98.

295. *Id.* at 498.

296. *Id.* at 498-503.

297. 978 N.E.2d 505 (Ind. Ct. App. 2012), *trans. denied*, 985 N.E.2d 339 (Ind. 2013).

298. 977 N.E.2d 1004, 1006 (Ind. Ct. App. 2012), *trans denied*, 985 N.E.2d 339 (Ind. 2013).

299. *Id.* at 1008-09.

300. *Id.* at 1009.

301. 985 N.E.2d 1108 (Ind. Ct. App.), *trans. granted*, 999 N.E.2d 417 (Ind. 2013).

forfeiture.[302] After concluding that there was a sufficient nexus between the vehicle and the crime, the court addressed Sargent's argument that the vehicle should be exempt from forfeiture because she was impoverished and fell within the exemptions enacted under the constitutional provision requiring statutes to exempt "a reasonable amount of property from seizure or sale, for the payment of any debt or liability . . . ."[303] The relevant statute exempts from creditors' reach personal property up to $8000 in value, and Sargent's vehicle was worth less than that amount.[304] The court rejected applying the exemption in this case, however, ruling that they do not apply to forfeitures.[305] The constitutional provision is designed to protect "debtors," a term that does not apply to Sargent in this case, and "expanding the reach of those exemptions . . . would be contrary to the clear intent of our legislature."[306]

XV. OPEN COURTS—ARTICLE 1, SECTION 12

The Indiana Court of Appeals held in *Jenkins v. South Bend Community School Corporation*,[307] that interpreting a clause in a collective bargaining agreement in a manner that would make advisory arbitration the exclusive remedy for resolving controversies violated the provision of article 1, section 12 providing for open courts.[308] The school's contract with bus drivers included a nonbinding arbitration provision that the contract deemed the "exclusive remedy" for disputes.[309]

Jenkins's dispute was arbitrated in her favor, but the school refused to comply, treating the ruling as merely advisory, and Jenkins sued complaining that the school corporation fired her without just cause.[310] The court held that because article 1, section 12 promises a "remedy by due course of law" for any "injury," the arbitration provision must be read as an exhaustion-of-administrative-remedies provision and not a bar to the civil court system.[311]

In *Medley v. Lemmon*, a prisoner in the custody of the Indiana Department of Correction sought judicial relief for a sanction imposed outside the prison disciplinary system, relying on the "open courts" language in article 1, section 12.[312] After Medley was convicted in an administrative process of certain rule

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302. *Id*. at 1113.

303. *Id*. at 1113-14 (citing IND. CONST. art. 1, § 22).

304. *Id*. at 1114 (citing IND. CODE § 34-55-10-2).

305. *Id*.

306. *Id*. at 1115.

307. 982 N.E.2d 343 (Ind. Ct. App.), *trans. denied*, 992 N.E.2d 208 (Ind. 2013).

308. *Id.* at 348 (representing appellee in this matter was the Indiana law firm Faegre Baker Daniels LLP).

309. *Id.* at 345.

310. *Id.*

311. *Id.* at 348.

312. 994 N.E.2d 1177 (Ind. Ct. App.), *trans. denied*, 999 N.E.2d 418 (Ind. 2013).

violations, the facility where she was housed restricted her visitation privileges.[313] These restrictions were explicitly independent of the sanctions she received for the rule violation.[314] She filed an action in court against prison officials, making claims under federal civil rights laws and for violations of the state and federal constitutions, alleging primarily that the restrictions were in retaliation for grievances she filed.[315] She also alleged that the prison officials' actions violated state statutes.[316] The court of appeals ruled that it lacked jurisdiction to address any alleged statutory violations, reiterating the case law holding that there is no judicial review of prison disciplinary decisions or of alleged statutory violations relating to discipline or conditions of custody.[317] It also reiterated the Indiana Supreme Court's ruling that the open courts provision of the Indiana Constitution does not allow judicial review of prison officials' actions relating to prisoners' disputes over custody or confinement.[318] The court affirmed dismissal of all Medley's state claims, but reversed as to certain federal claims alleging retaliation.[319]

XVI. FREE SPEECH—ARTICLE 1, SECTION 9

In *Harris v. State,* the court of appeals addressed Indiana's sex offender registration requirement and prohibition on sex offenders' participation in Internet chat rooms, instant messaging, or social networks with unlimited access to persons under the age of eighteen.[320] The court found that the prohibition violated First Amendment principles,[321] but held that a registration requirement satisfied both the First Amendment and Indiana's constitutional protection of speech.[322]

Indiana's Free Expression Clause provides that no law shall restrain "the free interchange of thought and opinion, or restricting the right to speak, write, or print freely, on any subject whatever: but for the abuse of that right, every person shall be responsible."[323] The court applied the provision's qualifier—"for the abuse of that right, every person shall be responsible"—by requiring Harris show that the State could not reasonably conclude that his restricted expression was

313. *Id.* at 1181.

314. *Id.*

315. *Id.* at 1182.

316. *Id.*

317. *Id.* at 1185.

318. *Id.* at 1186.

319. *Id.* at 1191.

320. 985 N.E.2d 767 (Ind. Ct. App.), *trans. denied*, *989* N.E.2d 337 (Ind. 2013).

321. *Id.* at 780 (The court's holding rested on the decision in *Doe v. Marion County Prosecutor*, 705 F.3d 694 (7th Cir. 2013), finding the state law unconstitutional under the First Amendment).

322. *Id.* at 782.

323. *Id.* at 781 (quoting IND. CONST. art. 1, § 9).

abused.[324] In other words, Harris had to show that the State's regulation lacked rationality.[325] The court found that his argument that the State failed to allege abuse did not satisfy this burden.[326]

XVII. SPECIAL LAWS—ARTICLE 1, SECTIONS 1, 12, 23 AND ARTICLE 4, SECTION 22

A claim that the state law provision classifying heirs and taxing the various classes at different rates violated the Indiana Constitution failed in *Odle v. Indiana Department of State Revenue*.[327] The classifications did not violate the Equal Privilege and Immunities Clause (article 1, section 23) or the principles of equality in article 1, section 1, because of Indiana Supreme Court precedent holding that inheritance tax classifications distinguishing between relatives and strangers are equitable and reasonable.[328] The classifications did not violate article 1, section 12 because a remedy for injury was not precluded and inequitable administrative costs were not imposed.[329] The prohibition on "special laws" in article 4, section 22 did not apply because the classifications applied uniformly—not just in one location or to one group.[330]

XVIII. SENTENCING—ARTICLE 7, SECTION 4

As has been true for the past several years, both the Indiana Supreme Court and Indiana Court of Appeals issued several opinions during the survey period applying their authority to review and revise sentences under article 7, section 4 of the Indiana Constitution.[331] These decisions will be reviewed in full in the article on developments in Indiana criminal law.

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324. *Id.* at 782.

325. *Id.*

326. *Id.* The court also found that Harris failed to meet his burden of showing that the statute's actual operation restricted his speech.

327. 991 N.E.2d 631, 632-33 (Ind. T.C.), *review denied*, 997 N.E.2d 356 (Ind. 2013).

328. *Id.* at 635 (citing Crittenberger v. State Sav. & Trust Co., 127 N.E. 552 (1920)).

329. *Id.* at 636.

330. *Id.* at 636-37.

331. *See*, *e.g.*, Chambers v. State, 989 N.E.2d 1257 (Ind. 2013); Kovats v. State, 982 N.E.2d 409 (Ind. Ct. App. 2013); Kimbrough v. State, 979 N.E.2d 625 (Ind. 2012).