J. CONSTITUTIONAL LAW

J.1. Due process (5th and 14th Amend; Ind.Const Art 1, 12)

TITLE: Blanck v. Ind. Dep't of Corr.
INDEX NO.: J.1.
CITE: (06-22-05), Ind., 829 N.E.2d 505
SUBJECT: No judicial review of prison disciplinary decisions
HOLDING: Neither Ind. Code 11-11-5-4, which prohibits DOC from imposing certain disciplinary actions, nor "Open Ct.'s." provision of Article I, Section 12 of Indiana Constitution create subject matter jurisdiction over claims seeking judicial review of DOC discipline decisions. Ct. has never held that Open Ct.'s. Clause provides a substantive "right" of access to Ct.'s or to bring a particular cause of action to remedy an asserted wrong. Martin v. Richey, 711 N.E.2d 1273 (Ind. 1999). Held, transfer granted, Ct. App.' opinion at 806 N.E.2d 788 vacated, dismissal of plaintiff's complaint affirmed but Ct. should have dismissed on grounds of lack of subject matter jurisdiction under Trial Rule 12(b)(1); Boehm & Rucker, JJ., concurring in result, believe that complaint should be dismissed because it fails to state a claim pursuant to Trial Rule 12(b)(6), & if private cause of action were provided under statutes, claim could be presented in a Ct. of general jurisdiction.

RELATED CASES: Holmes-Bey, 20 N.E.3d 578 (Ind. Ct. App. 2014) (Tr. Ct. should have dismissed instead of denied D's petition to challenge DOC reduction of credit time; such decisions are not subject to judicial review); Varner, App., 905 N.E.2d 493, aff'd 922 N.E.2d 610 (the Blanck line of cases did not preclude Tr. Ct. from hearing inmate's mandate action filed pursuant to Ind. Code 34-27-3-1 requesting that all five members of the parole board vote on his parole eligibility; inmate's mandate did not involve prison discipline and the regulation of the inmate population in general); Israel, 868 N.E.2d 1123 (seizure of inmate's settlement check was restitution as a result of a disciplinary sanction & is therefore not subject to judicial review, following Blanck); Kimrey, 861 N.E.2d 379 (Tr. Ct. properly dismissed inmates' complaint against DOC, which alleged that an administrative procedure prohibiting sexually explicit printed matter violated rights conferred upon them by Ind. Code 11-11-3-6(a). Inmates alleged no constitutional violations, & legislature did not intend to provide inmates with a private right of action to enforce Ind. Code 11-11-3-6); Gick, 106 N.E.3d 1052 (Ind. Ct. App. 2018) (Tr. Ct. lacked authority to order DOC to permit inmate sex offender to have visitation with her minor child while D is in the custody of the DOC).

TITLE: Connecticut Dept. of Public Safety v. Doe

INDEX NO.: J.1.

CITE: 538 U.S. 1 (2003)

SUBJECT: Sex offender registry, "Megan's Law," current dangerousness, liberty interest, due process

HOLDING: In this class action suit, respondent Doe was a convicted sex offender subject to a state registry law (a "Megan's Law") that required him to provide his personal information to the state department of public safety, and to keep the state notified of any change of his residence, among other requirements. He challenged the state registry law on due process grounds, claiming that the damage to his reputation deprived him of a protected liberty interest and that he was entitled to a hearing to determine whether or not he was currently dangerous before being required to register and included on the list.

Under the state law, every convicted sex offender must register, without any determination by the state whether the person is currently dangerous. The registry contains a disclaimer stating that persons on the registry are included solely because of their conviction records, with no individual determination by the state that they are currently dangerous.

The U.S. Supreme Court held that because Doe's duty to register was triggered by the simple fact of a prior conviction, and because the presence of a name on the registry was not tied to any determination of current dangerousness, Doe's current dangerousness or lack thereof was not a relevant issue and Doe was not entitled to a hearing on the procedural due process claim.

TITLE: Doe v. Town of Plainfield, Indiana

INDEX NO.: J.1.

CITE: (1st Dist., 09-24-08), Ind. App., 893 N.E.2d 1124

SUBJECT: Constitutionality of ordinance barring sex offenders from parks

HOLDING: Ordinance prohibiting individuals who are listed on Indiana sex and violent offender registry from entering parks and recreation areas does not violate Article 1, Sections 1, 12, and 24 of the Indiana Constitution on its face. The rights guaranteed in Article 1, Section 1, are expressed in language so broad -- "life, liberty, and the pursuit of happiness," among other rights--that it is impossible to conclude from the text itself that the provision recognizes, as a core value, the right to enter public parks for legitimate purposes. Inquiry under Article 1, Section 12, which recognizes an individual's right to be free from arbitrary government treatment, is similar to rational basis review under federal substantive due process analysis. Court could not say that excluding sexually violent predators from Plainfield's parks and recreation areas lacks a rational relationship to ordinance's goal of protecting health and safety of persons using the parks.

As to Doe's ex post facto claim under Article 1, Section 24, Court agreed with Doe that certain aspects of ordinance evidence a punitive purpose when the factors outlined in Smith v. Doe, 538 U.S. 84 (2003), are applied. Such a showing, however, does not carry the heavy burden of establishing "clearest proof" that ordinance's civil, non-punitive purpose has been negated. Specifically, Court noted that: 1) Doe failed to present clearest proof that ordinance operates to banish sex or violent offenders in a manner that is wholly consistent with historical forms of punishment; 2) exclusion from park is far less of an affirmative disability or restraint than imprisonment; 3) although ordinance deters criminal behavior, such evidence is not clearest proof of a punitive purpose in light of fact that ordinance is rationally related to legitimate, non-punitive goal of protecting health and safety; and 4) to extent Doe argues ordinance is excessive because it bans sex or violent offenders who present no risk of re-offending, such evidence does not necessarily render the provision excessive. Held, grant of summary judgment in favor of Plainfield and against Doe affirmed.

RELATED CASES: Dowdell, 907 N.E.2d 559 (Ind. Ct. App. 2009) (ordinance barring convicted sex offenders from public parks violated Indiana Constitution prohibition against ex post facto laws as applied to D, who was convicted, served his sentence and completed his registration requirements before ordinance was enacted).

TITLE: Enis v. Dept. Health & Social Services, Wisc.
INDEX NO.: J.1.
CITE: 962 F. Supp. 1192 (D.C. W. Wisc. 1996)
SUBJECT: Forced Medication -- Insanity Acquittees
HOLDING: Wisconsin statute allowing insanity acquittee confined in mental health facility to be given psychotropic medication against his will on basis of finding of incompetency to refuse medication, without concomitant finding that he is currently dangerous to himself or to others, violates due process. In Washington v. Harper, 494 U.S. 210 (1990), U.S. Supreme Court held that convicted prisoner could be forcibly medicated only on basis of finding of current dangerousness to self or others, together with finding that medication is medically necessary. Here, state argues that finding that petitioner was not guilty by reason of insanity and committed to mental health facility 22 years ago provides sufficient due process protection. District Court disagrees, holding that Harper clearly requires current finding of dangerousness, and further that it requires finding that he is dangerous within confines of mental health facility in which he is housed, rather than if released into general public.

RELATED CASES: In re A.M-K., 983 N.E.2d 210 (Ind. Ct. App. 2013) (where a parent in a CHINS case objects to an order directing the parent to take all medications as prescribed and presents evidence of side effects and religious beliefs supporting that objection, additional evidence is necessary to overcome the parent's constitutionally protected liberty interest in remaining free of unwarranted intrusions in the mind and body).

TITLE: Fiore v. White

INDEX NO.: J.1.

CITE: 531 U.S. 225, 121 S. Ct. 712, 148 L.Ed.2d 629 (2001)

SUBJECT: Elements of offense, due process

HOLDING: A conviction obtained without proving all the elements of a crime violates the Due Process Clause. D was convicted of operating a hazardous waste facility without a permit. Shortly after his conviction, the state supreme court interpreted the law such that D's conduct did not violate the statute, but did not grant D collateral relief. The U.S. Supreme Court certified the question whether the state supreme court had announced a new rule or had interpreted the law as it was at the time of D's conviction. The state supreme court responded that it had interpreted the law. The U.S. Supreme Court then reversed the conviction, reasoning that it was based on conduct not covered by the state statute.

TITLE: State v. Cannady
INDEX NO.: J.1.
CITE: 727 N.W.2d 403 (Minn. 2007)
SUBJECT: Statute shifting burden on age in child porn violates due process
HOLDING: The Minnesota Supreme Court held that a provision of Minnesota's child pornography law that makes it an affirmative defense that the pornographic material depicted only people 18 or older violates due process by making Ds meet the burden of proof concerning the subjects' ages. An accused's failure to make a prima facie case as to the ages of the subjects would preclude him from contesting it at trial, and consequently the state would never have to produce evidence on the element at all in such a case.

TITLE: Zavala v. State
INDEX NO.: J.1.
CITE: (2nd Dist.; 10-31-00), Ind. App., 739 N.E.2d 135
SUBJECT: Due process - does not require advisement under Vienna Convention
HOLDING: State's failure to inform D of his rights under Article 36 of Vienna Conviction on Consular Relations, & State's failure to notify Mexican Consulate of D's arrest did not prejudice D's fundamental rights of due process. "If he so requests, competent authorities of receiving State shall, without delay, inform consular post of sending State if, within its consular district, national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner.. . . Said authorities shall inform person concerned without delay of his rights under this sub-paragraph." Vienna Convention, art. 36(b) (April 24, 1963). In order to prove that D was prejudiced by violation of Convention, D must establish that: (1) he did not know of his right to contact consulate for assistance; (2) he would have availed himself of right had he known of it; & (3) there was likelihood that consulate would have assisted D. U.S. v. Chaparro-Alcantara, 37 F.Supp.2d 1122 (N.D.Ill. 1999).

Here, it is undisputed that officers violated Vienna Conviction by failing to advise D of his right to contact Mexican consul. However, D did not raise violation until Motion to Correct errors &, thus, waived issue for appeal. Following other jurisdictions, Ct. held that fundamental error doctrine is inapplicable to instant case because no violation of fundamental right is implicated. Waiver notwithstanding, D would not be entitled to suppression or dismissal because he failed to show actual prejudice from violation. Mexican Consulate's affidavit did not provide any specific information as to D but rather stated general policies of Mexican Consulate with respect to Article 36 of Vienna Convention. D's affidavit stated that he would have exercised his right to speak with his Consulate; however, it did not state he would have exercised his Fifth Amendment rights after speaking with his Consulate. Thus, without any evidence about what D would have done if he had been provided immediate notice of his right to speak with Consulate, it is too speculative to conclude that D was prejudiced by officers' failure to advise him of his rights under the Vienna Convention. Held, judgment affirmed.

RELATED CASES: Alexander, App., 837 N.E.2d 552 overruled in part on other grounds, Ryle v. State, 842 N.E.2d 320 (Ind. 2005) (Mathias, J., concurring, urged law enforcement authorities to inform foreign nationals of their right to consular contact, & to make such advice standard operating procedure in order to help establish efficient & objectively fair notice & contact process that complements Sixth Amendment indigent right to counsel.

J. CONSTITUTIONAL LAW

J.1. Due process (5th and 14th Amend; Ind.Const Art 1, 12)

J.1.a. General principles

TITLE: Alvies v. State
INDEX NO.: J.1.a.
CITE: (06/07/85), Ind., 478 N.E.2d 678
SUBJECT: Due process - disparity in sentencing
HOLDING: Court finds D's argument that he was denied due process of law when Tr. Ct. imposed much more severe sentence (35 years) in his case than in totally unrelated case of F.J. (3 years) is without merit because D & F.J. were not similarly situated. D was convicted of Class A robbery after inflicting serious bodily injury on 76-year-old woman when taking her purse. D was 21 years old & was on probation for essentially same offense at the time. F.J. was 16, convicted of Class C robbery & had no prior record. Held, no error.

TITLE: Campbell v. Criterion
INDEX NO.: J.1.a.
CITE: (12-30-92), Ind., 605 N.E.2d 150
SUBJECT: Indigent's right to transcript - civil proceedings
HOLDING: This case is noted because, while it deals with indigent's right to free transcript in appealing civil proceedings, it may have some applicability & force in arguing for various ancillary rights of indigent Ds, including situations denominated as civil, but which have criminal implications. Ct. held that standard for right to transcript at public expense is whether failure to provide pauper with transcript is tantamount to denying access to process to which he would otherwise have claim.

TITLE: Clemons v. Walls
INDEX NO.: J.1.a.
CITE: 202 F.Supp.2d 767 (N.D. Ill. 2002)
SUBJECT: Expert Testimony on Gangs Violated Right to Fair Trial
HOLDING: Admission of expert testimony on history, organization and activities of criminal street gang to which D belonged, at D's trial for murder of rival gang member, violated D's right to fair trial. Expert testimony was highly prejudicial, and its probative value was limited, as it tended to show merely that a member of D's gang, not D in particular, had committed murder.

TITLE: Gibson v. McBride
INDEX NO.: J.1.a.
CITE: 663 S.E.2d 648 (W.Va. 2008)
SUBJECT: No fair trial - State's prison witnesses testify in street clothes; D's prison garb
HOLDING: West Virginia Supreme Court held a judge's decision in a prison-murder trial to allow inmates testifying for the prosecution to take the stand in street clothes but compel defense witnesses to appear in prison attire and shackles violated D's constitutional right to a fair trial. Court acknowledged that Ds in the state have no constitutional right to have witnesses appear without restraints. However, based on past precedent, Court noted "there may be occasions when forcing the D's witnesses to testify in physical restraints [or prison attire] may create sufficient prejudice that reversible error will occur." Court added that the case came down to a battle over the credibility of the prosecution's and the D's witnesses. "The drastic contrast in the physical appearance of the parties' incarcerated witnesses - each of whom provided crucial testimony at trial - unfairly influenced the jury's judgment of the witnesses' credibility."

TITLE: Carnes v. State
INDEX NO.: J.1.a.
CITE: (2d Dist. 7/23/85), Ind. App., 480 N.E.2d 581
SUBJECT: Due process - threats to gain cooperation
HOLDING: Tr. Ct. did not err in denying D's motion to dismiss charges. Here, Ds (husband & wife) argue officer's threat to file charges against wife & additional charges against husband unless he consented to being an informant violated their due process rights. Police had probable cause to charge Ds originally; therefore, Ds were not harmed. Court finds situation similar to threats made to induce guilty plea, where D may face re-indictment on more serious charge. See US v. Horton (CA5 1981), 646 F.2d 181 (not unlawful coercion to threaten to indict members of D's family to induce D's guilty plea). "Although we do not condone [officer's] conduct, we will not decide what law enforcement tactics, aside from those which are constitutionally & statutorily prohibited, should or should not be employed." Held, no error.

TITLE: Gajdos v. State
INDEX NO.: J.1.a.
CITE: (4/30/84), Ind., 462 N.E.2d 1017
SUBJECT: Due process - availability of transcript
HOLDING: Right to speedy trial does not encompass right to speedy appeal. Doescher v. Estelle (N.D. TX 1978), 454 F. Supp. 943; US v. Alston (DC 1980), 412 A.2d 351; State v. Lagerquist (SC 1970), 176 S.E.2d 141; [other citations omitted]. 6th Amend right to speedy "trial" means trial by jury to determine guilt or innocence. It does not include an appeal. Alston; Lagerquist. Here, D was convicted & sentenced 9/19/80. Transcript was not completed until 10/1/82. Court does not condone such "inaction;" "Tr. Ct. reporter should make every effort to assure transcript is provided expeditiously to D." Delay can be attacked under due process or equal protection if purposeful & oppressive. Although D was incarcerated during 2-year period, Tr. judge did set appeal bond (which D could not meet). Held, no error.

TITLE: Griffin v. U.S.
INDEX NO.: J.1.a.
CITE: 502 U.S. 46, 122 S. Ct. 466, 116 L.Ed.2d 371 (1991)
SUBJECT: Due process - General Verdict; insufficient evidence
HOLDING: Insufficiency of evidence as to one of multiple objectives of conspiracy charged in single count does not require setting aside general verdict of guilty. Due process requires that general guilty verdict must be set aside if it could rest on legally inadequate basis. Yates v. U.S. (1957), 354 U.S. 298, 77 S. Ct. 1064, 1 L.Ed.2d 1356. Insufficiency of evidence differs from legal inadequacy & does not require that verdict be set aside. Legal error means mistake regarding law, as opposed to mistake regarding weight or factual import of evidence. Distinguishing between 2 types of error makes sense in this context, because jurors are not generally able to recognize & avoid illegal theory of guilt, but are quite able to analyze factual evidence. Blackmun, J., CONCURS IN RESULT.

TITLE: Holbrook v. Flynn
INDEX NO.: J.1.a.
CITE: 475 U.S. 572,106 S. Ct. 1340 (1986)
SUBJECT: Impartial Atmosphere - Presence of uniformed officers in courtroom
HOLDING: D was not denied right to fair trial when, at his trial with 5 Co-Ds, customary courtroom security force was supplemented by 4 uniformed state troopers sitting in 1st row of spectator section. There was no reason to believe that troopers' presence tended to brand D with guilt. Any D accused of crime is entitled to have his guilt or innocence determined solely on evidence introduced at trial, not on grounds of official suspicion, indictment, or continued custody. Conspicuous deployment of security personnel in courtroom during trial is not inherently prejudicial practice & must be examined on case-by-case basis. Sight of security force within courtroom might under certain conditions create impression in minds of jury that D is dangerous & untrustworthy. Whenever courtroom arrangement is challenged as inherently prejudicial, question is not whether jurors articulated a consciousness of some prejudicial effect, nor whether it might have been feasible for state to have employed less conspicuous security measures, but rather whether there was an unacceptable risk of prejudice. Held, conviction affirmed. Burger, C.J., concurring.

TITLE: Moran v. Burbine

INDEX NO.: J.1.a.

CITE: 475 U.S. 412, 106 S. Ct. 1135, 89 L.Ed.2d 410 (1986)

SUBJECT: Due process - police deception in interrogating suspect

HOLDING: Conduct of police in advising an attorney who called on suspect's behalf that police would not be questioning suspect further nor placing suspect in a lineup that evening (when in fact suspect was questioned 45 minutes after attorney's call resulting in suspect's inculpatory statement) did not violate due process. Court notes that "on facts more egregious than those presented here police deception might rise to a level of a due process violation." Held, challenged conduct falls short of kind of misbehavior that so shocks sensibilities of civilized society as to warrant federal intrusion into criminal processes of the states. Stevens, joined by Brennan, & Marshall, DISSENTS.

TITLE: Nelson v. Colorado
INDEX NO.: J.1.a.
CITE: (4/19/2017), 137 S. Ct. 1249 (2017)
SUBJECT: Exonerated defendant's due process right to recoup restitution, fees, and costs
HOLDING: For an exonerated defendant to recoup financial assessments, the Colorado Exoneration Act ("the Act") requires her to file a civil case and prove her innocence by clear and convincing evidence. This requirement violates the right to due process under the Fourteenth Amendment.

Defendant Nelson was convicted of felonies and misdemeanors for alleged sexual and physical abuse of her children. The Tr. Ct. ordered her to pay $8,192.50 in costs, fees and restitution. Her convictions were reversed on appeal, and she was acquitted of all charges on retrial. Defendant Madden was convicted of patronizing a child prostitute and attempted sexual assault. He was ordered to pay $4413.00 in costs, fees and restitution. His convictions were vacated, one on direct review and the other on collateral review. The State did not retry him. Both defendants petitioned for reimbursement but did not seek relief under the Act. Defendant Nelson's Tr. Ct. denied her request outright while Defendant Madden's Tr. Ct. refunded costs and fees but not restitution. The Colorado Court of Appeals reversed both Tr. Ct.s, but the Colorado Supreme Court affirmed both Tr. Ct.s, finding that the failure of the defendants to seek relief under the Act was fatal to their claims.

The Colorado Supreme Court's ruling is reversed because the Colorado statute denies the defendants' right to due process for three reasons. See Mathews v. Eldridge, 424 U.S. 319 (1976). First, defendants' interest in regaining their funds is high. Second, the risk of erroneous deprivation of funds is unacceptable. The Act conditions a refund upon a showing of innocence by clear and convincing evidence even though the reversal of the defendants' convictions means they are presumed innocent. The risk is unacceptably high also because the Act provides no remedies for misdemeanor convictions and, where the recoupment amount is not large, the cost of mounting a claim and hiring counsel would be prohibitive. Third, the State has no interest in withholding the funds, and it has identified no equitable factors supporting its position. Held, cert. granted, opinions of the Colorado Supreme Court reversed, and judgment reversed. Ginsburg, J., joined by Roberts, C.J., and Kennedy, Breyer, Sotomayor, and Kagan, JJ. Alito, J., concurring. Thomas, J., dissenting.

TITLE: Ohio Adult Parole Authority v. Woodard
INDEX NO.: J.1.a.
CITE: 523 U.S. 272, 118 S. Ct. 1244, 140 L.Ed.2d 387 (1998)
SUBJECT: Due Process -- Applicability to Capital Clemency Proceedings
HOLDING: The Court split on the issue of whether the due process clause applies to capital clemency proceedings. Four justices (Rehnquist, Scalia, Kennedy, & Thomas, JJ.) found that the petitioner had no life interest in clemency beyond the life interest which was adjudicated -- and extinguished -- at the original trial and sentencing. This group wrote that all an inmate has when seeking clemency is a "unilateral hope" and that recognizing due process rights in clemency proceedings would be inconsistent with the principle that granting clemency is a matter of grace. This group rejected the lower court's holding that clemency is an integral part of the criminal justice system and therefore implicates due process, under Evitts v. Lucey, 469 U.S. 387 (1985). Distinguishing between clemency and the appeal involved in Evitts, this group wrote that clemency proceedings "are not part of the trial -- or even of the adjudicatory process." A second group of four justices (O'Connor, Souter, Ginsburg, and Breyer, JJ.) concurred in the conclusion that no due process violation occurred in this case, but argued that death-row inmates do retain a life interest and that the due process clause requires at least "minimal procedural safeguards." This group found that the process which the petitioner received, including notice of the hearing and an opportunity to participate in an interview, satisfied these minimal requirements. Justice Stevens DISSENTED, agreeing with O'Connor, et al that the due process clause applied to clemency proceedings, and arguing that the case should be remanded to the district court to determine what process was due.

TITLE: Parke v. Raley
INDEX NO.: J.1.a.
CITE: 506 U.S. 20 (1992)
SUBJECT: Habitual offender; challenge to prior convictions; burden of proof
HOLDING: Where prior guilty pleas which are not affirmatively shown by records to be knowing and voluntary are used for sentence enhancement, it does not violate due process to place burden on D to produce evidence that prior convictions were invalid. D was charged as habitual offender, and challenged one of his prior convictions on ground that it was not made knowingly. No transcript of plea hearing existed, and D did not meet burden of producing evidence that plea was unknowingly entered. On federal habeas review, 6th Circuit Court of Appeals set aside habitual offender enhancement on ground that state improperly placed burden on D to prove validity of prior plea. On direct review of guilty plea, waiver of rights cannot be presumed from silent record. Boykin v. Alabama (1969), 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 274. However, to import Boykin presumption into context of collateral attack on guilty plea ignores presumption of regularity that attaches to final judgments. Even when collateral attack on final conviction rests on constitutional grounds, presumption of regularity makes it appropriate to assign burden of proof to the D.

TITLE: People v. Blue
INDEX NO.: J.1.a.
CITE: 724 N.E.2d 920 (Ill. 2000)
SUBJECT: Prosecutorial Misconduct -- Fundamental Unfairness
HOLDING: Despite overwhelming evidence of guilt, Illinois Supreme Court reverses murder conviction due to prosecutorial misconduct which it said undermined the integrity of the judicial process. D was charged with shooting police officer, and during guilt phase of trial, as well as during jury deliberations, prosecutors displayed blood and brain-spattered uniform of officer on headless mannequin. State argued that uniform corroborated medical evidence concerning location and nature of officer's wounds. Because these facts were not seriously in issue, and because of the tremendous prejudicial impact of uniform covered with both blood and brains, display of uniform was improper. Prosecutors also made emotional argument to jury during guilt phase describing in great detail the loss suffered by the victim's parents, wife, and children, and telling jurors that victim's family, as well as other police officers, needed to hear from jury that you cannot shoot an officer and get away with it. This argument was inflammatory and prejudicial and had nothing to do with D's guilt or innocence. Finally, during both direct and cross-examination of D's girl-friend, prosecutor repeatedly objected by saying, "That's a lie," and in two instances, going on to state the prosecutor's version of events. These "objections" violated the prohibition against an advocate becoming a witness. The state argued that evidence of D's guilt was so overwhelming that any prosecutorial misconduct was harmless. The Illinois Supreme Court disagreed, pointing out that prejudice to the D was not its sole concern, and that even guilty Ds must be tried fairly in order to preserve the integrity of the judicial process. The Court found that the prosecutors' acts indeed cast doubt on the integrity of the judicial process, and taken together, they created a pervasive pattern of unfair prejudice, requiring reversal.

TITLE: Sanchez-Llamas v. Oregon

INDEX NO.: J.1.a.

CITE: 548 U.S. 331, 126 S. Ct. 2669, 165 L.Ed.2d 557 (2006)

SUBJECT: Vienna Convention violation, suppression inappropriate

HOLDING: Court determined that suppression was not an appropriate remedy where a D is not accorded rights under the Vienna Convention to notify his nation's consulate of his detention. Article 36(1)(b) of the Vienna Convention on Consular Relations provides that if a person detained by a foreign country "so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" of such detention, and "inform the [detainee] of his rights under this subparagraph." Article 36(2) specifies: "The rights referred to in paragraph 1 . . . shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso . . . that the said laws . . . must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Along with the Convention, the United States ratified the Optional Protocol Concerning the Compulsory Settlement of Disputes, which provides: "Disputes arising out of the . . . Convention shall lie within the compulsory jurisdiction of the International Court of Justice [(ICJ)]." The United States withdrew from the Protocol on March 7, 2005. Court held that even assuming without deciding that the Convention creates judicially enforceable rights, suppression is not an appropriate remedy for a violation, and a State may apply its regular procedural default rules to Convention claims. The convention does not mandate suppression or any other specific remedy, but expressly leaves Article 36's implementation to domestic law. "It is beyond dispute that [this Court does] not hold a supervisory power over the [state] courts." Dickerson v. United States, 530 U. S. 428, 438. The exclusionary rule cases on which D principally relies are inapplicable because they rest on the Court's supervisory authority over federal courts. The Court's authority to create a judicial remedy applicable in state court must therefore lie, if anywhere, in the treaty itself. Where a treaty provides for a particular judicial remedy, courts must apply it as a requirement of federal law. United States v. Giordano, 416 U. S. 505, 524B525. But where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own. Majority did not find that Article 36 even addresses searches or interrogations nor that it provides Ds any rights at all. It secures for foreign nationals only the right to have their consulate informed of their arrest or detention, not to have their consulate intervene, or to have police cease their investigation pending any such notice. Further, States may subject Article 36 claims to the same procedural default rules that apply generally to other federal-law claims. This claim is controlled by Breard v. Greene, 523 U.S. 371 (1998) (*per curium).* Of the challenges raised to this ground, the more difficult to dismiss is that the International Court of Justice has the interpreted the Vienna Convention to preclude the application of procedural default rules to Article 36 claims. Court disagreed that it was obligated to comply with the Convention as interpreted by the ICJ. Although the ICJ's interpretation deserves respectful consideration, nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts. Held, judgments of the supreme courts of Oregon and Virginia are affirmed; Ginsburg, concurring in the judgment, agreed with the majority on the suppression and procedural default issues, but agreeing with the dissent of Justice Breyer that Article 36 of the Vienna Convention grants rights that may be invoked by an individual in a judicial proceeding but did not believe the dissent was narrowly addressing the cases at hand; Breyer, J., with whom Stevens, J. And Souter, J. join, and with whom Ginsburg, J. joins in part, dissenting in short would hold that a criminal D may raise a claim that state authorities violated the Convention in his case; sometimes state procedural

default rules must yield to the Convention's insistence that domestic laws “enable full effect be given to the purposes” for which Article 36's rights are intended; and suppression may sometimes provide an appropriate remedy.

TITLE: Stanger v. State
INDEX NO.: J.1.a.
CITE: (1st Dist. 11/6/89), Ind. App., 545 N.E.2d 1105
SUBJECT: Fairness of trial - allowing support person to sit near child witness
HOLDING: Allowing support person to sit near child witnesses during testimony did not deprive D of due process. On appeal, D argues that presence of support person undermined fairness of trial by invoking juror sympathy for witnesses & by enhancing their credibility. Whenever courtroom arrangement is challenged as inherently prejudicial, court must consider whether practice presents unacceptable risk that impermissible factors might erode presumption of innocence. See Holbrook v. Flynn (1986), 475 U.S. 568, 106 S. Ct. 1310, 89 L.Ed.2d 525; Coy v. Iowa (1988), 487 U.S. 1012, 108 S. Ct. 2798, 101 L.Ed.2d 857. If challenged practice is not found inherently prejudicial & D fails to show actual prejudice, inquiry is over. Holbrook, supra. Unlike other courtroom practices which have been condemned, such as prison clothing or shackles, there is nothing about person sitting quietly to side of witness which is particularly distracting or likely to arouse intense feelings among jurors for witness or against D. Indiana decisions attest presence of mother in courtroom during victim's testimony is not, of itself, inherently prejudicial. [Citations omitted.] Since D has not shown actual prejudice, Court of Appeals finds no due process violation. Held, conviction affirmed.

TITLE: State v. Lively
INDEX NO.: J.1.a.
CITE: 130 Wash.2d. 1; 921 P.2d 1035 (Wash. 1996)
SUBJECT: Outrageous State Conduct - Due Process Violation
HOLDING: Police informer's conduct in attending Alcoholics/Narcotics Anonymous meetings "trolling for targets" and developing romantic relationship with lovelorn, alcoholic D led to finding that state's conduct was so objectively outrageous as to violate due process clause. Informer met D at meeting, developed romantic relationship, and asked her to obtain small amounts of cocaine for a friend, which she did. Court found that because the D did not prove that she was not predisposed to deliver cocaine, she had not proved entrapment. However, focus of "outrageous conduct" defense is conduct of government agents, not predisposition of D, and here, conduct of informant was sufficiently outrageous to violate due process. **Note:** With regard to entrapment, in Indiana, as in most jurisdictions, once D presents evidence that government agents were involved in criminal activity, burden shifts to state to prove that the D was predisposed to commit the offense.

TITLE: State v. Murtagh
INDEX NO.: J.1.a.
CITE: 169 P.3d 602 (Alaska 2007)
SUBJECT: Statute allowing victims to not speak with defense found unlawful
HOLDING: Alaska Supreme Court held that provisions of the Alaska Victims' Rights Act that require advising victims and some witnesses that they need not talk to defense investigators, that allow victims and witnesses of sex crimes to refuse contact with defense investigators, and that preclude defense investigators from covertly recording interviews unjustifiably interfere with defense investigations in violation of the state constitution's procedural due process guarantee. Court decided that the provisions create too great a risk of suppressing sources of evidence that otherwise would be available to Ds.

TITLE: Stumpf v. Mitchell

INDEX NO.: J.1.a.

CITE: 367 F.3d 594 (6th Cir. 2004); reversed in part by Bradshaw v. Stumpf, 540 U.S. 175 (2005)

SUBJECT: Use of Conflicting Theories Against Co-Ds Violates Due Process

HOLDING: Sixth Circuit Court of Appeals holds that state's arguing that each of two Ds, one of whom pled guilty and one of whom went to trial, was actual shooter, resulting in aggravated murder conviction for each, was denial of due process. Petitioner entered guilty plea to aggravated murder, which required proof of specific intent to kill. At evidentiary hearing, to establish factual basis, the state argued that he was the actual shooter. Petitioner was sentenced to death. At co-D's later trial, the state presented testimony of jail-house snitch that co-D was actual shooter. Petitioner then sought to withdraw his guilty plea, and the state opposed his motion, stressing the unreliability of the informant's testimony. Sixth Circuit vacates plea, finding reasonable probability that, had the state not pursued conflicting theories, petitioner would not have entered guilty plea or Tr. Ct. would not have found factual basis. Petitioner was represented by Alan Freedman, of the Midwest Center for Justice in Chicago.

TITLE: Wallace v. State
INDEX NO.: J.1.a.
CITE: (3/6/85), Ind., 474 N.E.2d 1006
SUBJECT: Due process (DP) - state's use of false testimony
HOLDING: D's DP rights were not violated by admission of controverted testimony. Here, D contends state allowed witness to submit perjured testimony & that her DP rights were denied because state knew/should have known testimony to be false. Knowing use of perjured testimony is fundamentally unfair; conviction obtained by use of such testimony cannot be upheld. Sypniewski 400 N.E.2d 1122; Richard 382 N.E.2d 899. Where state, knowing testimony to be false, either solicits such testimony or allows it to go uncorrected when it appears, conviction must be reversed. Napue v. IL (1959), 360 U.S. 264, 79 S. Ct. 1173, 3 L.Ed.2d 1217; Sparks 393 N.E.2d 151. Court finds contradictory testimony does not lead inescapably to conclusion witness was lying. Incredulous account of circumstances surrounding perpetration of crime does not amount conclusively to perjury. Conflicts/believability are best resolved by jury. Kocher 439 N.E.2d 1344; Duvall 415 N.E.2d 718. Held, no error.

TITLE: Williams v. Pennsylvania
INDEX NO.: J.1.a.
CITE: (6/9/2016), 136 S. Ct. 1899 (U.S. 2016)
SUBJECT: Judge must recuse for death penalty decision as prosecutor 30 years earlier
HOLDING: The 14th Amendment's Due Process Clause requires a judge to recuse himself where, previously, he was "significantly and personally" involved as a prosecutor in a critical decision in a D's case. Here, the Pennsylvania Supreme Court Chief Justice, who was considering D's post-conviction appeal, thirty years earlier made the decision to seek the death penalty against D. The inquiry is objective, that is, whether the average judge is likely to be neutral or whether there is an unconstitutional potential for bias. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 872 (2009). The fact that the judge was just one of several judges on the Pennsylvania Supreme Court does not overcome the constitutional infirmity: "an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote." Held, cert. granted, opinion of Pennsylvania Supreme Court vacated, and case remanded. Kennedy, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.; Roberts, C.J., dissenting, joined by Alito, J., Thomas, J., dissenting.

J. CONSTITUTIONAL LAW

J.1. Due process (5th and 14th Amend; Ind.Const Art 1, 12)

J.1.b. Right to hearing/notice

TITLE: A.J.R. v. State
INDEX NO.: J.1.b.
CITE: (1/23/2014), 3 N.E.3d 1000 (Ind. Ct. App. 2014)
SUBJECT: Lack of notice that officer would testify as skilled witness did not deny Juvenile a fair hearing
HOLDING: Tr. Ct. did not abuse its discretion and deny Juvenile (A.J.R.) due process and a fair hearing by admitting police officer's testimony about A.J.R.'s location when he shot and killed two cows, where State did not provide notice that it would call the officer as a skilled witness.

A lay witness may offer opinions and draw inferences if the witness's testimony is "'(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.' This rule encompasses persons whom the courts have labeled 'skilled witnesses.' Kubsch v. State, 784 N.E.2d 905, 922 (Ind. 2003)."

A.J.R. cites no authority that such notice is required. Further, A.J.R. was notified that officer was on State's witness list, and A.J.R.'s counsel thoroughly cross-examined officer. A.J.R. was not denied due process and a fair hearing. See U.S. Const. Amend. XIV, § 1. Held, judgment affirmed.

TITLE: Apprendi v. New Jersey

INDEX NO.: J.1.b.

CITE: 530 U.S. 466, 99-478, 120 S. Ct. 2348 (2000)

SUBJECT: Right to jury trial, notice, standard of proof, sentence enhancement

HOLDING: The Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. Sentence enhancement scheme where, after D pled guilty to a charge carrying maximum penalty of 10 years, sentence was enhanced to 12 years because of facts found by judge at sentencing hearing, violated D's right to notice, to trial by jury, and to due process. After D pled guilty to shooting at his neighbor's house, prosecutor filed a motion to enhance his sentence, alleging that the crime was racially motivated. The sentencing judge found by a preponderance of the evidence that the crime was a hate crime and enhanced D's sentence beyond the statutory maximum for the underlying offense.

RELATED CASES: Almendarez-Torres v. U.S., 523 U.S. 224 (enhancement may be based on a judicial finding of the fact of a prior criminal conviction); Jones v. U.S, 526 U.S. 227; U.S. v. O'Brien, 130 S. Ct. 2169 (2010) (machine gun provision of 18 U.S.C. § 924(c)(1)(B)(ii), which imposes a thirty-year mandatory minimum sentence when the firearm used in certain crimes is a machine gun, is an element of the offense that must be proved to a jury beyond a reasonable doubt, rather than a sentencing factor to be proved to the judge at sentencing).

TITLE: Burris v. State
INDEX NO.: J.1.b.
CITE: (6/29/84), Ind., 465 N.E.2d 171
SUBJECT: Due process -- notice; failure to specify intent; underlying felony
HOLDING: Information must state crime in words of statute or words that convey similar meaning.

Smith, 445 N.E.2d 998. D claimed that information charging him with felony murder was inadequate in that it failed to allege that he knowingly or intentionally took money from victim. However, D did not raise this in any of three motions to correct errors. Because of this, alleged error was deemed waived. However, assuming issue had not been waived, Ct. held that information was sufficiently certain and particular so as to enable accused, Tr. Ct. and jury to determine crime for which conviction was sought. It also gave D sufficient information to prepare his defense, assure against double jeopardy and anticipate proof which would be adduced against him, notwithstanding claim that information was insufficient because it failed to allege that D knowingly or intentionally took money from victim. Held, conviction affirmed.

TITLE: Deurloo v. State
INDEX NO.: J.1.b.
CITE: (5th Dist., 1-27-98), Ind. App., 690 N.E.2d 1210
SUBJECT: Due process - violation of pretrial diversion agreement
HOLDING: D was not deprived of her Fourteenth Amendment right to procedural due process when she was summarily terminated from prosecutor's pretrial diversion program without adequate notice or opportunity for hearing before Ct. Ind. Code 33-14-1-7 grants prosecutor discretion to withhold formal prosecution in appropriate cases to afford D opportunity to successfully complete alternative course of action. Aside from few details outlined in statute, organization & administration of pretrial diversion program is left entirely to prosecutor. Whether individual is entitled to procedural due process is dependent upon whether she is being deprived of property or liberty interest. Bd. of Regents v. Roth, 408 U.S. 564 (1972); Hopper, App., 546 N.E.2d 106. D's status as pretrial divertee differs from that of parolee, probationer, or individual in rehabilitative treatment, because she had not yet come before Ct. to answer charge against her & was not under Ct. supervision. Fact that D had been terminated from pretrial diversion program in no way impacted subsequent criminal proceedings. D did not have protected liberty interest in remaining in pretrial diversion program, & therefore was not entitled to due process hearing prior to her termination from program. Thus, Tr. Ct. did not err in denying D's request for such hearing. Held, conviction affirmed. Sullivan, J., concurring, noted that D did not seek interlocutory appeal from order denying claim of entitlement to notice & opportunity to be heard. Had she done so, Judge Sullivan would have held that, in absence of such notice & opportunity to be heard, prosecution should not have gone forward.

TITLE: Dudley v. State
INDEX NO.: J.1.b.
CITE: (7/15/85), Ind., 480 N.E.2d 881
SUBJECT: Due process -- notice; joint venture theories
HOLDING: D is entitled to be informed specifically of crime with which he is charged so that he may be able to intelligently prepare defense. Dorsey, 260 N.E.2d 800. Purpose of information is first to inform Ct. of facts alleged, so that it may decide whether they are sufficient in law to support conviction and to furnish accused with such description of charge as will enable him to make his defense and avail of his conviction or acquittal for protection against further prosecution for same offense. Trotter, 429 N.E.2d 637.

Information in this case sufficiently stated that Ds committed robbery, with inference that they acted in concert. It was not necessary for information to state amount or further describe U.S. currency which was stolen. Randall, 32 N.E. 305. Ds were given sufficient notice of crime against which they had to defend themselves. Held, convictions affirmed; remanded for correction of sentence.

TITLE: Flores v. State
INDEX NO.: J.1.b.
CITE: (12/5/85), Ind., 485 N.E.2d 890
SUBJECT: Due process -- must inform accused of nature of charges
HOLDING: Ind. Const. Art. I, section 13 provides that in all criminal prosecutions, accused shall have right to demand nature and cause of accusation against him. Indictment or information must sufficiently apprise accused of nature of charges against him so that he may anticipate State's proof and prepare defense in advance of trial. This implicates protection provided by due course of law clause in Ind. Const. Art. I, section 12. Also, when it is possible to do so, indictment or information must name or describe property charged to have been stolen. Here, D charged with robbery and burglary. Amendments to robbery information deleted references to "wallet" and "jewelry box" so as to simply accuse D of taking "property" from victims. Amendments failed to apprise D of robbery charges against him and thus violated Const. Art. I, sections 12 and 13. Held, convictions reversed in part and affirmed in part.

RELATED CASES: Wurster, App., 708 N.E.2d 587, aff'd, 715 N.E.2d 3417 (bribing indictment failed to allege elements of offense & failed to apprise Ds of offense they were required to defend against); Moran, App., 477 N.E.2d 100 (indictment for official misconduct by violating bidding procedures was inadequate under Ind. Code 35-34-1-4(a)(4) because specific procedures required by statute which were allegedly violated were not set out); Gebhard, 459 N.E.2d 58 (information charging D with knowingly engaging in tumultuous conduct failed to state facts and circumstances with sufficient precision so as to apprised D of charge against him; information inadequate under statutory guidelines).

TITLE: Griffin v. State
INDEX NO.: J.1.b.
CITE: (8/27/82), Ind., 439 N.E.2d 160
SUBJECT: Due process -- failure to inform D of prohibited conduct
HOLDING: It is fundamental tenet of pleading criminal causes that information must set forth nature and elements of offense charged in plain and concise language. Ind. Code 35-3.1-1-2. Precision in pleading, which is embraced within Indiana constitution, is designed to afford all Ds safeguards guaranteed by due process of law. To permit conviction on charge not made would be sheer denial of due process. Where indictment and statute defining offense employ generic terms which do not inform accused in any meaningful way of particular conduct complained of, dismissal is required. Failure to adequately inform D of charges against him is fundamental error, requiring reversal even when not objected to at trial.

Here, D was charged with four counts of theft and one count of being habitual criminal. First four counts of original information described stolen property and named owners of stolen goods, but amended information alleged only that D knowingly received stolen property. There was no description of property or any indication as to identities of rightful owners. Even though D did not question adequacy of information at any time during trial, fact remains that D was tried on charge which was totally inadequate in informing D about what he should defend against and his conviction also placed him in jeopardy because Ct. could not determine from information what property D received as stolen goods. Held, conviction and habitual offender status set aside, and all charges dismissed.

TITLE: Hamling v. U.S.
INDEX NO.: J.1.b.
CITE: 418 U.S. 87 (1974)
SUBJECT: Due process -- standard for adequate notice
HOLDING: Indictment is sufficient if it contains elements of offense charged & fairly informs D of charge against which he must defend and enable him to plead acquittal or conviction in bar of future prosecutions for same offense. Hagner, 285 U.S. 427. It is generally sufficient that indictment set forth offense in words of statute itself, as long as "those words of themselves fully, directly & expressly, without any uncertainty or ambiguity, set forth all elements necessary to constitute offense intended to be punished. Carll, 105 U.S. 611. Undoubtedly language of statute may be used in general description of offense, but it must be accompanied with such statement of facts & circumstances as will inform accused of specific offense, coming under general description, with which he is charged. Hess, 124 U.S. 483.

Here, indictment charged Ds in language of statute, which provides that obscene material & written information as to where it may be obtained is nonmailable & that whoever knowingly uses mails for mailing of anything declared by statute to be nonmailable commits crime. Because various component parts of constitutional definition of obscenity need not be alleged in indictment in order to establish its sufficiency, indictment in this case was sufficient to adequately inform D of charges against them. Held, conviction affirmed; Douglas, Brennan, Stewart & Marshall, JJ., dissenting.

RELATED CASES: Garcia, App., 433 N.E.2d 1207 (information or affidavit must charge & direct in unmistakable terms offense with which D is accused; if there is reasonable doubt as to what offenses are set forth, that doubt should be resolved in favor of D).

TITLE: Hillard v. State
INDEX NO.: J.1.b.
CITE: (7/7/87), Ind. App., 509 N.E.2d 1124
SUBJECT: Due process -- notice; conviction of lesser included offense (LIO)
HOLDING: D can be convicted of LIO of greater offense charged if information actually charged all elements of lesser offense. Here, D was charged with burglary and over defense counsel's objection, Tr. Ct. instructed jury that they might convict D of theft, which they did. Information charged that D broke and entered building or structure with specific intent to commit theft. It did not allege that theft was, in fact, committed.

Underlying theft felony is different offense from burglary; thus, it is not necessarily included offense in burglary charge. Therefore, offense could be considered LIO only if information actually charged all elements of offense. Reason for this is that due process requires that accused be advised of offense(s) he is charged with having committed. Blackburn, 291 N.E.2d 686. Here, information was therefore insufficient to allege that D actually committed theft. It contained no allegation specifying what property had been stolen. Such information would have been necessary to state valid charge of theft. Thus, jury was improperly instructed it might convict D of theft. Held, conviction reversed.

RELATED CASES: Garcia, 433 N.E.2d 1207 (improper to convict on battery, Class C felony; D charged with Class A felony robbery, necessary element of which is mere bodily injury to robbery victim or serious bodily injury to any other person; because information alleged only bodily injury with respect to robbery victim, D was not put on notice of serious bodily injury required for Class C felony; Ct. modified conviction to battery, Class A misdemeanor, LIO of charged offense); Gutowski, App., 354 N.E.2d 293 (if element of great bodily harm or disfigurement is properly alleged in charging affidavit, then aggravated assault and battery may be LIO of assault and battery with intent to kill).

TITLE: Hopper v. State
INDEX NO.: J.1.b.
CITE: (1st Dist. 11/14/89), Ind. App., 546 N.E.2d 106
SUBJECT: Treatment in lieu of prosecution - due process required for termination
HOLDING: Before treatment program pursuant to Ind. Code 16-13-6.1-16 may be terminated, D must be afforded procedural due process similar to probation or parole revocation procedures. Under Ind. Code 16-13-6.1-16, D may request treatment in lieu of prosecution or imprisonment, & if treatment period is successfully completed, D is entitled to discharge of criminal proceedings. Ind. Code 16-13-6.1-17(a). Where statute creates right which may be forfeited only upon misconduct of individual, procedural due process must be afforded to prevent arbitrary determination that misconduct has occurred. [Citations omitted.] Although statute here does not specify that treatment may be terminated only upon misconduct, it does require determination by department of mental health that D cannot be further treated. Court of Appeals finds that D's status is akin to probationer or parolee, & determines that same minimal requirements must be met as for revocation of probation or parole. D must have written notice of claimed violations, disclosure of evidence, opportunity to be heard, right to confront & cross-examine witnesses, neutral & detached hearing body, & written statement describing evidence relied upon for action taken. Purpose is to ensure that decision rests upon some reasonable basis. Further, state must bear burden of proving its allegations. See Ind. Code 35-28-2-3(d); Ind. Code 11-13-2-3-10. It appears from record that D was in fact afforded these procedural protections. Held, affirmed. Sullivan, J., DISSENTS, arguing that D erroneously bore burden of proving successful completion by preponderance of evidence, & Court of Appeals cannot know what Tr. Ct. might have decided under proper standard.

RELATED CASES: Gosha, 931 N.E.2d 432 (Ind. Ct. App. 2010) (same due process requirements afforded Ds in probation revocation proceedings apply to termination of participation in Drug Court Programs).

TITLE: Lee v. Coughlin
INDEX NO.: J.1.b.
CITE: 26 F.Supp.2d 615 (S.D. N.Y. 1998)
SUBJECT: Year-Long Assignment to Special Housing Unit (SHU) -- Due Process Liberty Interest
HOLDING: A year-long assignment to a SHU differed sufficiently from the typical life of inmates in general population to create a due process liberty interest in the disciplinary proceedings that resulted in the placement. In Sandin v. Conner, U.S. S. Ct. held that due process rights attach only to those infringements on inmates' freedom that impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." The Court found that a 30-day stay in disciplinary segregation was not sufficiently dissimilar, in duration or degree of restriction, from other types of administrative segregation which prison officials had broad discretion to impose. Here, however, inmate's assignment to SHU was considerably longer, and involved restrictions much more severe, than ordinary administrative segregation or protective custody.

TITLE: Matter of Brettin
INDEX NO.: J.1.b.
CITE: (3rd Dist., 2-4-00), Ind. App., 723 N.E.2d 913
SUBJECT: Modification of bail without hearing - due process violation
HOLDING: Tr. Ct.'s order increasing D's bail constituted alteration of previous amount & therefore entitled D to hearing pursuant to Ind. Code 35-33-8-5. When Tr. Ct. first discussed & set bail, no formal charges had been filed against D. Tr. Ct. set bail at $50,000 based upon State's representations to Ct. concerning nature & number of offenses to be charged against D. Subsequently, State filed twice as many charges as it had originally anticipated & requested increase in amount of bail. After State filed charges, Tr. Ct. reconvened initial hearing & notified D that it had increased his bail to $300,000.

Ind. Code 35-33-8-5 requires hearing before bail can be altered or revoked. If bail is set on additional charges, Ind. Code 35-33-8-4 permits Tr. Ct. to make bail determination ex parte, without hearing. Had State charged D with known offenses at time of first initial hearing, State could have added additional charges at later date & Tr. Ct. could have then set bail on additional charges without hearing pursuant to Ind. Code 35-33-8-4. Instead, State chose to wait seventy-two hours to file charges & Tr. Ct. set bail based upon anticipated charges. Ct. disagreed with State's characterization that it requested that bail be set on additional charges. State's affidavit for additional/increase in bail requested increased bail based upon alleged risk D posed to community. State's request was for alteration of bail, & Ind. Code 35-33-8-5 entitled D to hearing. Thus, Tr. Ct. erred when it denied D's application for writ of habeas corpus. Held, reversed & remanded with instructions to release D from custody of sheriff on original bond until & unless Tr. Ct. determines after hearing that State has met its burden in seeking increase in bail.

TITLE: Million v. State
INDEX NO.: J.1.b.
CITE: (1st Dist., 2-23-95), Ind. App., 646 N.E.2d 998
SUBJECT: Community corrections program - revocation hearing & due process
HOLDING: Revocation of D's placement in community corrections program did not comply with due process. Ct. first noted that Ind. Code 35-38-2.6-3(a), which provides that Tr. Ct. "may impose reasonable terms on the probation," does not require that Tr. Ct. give written notice of terms of placement or specify those terms on record. Evidence showed that D received actual notice of terms through oral advisement of rules & standards of conduct governing work release prior to his placement. Revocation of placement in program could be properly based upon rule violation which occurred prior to placement, Asba, App., 570 N.E.2d 937.

However, D in program was entitled to written notice of claimed violation of terms of placement, disclosure of evidence against him, opportunity to be heard, to present evidence & confront adverse witnesses in neutral hearing before Tr. Ct. Isaac v. State, Ind., 605 N.E.2d 144. Only Tr. Ct. may revoke placement for violation of terms under Ind. Code 35-38-2.6-5(3), & statute does not provide for administrative hearing & judicial review prior to revocation of placement. Here, record indicates that Tr. Ct. improperly deferred to administrative decision made by community corrections personnel. Held, reversed & remanded.

RELATED CASES: Debro, 821 N.E.2d 367 (same due process rights afforded to Ds in context of probation revocation inure also to benefit of Ds in proceedings to enforce a deferred sentence or withheld judgment); Cox, 706 N.E.2d 547 (due process requirements for probation revocations are also required when Tr. Ct. revokes D's placement in community corrections program).

TITLE: Nelson v. State
INDEX NO.: J.1.b.
CITE: (6/11/85), Ind., 479 N.E.2d 48
SUBJECT: Due process - right to notice
HOLDING: Where D was charged with felony-murder, his conviction for voluntary manslaughter (VM), constituted a denial of due process. Here, Tr. Ct. instructed jury re intentional homicides. D did not object or raise issue on appeal. Court finds D had no notice he must defend charge of knowing/intentional homicide. Held, fundamental error. VM conviction set aside & cause remanded for further consistent proceedings.

RELATED CASES: Proffit, App., 817 N.E.2d 675 (Tr. Ct. did not abuse its discretion in giving instructions on conspiracy to jury despite fact that D was not charged with conspiracy but rather murder, voluntary manslaughter & robbery. Although D was not charged with conspiracy, neither was he convicted of it); Rouse, App., 525 N.E.2d 1278(BAC resulting in death was not included in charged offense of DWI resulting in death; held, conviction reversed); Salary, App., 523 N.E.2d 764 (failure to yield to traffic, Ind. Code 9-4-1-83, not included in failure to stop, Ind. Code 9-4-1-110, conviction reversed); 4447 Corp. v. Goldsmith 509 N.E.2d 174 (Shepard's DISSENT from denial of Petition for Rehearing contains good discussion of procedural due process requirements in 1st Amend. matters & would overturn Allen County order seizing adult bookstore subject to possible forfeiture under RICO because order failed to provide for prompt adversarial hearing & because restraint went beyond that needed to preserve status quo); Kingston, App., 479 N.E.2d 1356 (Indict 191(7); elements of false reporting were not charged in information charging obstruction of justice; held, conviction reversed).

TITLE: U.S. v. Brandon
INDEX NO.: J.1.b.
CITE: 158 F.3d 947 (6th Cir. 1998)
SUBJECT: Medicated Competence to Stand Trial (CST) -Judicial Hearing Required
HOLDING: D found lacking CST is entitled to judicial hearing before being forced to take anti-psychotic medication for purpose of regaining CST. Sixth Circuit distinguishes Parham v. J.R., 442 U.S. 584 (1979) (no judicial hearing required to decide whether child should be civilly committed) and Washington v. Harper, 494U.S. 210 (1990) (no judicial hearing required to determine whether convicted felon should be medicated to alleviate dangerousness or serve his medical interests). Those cases dealt with the strictly medical issue of what treatment was in the best interests of the individuals in custody, and U.S. S. Ct. reasoned that using judges untrained in medicine reviewing the decisions of medical professionals would not increase reliability. Here, the decision whether a non-dangerous pre-trial detainee should be medicated for purposes of becoming CST involves issues beyond the expertise of medical professionals. Medication could affect D's ability to aid in preparation of his defense or his demeanor before the jury, potentially affecting his right to counsel or right to a fair trial. These decisions must be made by court in light of medical evidence. Further, state must show that forcible medication is narrowly tailored to a compelling interest, and must make this showing by clear and convincing evidence.

TITLE: United States v. Hunt

INDEX NO.: J.1.b.

CITE: 526 F.3d 739 (11th Cir. 2008)

SUBJECT: False reports by police can be criminally prosecuted under federal statute

HOLDING: Eleventh Circuit Court of Appeals held a provision of the 2002 Sarbanes-Oxley Act that criminalizes knowingly making false entries in records with the intent to impede or obstruct a federal investigation can apply to lies entered in a police use-of-force report. Court rejected an argument that application of the statute outside the context of white collar crime is a denial of the due process requirement of fair notice. The statute, 18 U.S.C. ' 1519, applies to anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . ., or in relation to or contemplation of any such matter or case." D in this case, a police officer, was convicted under Section 1519 on the basis of a false statement he made in a use-of-force report concerning an accident in which an arrestee was seriously injured. Knowing that he faced a future investigation into potential federal civil rights violations, D wrote the report to make it look as though the use of force was justified even though it was not. The incident was later investigated by the FBI and led to D's conviction.

TITLE: Wilson v. State
INDEX NO.: J.1.b.
CITE: (4th Dist., 04-16-07), Ind. App., 865 N.E.2d 1024
SUBJECT: Due process - right to present evidence at sentencing hearing
HOLDING: In murder prosecution, Tr. Ct. violated D's due process rights by denying him the right to present evidence at his sentencing hearing because of his refusal to cooperate with probation officer assigned to prepare his PSI report. Ind. Code 35-38-1-3 provides that a convicted person "is entitled to subpoena & call witnesses & to present information in his own behalf." In holding that D waived his rights by failing to provide personal information for PSI report, Tr. Ct. violated statute & D's federal due process rights when it refused to admit evidence presented on D's behalf through testimony of others at sentencing hearing.

Ct. could not conclude that error in excluding this evidence was harmless beyond a reasonable doubt. While Tr. Ct. considered hardship as a potential mitigating factor, it did not weigh other information revealed in testimony of D's mother & former girlfriend. In offer to prove, D's mother testified that D had two children, an "expecting girlfriend," has struggled with depression for number of years, was in special education classes throughout most of his education & that he was enrolled in a program to obtain his high school diploma. D's former girlfriend would have testified that D was father of her ten-month-old daughter. Held, 60-year sentence vacated & remanded for another sentencing hearing.

TITLE: Young v. State
INDEX NO.: J.1.b.
CITE: (5/14/2015), 30 N.E.3d 719 (Ind. 2015)
SUBJECT: Ds lacked fair notice of charge of which they were ultimately convicted
HOLDING: In murder and conspiracy prosecution, Ds were denied due process right to fair notice about the crime for which they were convicted. State chose to charge Ds with murder as accomplices in a shooting, and relied on that theory alone at Ds' bench trial. Tr. Ct. found that there was insufficient evidence that Ds knew a member of the group would shoot the victim, so it dismissed the murder charge (the actual shooter remained unidentified). However, after finding that Ds intended a group beating of the victim, Tr. Ct. entered judgment of conviction for attempted aggravated battery as a lesser-included offense.

Although Ds did not argue that attempted aggravated battery was not a lesser included offense of murder or that there was an impermissible variance from the charging Information, the Supreme Court found fundamental error.

Ds must have "fair notice" of the charges of which they may be convicted, including inherently or factually included lesser offenses. Under these unusual circumstances, attempted aggravated battery by beating was not just a lesser offense of the charged murder by shooting - it was a completely different offense, based on a completely different "means used" than alleged in the charging informations. This deprived Ds of fair notice to extend their defense to that very different lesser charge. Held, transfer granted, Court of Appeals' opinions at 11 N.E.3d 964 and 15 N.E.3d 670 vacated, convictions reversed and remand with instructions to enter judgments of acquittal in both cases.

RELATED CASES: Grayson, 58 N.E.3d 998 (Ind. Ct. App. 2016) (where Tr. Ct. corrected its earlier finding that D's new crime violated his parole for an earlier attempted robbery conviction by finding it actually violated parole for another conviction, it denied D's right to due process by doing so without holding a hearing); Lee, 43 N.E.3d 1271 (Ind. 2015) (Ct. granted third co-D's belated petition to transfer to avoid "serious injustice" of facing opposite results than her son and Young on the very same issue originating from the very same trial).

TITLE: Young v. Harper

INDEX NO.: J.1.b.

CITE: 520 U.S. 143, 117 S. t. 1148; 137 L.Ed.2d 270 (1997)

SUBJECT: Due Process Protections Required Before Revocation of "Pre-parole" Status

HOLDING: State's "pre-parole" program, which was established for purpose of reducing prison overcrowding, was sufficiently like parole to require due process protections set out in Morrissey v. Brewer, 408 U.S. 471 (1972). Here, after petitioner had served 15 years of life sentence for murder, parole board simultaneously granted him pre-parole release and recommended him to governor for parole. Petitioner's release under pre-parole program was contingent upon his compliance with conditions similar to conditions of parole. After 5 months in which petitioner did not violate any conditions, his pre-parole release was terminated because governor denied him parole, and he returned to prison. Petitioner then filed state habeas corpus petition complaining that he should have been afforded due process protections of Morrissey before his pre-parole release was terminated. State Ct.'s denied writ, as did federal district Ct., but 10th Circuit reversed. State petitioned for cert., arguing that petitioner was merely transferred to higher degree of confinement, so that Morrissey did not apply. The state argues that pre-parole was merely a lower security classification, and was not like parole. Unanimous Ct. finds distinctions state raises largely illusory. Even actual differences, such as fact that pre-parole status could be granted by Parole Board acting alone, whereas Board merely made recommendation to governor regarding parole itself, are not such as to distinguish it from parole as viewed in Morrissey. Petitioner was released from incarceration, subject to certain conditions, just like parolee, and was told that his continued liberty was contingent upon compliance with those conditions. Because his status resembled that of parolee considered in Morrissey, he was entitled to due process protections set out in Morrissey before his preparole status could be terminated.

J. CONSTITUTIONAL LAW

J.1. Due process (5th and 14th Amend; Ind.Const Art 1, 12)

J.1.c. Vagueness/overbreadth

TITLE: Armes v. State
INDEX NO.: J.1.c.
CITE: (07/08/2022), Ind. Ct. App., 191 N.E.3d 942
SUBJECT: Charges for dealing a synthetic drug declared illegal by emergency rule dismissed on constitutional vagueness grounds
HOLDING: This is an interlocutory appeal from the denial of the defendants' motions to dismiss. Effective November 2020, the Board of Pharmacy adopted an emergency rule to add a drug compound identified as MDMB-4en-PINACA (MDMB) to the list of Schedule I controlled substances. In January 2021, three defendants were charged with various crimes involving MDMB. They filed motions to dismiss, arguing that the charges failed to state an offense because MDMB was not found under Schedule I and was not otherwise declared to be a Schedule I substance. They further argued that the statutory scheme defining controlled substances was unconstitutionally vague as applied to them.

The Court of Appeals rejected the defendants' first argument. Synthetic drugs listed under IC 35-31.5-2-321 also explicitly include any compound determined to be a synthetic drug by Emergency Rule under IC 25-26-13-4.1. Although MDMB was not explicitly named under either statute at the time the defendants committed the offenses, the Board is authorized to add substances to Schedule I because Schedule I includes substances adopted under Section 4.1. Therefore, the Emergency Rule effectively made MDMB a controlled substance. As such, the defendants were not entitled to dismissal of the charges on the basis that the informations fail to state an offense. But the Court agreed with the defendants' second argument that the Emergency Rule is unconstitutionally vague as applied to them. The Court determined that the Emergency Rule fails to provide adequate information for a person of ordinary intelligence to determine whether they are dealing in a substance that contains MDMB. Unlike the emergency rule at issue in Tiplick v. State, 43 N.E.3d 1259 (Ind. 2015), the Emergency Rule here does not explicitly identify the listed substances as synthetic drugs. An even greater problem is that the Emergency Rule does not provide the chemical composition of MDMB. Thus, there is no official designation of what constitutes MDMB. Accordingly, the Emergency Rule fails to provide the notice required by due process under the federal constitution and the trial court erred in denying the motion to dismiss the charging informations. As a final matter, the Court noted that the defendants were likely correct in arguing that the vagueness analysis under the Indiana Constitution requires higher scrutiny than the federal constitution. This is based partly on Article 4, Section 20, which states, “Every act and joint resolution shall be plainly worded, avoiding, as far as practicable, the use of technical terms,” and the comments from the delegate who proposed it. But the Court did not ultimately resolve the question, having already found the Emergency Rule unconstitutionally vague under the Fifth Amendment.

HOLDING: Armes, 191 N.E.3d 942 (Ind. Ct. App. 2022) (On rehearing, Ct. affirms prior decision reversing the filing of charges involving MDMB as a schedule I controlled substance as unconstitutionally vague).

TITLE: Bozarth v. State
INDEX NO.: J.1.c.
CITE: (2d Dist. 3/24/88), Ind. App., 520 N.E.2d 460
SUBJECT: Due process - vagueness of statute; fundamental error
HOLDING: Statute prohibiting sexual intercourse with one who is so mentally disabled or deficient that consent cannot be given is not unconstitutionally vague. D failed to preserve objection by filing motion to dismiss 20 days before omnibus date. Vagueness may constitute fundamental error but does not in this case. Legislation is presumed constitutional. Miller 517 N.E.2d 64. Statute is not unconstitutionally vague when language is sufficiently definite to inform person of ordinary intelligence of conduct which is prohibited. Payne 484 N.E.2d 16. Meaning may be ascertained by reference to entire text of statute, to well-settled common law meanings, to prior case law, to similar statutes, or to generally accepted usage. [Citations omitted.] In this statute, capacity to consent presupposes intelligence capable of understanding sex act, its nature, & its consequences. Stafford, App., 455 N.E.2d 402. Plain & ordinary meaning of "mentally disabled or deficient" is subnormal intelligence. Persons of ordinary intelligence are capable of discerning kind of conduct proscribed by statute. Held, no fundamental error. Conviction affirmed.

TITLE: Payne v. State
INDEX NO: J.1.c.
CITE: (10/25/85), Ind., 484 N.E.2d 16
SUBJECT: Due process -- vagueness
HOLDING: Statute will not be found unconstitutionally vague if language is sufficiently definite to inform person of common intelligence of conduct which is prohibited. Here, D convicted of robbery and robbery resulting in bodily injury. He claimed that Indiana robbery statute is unconstitutionally vague insofar as it incorporates definition of "bodily injury" provided by Ind. Code § 35-41-1-2. Ct. held that it could think of no phenomenon of more common experience and understanding than concepts of "bodily injury" and "physical pain." Held, conviction affirmed.

RELATED CASES: Tiplick, 43 N.E.3d 1259 (Ind. 2015) (Indiana's synthetic and look-alike drug laws are not unconstitutionally vague, as both provide adequate notice as to the prohibited conduct; see full review at K.8); Kaur, 987 N.E.2d 164 (Ind. Ct. App. 2013) (D failed to demonstrate statute was vague as applied to her; D may not raise hypothetical situations to demonstrate vagueness); Baumgartner, App., 891 N.E.2d 1131 (statute criminalizing performing sexual conduct in presence of minor is not unconstitutionally vague); Wells, App., 848 N.E.2d 1133 (OWI statutes were not rendered unconstitutionally vague by 1001 amendments to statutes despite claim that they do not precisely define what amount of alcohol consumption could lead to finding of impairment); Szpunar, App., 783 N.E.2d 1213 (statute prohibiting sale of unregistered security is not unconstitutionally vague); Haggard, App., 771 N.E.2d 668 (Ind.'s unlawful use of body armor statute is not unconstitutionally vague); Vaillancourt, App., 695 N.E.2d 606 (Ind. Code 35-41-1-25, defining “serious bodily injury,” is not unconstitutionally vague); Helton, 624 N.E.2d 499 (Criminal Gang Statute, Ind. Code 35-45-9, which forbids knowingly and actively participating in group of five or more that participates in and requires as condition of membership commission of battery, is not vague).

TITLE: State v. Downey
INDEX NO.: J.1.c.
CITE: (4/11/85), Ind., 476 N.E.2d 121
SUBJECT: Due process - vagueness of statute
HOLDING: Statute is not unconstitutionally vague if it adequately informs individual of ordinary intelligence re proscribed conduct. Porter, App., 440 N.E.2d 690; Platt, App., 341 N.E.2d 219. Statute need not list each item of prohibited conduct. Hunter, App., 360 N.E.2d 588. Ct.'s may give statute narrowing construction to save it from nullification so long as such construction is consistent with legislative intent & does not establish new/different policy basis. State v. Kuebel 172 N.E.2d 45. Here, Tr. Ct. sustained vagueness challenge to neglect of dependent statute, Ind. Code 35-46-1-4(a)(1), & dismissed indictments. Ct. finds phrase "may endanger" causes persons of common intelligence to guess about statute's meaning & to differ re its application. Connally v. General Construction Co. (1926), 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322. However, Ct. construes term "may" out of statute & then finds due process notice requirements are met. Held, reversed & remanded.

RELATED CASES: Vaughn, App., 782 N.E.2d 417 (Ind. Code 35-42-2-1.3(2), defining domestic battery as "a person who knowingly or intentionally touches a person who...is or was living as a spouse of the other person in a rude, insolent, or angry manner that results in bodily injury" is unconstitutionally vague); Bemis, App., 652 N.E.2d 89 (statutes prohibiting possession & sale of psilocyn & psilocybin mushrooms are not unconstitutionally vague); Kolender v. Lawson (1983), 461 U.S. 352, 103 S. Ct. 1855 (criminal statute requiring loiterers/wanderers to provide "credible & reliable" identification/account for their presence to police is unconstitutionally vague because it encourages arbitrary enforcement by failing to describe with sufficient particularity what suspect must do to satisfy statute); Smith 459 N.E.2d 355 (juvenile waiver statute does not put unconstitutionally vague burden of proof on D); Miller, App., 449 N.E.2d 1119 (neither Ind. Code 35-42-2-2 (criminal recklessness) nor Ind. Code 35-41-2-2(c) (culpability - recklessly) are unconstitutionally vague on their faces or as applied).

TITLE: State v. Sturman

INDEX NO.: J.1.c.

CITE: (7/14/2016), (Ind. Ct. App. 2015)

SUBJECT: Legend drug statute not void for vagueness

HOLDING: In an issue of first impression, the Court held that the "legitimate medical purpose" restriction for legend drug prescriptions is not void for vagueness because it enables ordinary people to understanding what conduct is prohibited. See Morgan v. State, 22 N.E.3d 570, 573 (Ind. 2014). D prescribed massive amounts of pain killers to D.E.H., who died from "pharmacologic intoxication." D was charged under Ind. Code § 16-42-19-20, which provides: "[a] practitioner may not knowingly issue an invalid prescription or drug order for a legend drug[]" and "[a] prescription or drug order for a legend drug is not valid unless the prescription or drug order is issued for a legitimate medical purpose . . . ." (Emphasis added). The phrase is not vague because it requires physicians to prescribe legend drugs in accordance with commonly recognized standards of the medical field. Where state and federal laws do not specifically regulate prescribing practices, physicians are expected to look to learned treatises to determine standards. Practitioners also define appropriate standards of care based on their experience. Because the statute plainly informs physicians that they must look to the accepted standards of care, the statute provides sufficient notice of the prohibited conduct. Held, judgment affirmed.

TITLE: United States v. Davis
INDEX NO.: J.1.c.
CITE: 139 S. Ct. 2319 (U.S. 2019) 06/24/2019
SUBJECT: Enhancement for firearm cases during "crime of violence"unconstitutionally vague
HOLDING: Title 18 U. S. C. § 924(c)(3)(B), which provides enhanced penalties for using a firearm during a “crime of violence,” is unconstitutionally vague. The statute imposes longer sentences on criminal defendants who possess or use a firearm in a crime that “by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” But even the government admits that this language, provides no reliable way to determine which offenses qualify as crimes of violence. And "in our constitutional order, a vague law is no law at all" because it violates the core constitutional requirement that all federal statutes "give ordinary people fair warning about what the law demands of them." Held, judgment reversed. Kavaugh, J., joined by Thomas, Alito, JJ., and Roberts, C.J. (in part), DISSENTING, noting a "decision to strike down a 33-year-old, often-prosecuted federal criminal law because it is all of a sudden unconstitutionally vague is an extraordinary event, and noting that "The Court usually reads statutes with a presumption of rationality and a presumption of constitutionality."

TITLE: United States v. Maloney
INDEX NO.: J.1.c.
CITE: 513 F.3d 350 (3rd Cir. 2008)
SUBJECT: Probation term concerning questioning by police found overly vague
HOLDING: Third Circuit Court of Appeals held a condition of supervised release that required an offender to notify his probation officer within 72 hours of being "arrested or questioned" by a law enforcement officer was too vague to support a finding that a violation occurred when the offender neglected to report that he had been confronted by a city code enforcement officer and cited for failing to display a peddler's license. Court noted a great deal of disagreement at the revocation hearing as to just what "questioning" meant in this context. The district court and probation officer focused on the fact that the offender ultimately received a summons for failing to display the license, but Court noted that "the language of the condition focuses not on the result of the questioning , but on the simple act of questioning. We will not read the condition of supervision to incorporate a result-based threshold that is not evident on its face." Court also rejected probation officer's argument that the condition should be construed to encompass any "contact" with law enforcement, saying there was nothing in the record to indicate that the offender should have interpreted it that broadly. To comply with the condition, the offender would have to guess what the term meant, making it impermissibly vague.

TITLE: United States v. Williams
INDEX NO.: J.1.c.
CITE: 553 U.S. 285, 128 S. Ct. 1830, 170 L.Ed.2d 650 (2008)
SUBJECT: Child porn statute does not violate First Amendment
HOLDING: Majority upheld Congress's most recent effort to constitutionally prohibit offers to provide, and requests to obtain, child pornography, finding the pandering provision of the 2003 PROTECT Act does not cover so much protected speech that it is overbroad in violation of the First Amendment while also rejecting a claim that the statute is facially vague in violation of the Fifth Amendment's due process clause. Under New York v. Ferber, 458 U.S. 747 (1982), non-obscene, sexually explicit works using actual minors may be proscribed without violating the First Amendment due to the state's compelling interest in protecting minors from the harm that occurs both when the porn is produced and when records of children's sexual conduct is disseminated. In Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), Court struck down an anti-pandering provision of a statute that prohibited transactions involving a visual depiction that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct," while also finding that the First Amendment protects the possession of non-obscene material that depicts what appears to be children engaged in sexual activity but that is actually youthful-looking actors or computer-generated images. Under new version of 18 U.S.C. ' 2252A(a)(3)(B), provision makes it a crime for someone to knowingly advertise, promote, present, or distribute material or purported material that reflects the belief, or is intended to cause another to believe, that the material or purported material is, or contains (i) an obscene visual of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct. Majority did not believe that the statute would infringe on mainstream works addressing sexual themes involving children, stating "The average person understands that sex scenes in mainstream movies use non-child actors, depict sexual activity in a way that would not rise to the explicit level necessary under the statute, or, in most cases both." Majority also stressed that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection[,]" in that such offers "have no social value and thus, like obscenity, enjoy no First Amendment protection." Majority also noted that terms "promotes" and "presents" require proof that the speech at issue accompanied, or sought to induce, a transfer of child porn from one person to another and agreed with Justice Department that a prosecutor must prove both a subjective and an objective aspect of the "belief" that the depiction falls within one of two categories of bannable material identified in the statute. Majority conceded that the statute could support a conviction based on a documentary that depicts a rape of a minor, noting in such a situation a court would need to weigh "the educational interest in the dissemination of information . . . against the government's interest in preventing the distribution of materials that constitute a 'permanent record' of the child's degradation whose dissemination increases 'the harm to the child.'" In response to dissent, Majority stressed that a "crime is committed only when the speaker believes or intends the listener to believe the subject of the proposed transaction depicts *real* children." Bader, J., filed a dissent joined by Souter, J.

TITLE: Wood v. State
INDEX NO.: J.1.c.
CITE: (12/31/2013), 999 N.E.2d 1054 (Ind. App. 2013)
SUBJECT: Leaving the scene of a boating accident - statute constitutional
HOLDING: Indiana Code 14-15-4-1, which requires the "operator of a boat involved in an accident or a collision resulting in injury to or death of a person or damage to a boat or other property" to remain at the scene until he or she has provided information to the operator of the other boat and to each person injured regarding his identiy and the identity of the boat's owner, and to provide reasonable assistance to each person injured, is not unconstitutionally vague or overbroad. Here, the D attempted to assist a person whom he discovered to be dead, and then left for the nearest marina because he believed his boat to be taking on water. While headed to the marina, the D's passenger called 911 to report the accident and to seek help for the victims remaining at the scene. The 911 dispatcher to;ld them that help was being sent to the scene, and repeatedly instructed the passenger and D to stay at the marina until someone came for them. The majority finds "problems" with the statute, particularly its lack of an exception where a boater's own passengers may be in danger. Most other states' statutes recognize the need to consider the safety of these passengers and to balance the competing interests. However, the majority does not find it unconstitutionally vague. Kirsch, J., DISSENTS.

J. CONSTITUTIONAL LAW

J.2. Equal protection (14th Amend; IndConst Art 1, 23)

TITLE: Collins v. Day
INDEX NO.: J.2.
CITE: (11/28/94), Ind., 644 N.E.2d 72
SUBJECT: Equal protection -- Indiana Constitutional analysis
HOLDING: Article I, Section 23 of Indiana Constitution provides that General Assembly shall not grant to any citizen or class of citizens, privileges or immunities which upon same terms, shall not equally belong to all citizens. Section 23 should be given interpretation & application independent from Fourteenth Amendment. Ct. defined two applicable standards that govern statutes that grant unequal privileges or immunities to different classes of people. First standard focuses on nature of classification of people upon which legislature is basing its disparate treatment. Where legislature singles out class of people to receive privilege or immunity not equally provided to others, then classification must be based on distinctive, inherent characteristics which rationally distinguish unequally treated class, & disparate treatment must be reasonable related to such distinguishing characteristics. Second standard addresses need for uniformity & equal availability of preferential treatment for all who are similarly situated. When applying standard, Ct.'s must accord considerable deference to legislature's balancing of community interests. Unlike Fourteenth Amendment protection, Section 23 applies equally to prohibit all improper grants of unequal privileges & there is no varying degree of scrutiny for suspect classes or fundament rights. Held, judgment affirmed.

RELATED CASES: Lomont, App., 852 N.E.2d 1002 (lack of a forensic diversion program in Steuben County when five other counties & cities have such a program did not deny D equal protection of the law under Fourteenth Amendment to U.S. Constitution or violate D's rights guaranteed by Privileges & Immunities Clause of Indiana Constitution); Cowart, App., 756 N.E.2d 581 (Indiana's child molesting statute, Ind. Code 35-42-4-3, does not violate Privileges & Immunities Clause of Art. I, Sec. 23 of Indiana Constitution; see full review at K.3.e.3); Sanquenetti, 727 N.E.2d 437 (Indiana's accomplice liability statute, Ind. Code 35-41-2-4, does not violate Privileges & Immunities Clause of Indiana Constitution even though D was convicted of murder for aiding in killing of victim & his accomplice, whom D contended actually killed victim, was convicted of involuntary manslaughter in separate trial).

TITLE: Schaadt v. State
INDEX NO.: J.2.
CITE: (4/8/2015), 30 N.E.3d 1 (Ind. Ct. App. 2015)
SUBJECT: Disparity in drug sentence under old and new code does not violate Ind. Constitution
HOLDING: Savings clause of the 2014 criminal code revision does not violate the Equal Privileges and Immunities Clause of the Indiana Constitution. Under revised criminal code, D's dealing in methamphetamine conviction would constitute a Level 5 offense subject to a maximum prison term of six years. D committed his Class A felony dealing in methamphetamine offenses before the criminal code overhaul and received an aggregate 40-year sentence. He argued that the ameliorative sentencing provisions should apply retroactively to Ds who had not yet been convicted and sentenced when the revision took effect on July 1, 2014. But the General Assembly made it "abundantly clear" that the new criminal code was not intended to have any effect on the criminal proceedings for offenses committed prior to its enactment. It is the offender, as a result of the timing of the crime, not the State, who chooses which statute applies, so D's equal privileges and immunities claim fails.

Court also rejected D's appropriateness challenge to his sentence, noting it will not consider the disparity between his sentence and what he would have received under the revised code. Because the Legislature intended the new code to have no effect on those who committed crimes before 7/1/14, "[w]e think this is true with regard to considering the appropriateness of a sentence under Appellate Rule 7(B); we are to proceed as if the new criminal code had not been enacted." Held, judgment affirmed.

J. CONSTITUTIONAL LAW

J.2. Equal protection (14th Amend; IndConst Art 1, 23)

J.2.a. Suspect classification

J.2.a.1. Race

TITLE: Platt v. State
INDEX NO.: J.2.a.1.
CITE: (4/16/96), Ind. App., 664 N.E.2d 357
SUBJECT: Equal protection -- Public Defender system
HOLDING: D alleged that Marion County Public Defender system was racially discriminatory, and therefore violated Equal Protection Clause of 14th Amendment. He argued that because at least 60% of persons represented by public defenders in Marion County were African-Americans and only 25% of population of Marion County was such, it was clear intent of county's Public Defender system for African-Americans to receive ineffective assistance of counsel. Ct. held that although D presented evidence that existing Marion County Public Defender system may negatively affect African-Americans, such uneven effect will not give rise to constitutional concern unless policy is obvious pretext for discrimination against suspect class. Absent any evidence of intentional discrimination, inference of discriminatory intent cannot give rise to proof of constitutional violation. Held, dismissal of action challenging constitutionality of county Public Defender System and seeking mandatory injunctive relief affirmed.

TITLE: Williams v. State
INDEX NO.: J.2.a.1.
CITE: (8/7/96), Ind., 669 N.E.2d 1372
SUBJECT: Equal protection -- discrimination based on race
HOLDING: Batson doctrine protects right of prospective juror to serve, and while citizens have no right to sit on particular jury, they do have right not to be excluded from jury service on basis of race. Batson v. Kentucky, 476 U.S. 79. Batson and its progeny protect constitutional right to equal protection under law of both Ds and prospective jurors; that is, right that prospective juror will not be excluded from service on basis of race or gender. Here, D's counsel sought to strike white jurors based on his impressions. Ct. held that his race-neutral explanation for peremptory challenges, based on his impressions, without being able to point to any answer or act of prospective jurors giving rise to those impressions, were not clear and reasonably specific explanations sufficient to overcome great deference due Tr. Ct.'s findings rejecting challenges. Held, conviction affirmed.

RELATED CASES: Childress, 2018 Ind. App. LEXIS 101 (Ind. Ct. App. 2018) (adequate race-neutral explanation where prospective juror insisted that "beyond a reasonable doubt" meant "no doubt."); Steelman, App., 602 N.E.2d 152 (statutory provision increasing penalty for delivering marijuana if within 1,000 feet of school property did not violate equal protection by discriminating against minority Ds in absence of proof of racially discriminatory intent or purpose or proof that statute did, in fact, affect greater proportion of minority Ds than their "white suburban counterparts"); Chubb, 640 N.E.2d 44 (for D to establish prima facie case of purposeful racial discrimination in selection of jury, it must be shown that D is member of cognizable racial group, prosecutor has exercised peremptory challenges to remove members of D's race from venire, and facts that any other relevant circumstance of D's case raise inference that prosecutor used that practice to exclude veniremen from jury due to race).

J. CONSTITUTIONAL LAW

J.2. Equal protection (14th Amend; IndConst Art 1, 23)

J.2.a.2. Sex

TITLE: C.T. v. State
INDEX NO.: J.2.a.2.
CITE: (09-16-10), Ind. Ct. App., 939 N.E.2d 626
SUBJECT: Public indecency - no equal protection violation
HOLDING: Indiana's public nudity statute does not violate the Equal Protection Clause by criminalizing the public display of female, but not male, nipples. A gender-based discriminatory classification is subject to an intermediate level of scrutiny. The State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. A legislature is permitted legitimately to act to protect the social interest in order and morality. "[An] important government interest is the widely recognized one of protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous zones." US. v. Biocic, 928 F.2d 112, 115-16 (4th Cir. 1991).

Here, it cannot be seriously disputed that Hoosier society, in general, considers the female breast to be an erogenous zone but does not consider the male breasts to be one: public display of the former is almost certain to cause offense and unease while public display of the latter is not. The Court will not pretend that female and male breast are thought of in exactly the same way in contemporary Indiana society. Because Indiana's public nudity statute serves the important governmental objective of preserving order and morality and does not disadvantage women in any significant way, it does not run afoul of the Equal Protection Clause. Held, judgment affirmed.

TITLE: Young v. State
INDEX NO.: J.2.a.2.
CITE: (3d Dist. 3/23/83), Ind. App., 446 N.E.2d 624
SUBJECT: Equal protection - instruction re selective prosecution
HOLDING: Tr. Ct. did not err in refusing D's instruction concerning denial of equal protection because of selective prosecution. See Taylor 420 N.E.2d 1231 (no error in refusal to instruct regarding constitutionality of statute). Here, D was charged with prostitution as a result of an undercover investigation. D contended that prosecutor's failure to charge patron (who police equipped with tape recorder & money) denied her equal protection. Court finds no equal protection violation in prosecutor's decision to prosecute her but not her patron. Failure to prosecute one who may be violating a law does not excuse a violation by another, absent a showing of "bad faith or evil design." Highland Sales Corp. v. Vance 186 N.E.2d 682; Lee, App., 397 N.E.2d 1047. Held, no basis in record for issuing instructions, thus no error.

J. CONSTITUTIONAL LAW

J.2. Equal protection (14th Amend; IndConst Art 1, 23)

J.2.a.4. Other

TITLE: Hackett v. State
INDEX NO.: J.2.a.4.
CITE: (2/21/96), Ind. App., 661 N.E.2d 1231
SUBJECT: Equal protection -- penal statutes
HOLDING: Parole eligibility scheme which denied D who had been convicted of two counts of murder generating two life sentences while including others who are convicted under new penal code and who receive determinate sentences for murder did not violate equal protection. Legislation defining crimes and assessing penalties does not create different classes of people. Criminal statutes apply exclusively to one class of people, those who violate law, and they relate to specific point in time that violation occurs. Upon alteration of criminal law, individuals subsequently convicted are not similarly situated and cannot be equated to those previously convicted. Rivera, App., 385 N.E.2d 455. Held, conviction affirmed.

RELATED CASES: Helton, 624 N.E.2d 499 (Ct. concluded that gangs, fraternities, and all groups were treated similarly under gang and hazing statutes).

TITLE: Zagorac v. State
INDEX NO.: J.2.a.4.
CITE: (01-31-11), 943 N.E.2d 384 (Ind. Ct. App. 2011)
SUBJECT: Constitutional challenge to expungement statute
HOLDING: D waived his claim that Indiana's expungement statute, Ind. Code § 35-38-5-1, violates the Privileges and Immunities Clause found in Article I, § 23 of the Indiana Constitution, because D raised the issue for the first time on appeal. See Mahl v. Aaron, 809 N.E.2d 953, 958 (Ind. Ct. App. 2004). Nonetheless, the Court addressed the issue on the merits. D, a substitute teacher, was charged with class C felony child molesting for fondling a second-grade student. The State dismissed the charge because the alleged victim became ill from his fear of testifying in the presence of D.

The privileges and immunities clause provides, "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not belong to all citizens." Id. Legislation that distinguishes between classes of people is constitutional if the disparate treatment is "reasonably related to inherent characteristics [that] distinguish the unequally treated classes" and if the preferential treatment is "uniformly applicable and equally available to all persons similarly situated." Collins v. Day, 644 N.E.2d 72, 80 (Ind. 1994). D accurately noted that the expungement statute does not permit removal of an arrest from a criminal record unless Tr. Ct. finds the charge was dropped for lack of probable cause. Yet, at the same time, Ind. Code § 35-38-5-5 permits a convicted person to limit access to any history of arrest and conviction by filing a request with the police department, if more than fifteen years have passed since completing the sentence for the last conviction. D is correct that it seems counter-intuitive to provide a form of relief to convicted persons when that relief is not available to persons who have not been convicted. "[W]e too wonder how such disparate treatment could be related rationally to the characteristics that distinguish persons with and without convictions." However, if on the day that D's charge was dropped another person was convicted of class C felony child molesting and served the minimum sentence of two years, that person could not obtain relief under Ind. Code § 35-38-5-5 until October of 2022, assuming that person had no subsequent convictions. Thus, it is inconceivable that such a person could obtain relief unavailable to D on the same day D's charge was dropped. Held, judgment affirmed.

J. CONSTITUTIONAL LAW

J.2. Equal protection (14th Amend; IndConst Art 1, 23)

J.2.b. Non-suspect classification

TITLE: Hawkins v. State
INDEX NO.: J.2.b.
CITE: 08-28-12, 973 N.E.2d 619 (Ind. Ct. App. 2012)
SUBJECT: Equal protection/privileges challenge to denial of education credit rejected
HOLDING: Denial of D's request for education credit time based on 2011 amendment of Ind. Code 21-12-3-13, which eliminated funding for post-secondary education for inmates convicted of felonies, did not deny equal protection of laws. Amendment applied prospectively rather than retroactively.

D argued that inmates with only one semester remaining in academic programs were allowed to complete their classes but D was not because he had completed only one half of credits for associate's degree. The distinction is rationally related to legitimate purpose of "encouraging inmate rehabilitation despite budgetary challenges." See Bennett v. State, 801 N.E.2d 170, 175 (Ind. Ct. App. 2003); Fancher v. State, 918 N.E.2d 16, 20 (Ind. Ct. App. 2009).

The 2011 amendment likewise did not violate D's right to equal privileges under Ind. Const. Art I, § 23. The distinction between D and inmates allowed to complete course work was reasonably related to inherit characteristics that distinguish the two groups, and the preferential treatment was uniformly applicable and equally available to all similarly situated persons. See State v. Price, 724 N.E.2d 670, 675 (Ind. Ct. App. 2000). The distinction was related to the inherent characteristic of the different amount of work different groups of inmates needed to complete their degrees. Further, the preferential treatment was available to all inmates who needed only one more class to complete their degrees. Held, judgment affirmed

TITLE: Mueller/Evans v. State
INDEX NO.: J.2.b.
CITE: (2nd Dist., 11-16-05), Ind. App., 837 N.E.2d 198
SUBJECT: Denial of indigents to pretrial diversion unconstitutional
HOLDING: Requiring payment of a fee as an absolute condition of participating in a pretrial diversion program discriminates against indigent persons in violation of Fourteenth Amendment. Prosecutor had policy of providing diversion program with payment of $150 user fee & $80 class fee. The class fee would sometimes be waived, but never the user fee. Ind. Code 33-39-1-8 makes payment of fees a condition of diversion at a prosecutor's discretion. D conceded the statute was constitutional on its face, but challenged the application of the statute by the prosecutor. While a prosecutor has broad discretion in the administration of a pretrial diversion program, these decisions cannot violate the constitution. Bordenkircher v. Hayes, 434 U.S. 357 (1978). Here, nothing in record suggested Ds were excluded from the program, except for their asserted inability to pay the fees. Indigency alone does not place one in a suspect classification for Fourteenth Amendment review & thus rational basis analysis is applicable to the present case. Relying on language from Griffin v. Illinois, 351 U.S. 12 (1956) & Art. I, ' 12 of the Indiana Constitution, Ct. found that denial from participation in program based on Ds' inability to pay the $230 in fees violated their rights under the federal constitution. (Decision also provided lengthy review of cases finding & not finding constitutional violations for failure to pay fines or fees).

Cts. frequently make indigency determinations & it should be no great burden for a Ct. to make such indigency determinations in pretrial diversion cases. A finding of indigency with respect to Ct.-appointed counsel may not necessarily be dispositive of whether a D can afford to pay a fine. If found unable to pay, a D must be offered an alternative to full payment of the fee in the form of a partial waiver, reasonable payment schedule or a non-financial requirement such as community service. Held, judgment reversed & remanded for indigency hearing.

TITLE: State v. Alcorn
INDEX NO.: J.2.b.
CITE: (8/12/94), Ind., 638 N.E.2d 1242
SUBJECT: Equal protection – non-suspect classification; rational basis
HOLDING: Ct. will apply rational basis analysis to equal protection claim except where classification is suspect or involves fundamental rights. Here, applying rational basis analysis, Ct. held that savings clause providing that amended death penalty statute only applies to murders committed after amendment's effective date did not violate equal protection clause. Amended statute allows Tr. Ct. to impose sentence of life imprisonment without parole as alternative sentence to death and requires Tr. Ct. in death penalty case to instruct jury concerning range of statutory penalties.

D argued that since he has fundamental interest in life, statute's classification of murders must further compelling state interest. Ct. held that interest that D has in life is curtailed by procedures laid out in death penalty statute, and that there is no suspect class affected by saving clause. Held, granting of motion for jury instruction that it could recommend sentence of life imprisonment without parole as alternative sentence to death pursuant to amended death penalty statute reversed; DeBruler, J., dissenting.

TITLE: United States v. Trimble
INDEX NO.: J.2.b.
CITE: 487 F.3d 752 (9th Cir. 2007)
SUBJECT: Equal protection - additional fee for some, but not similar, traffic offenses
HOLDING: Ninth Circuit Court of Appeals held that tacking a processing fee onto the sentence of a person convicted of committing several traffic offenses but not onto the sentences of others convicted of similar infractions during the same period violates the Constitution's equal protection guarantee. In addition to the fines associated with the offenses, Tr. Ct. assessed D a $25 processing fee. She protested the fee, noting that several other offenders in the courtroom, who had been charged with similar offenses committed at the same time, were not assessed the fee. Court explained that the discrepancy arose because law enforcement officers were using two different form books for writing citations. The new forms included a notation concerning the fee, while the old ones did not. Regardless of the reason, Court said, treating similarly situated Ds differently in this instance violated the equal protection clause - proving, in the Court's words, "that our Constitutional principles protect against monetary injuries large and small." Court rejected government's justifications for treating D differently, saying it is "irrelevant" that the fee imposed on some offenders raises revenue. If offsetting administrative expenses justified charging some offenders the fee, Court asked, would it not be true that charging all similarly situated Ds the same fee would raise more money? Court concluded that there was no rational, non-arbitrary reason for distinguishing between these petty offenders. Concurrence was entered saying majority opinion exceeded grounds necessary to decide the appeal.

[Ed. **Note:** Although nature and facts of challenge would be significantly different than above case, defenders may want to consider equal protection implications in relation to how Indiana by statute treats motorists not wearing a seatbelt differently than that of other motorists stopped for minor traffic violations in relation to what police can do after stop. Compare Baldwin v. Reagan, 715 N.E.2d 332 (Ind. 1999) (interpreting Ind. Code 9-19-10-3 as restricting police officers from asking for consent after they had pulled someone over for failure to wear a seatbelt) with Whren v. United States, 517 U.S. 806 (1996), Mitchell v. State, 745 N.E.2d 775 (Ind. 2001).]

J. CONSTITUTIONAL LAW

J.2. Equal protection (14th Amend; IndConst Art 1, 23)

J.2.c. Fundamental rights

TITLE: Walker v. State
INDEX NO.: J.2.c.
CITE: (1st Dist. 9/26/83), Ind. App., 454 N.E.2d 425
SUBJECT: Equal protection - fundamental rights; harsher sentence after jury trial
HOLDING: Evidence presented by D does not conclusively prove that he received a harsher sentence because he exercised his right to a jury trial, thus sentence is not manifestly unreasonable. Here, D was convicted by a jury of (first offense) DUI. He was fined $500, ordered to attend an alcohol education program & his license was suspended for 6 months. Affidavit in MCE compared D's sentence to last 29 DUI cases on county court docket & concluded his fine was 10 times greater than non-jury cases with similar facts. Grant of jury trial for serious offenses is 6th Amend/fundamental right (Capps 377 N.E.2d 1338); infringement must be struck down (Johnson v. Duckworth (CA7 1981), 650 F.2d 122). See Bordenkircher v. Hayes (1978), 434 U.S. 357, 98 S. Ct. 663, 54 L.Ed.2d 604 (punishing D for exercising constitutional right violates due process); Commonwealth v. Bethea (PA 1977), 379 A.2d 102 (constitutionally impermissible to impose more severe sentence because D chose to stand trial rather than plead guilty); In re Lewallen (CA 1979), 590 P.2d 383 (court may not impose sentence that conflicts with D's exercise of constitutional right to jury trial). One who agrees to plea bargain may receive reduced sentence. Holmes, 398 N.E.2d 1279; Flowers, 421 N.E.2d 632. D's statistics do not indicate whether cases were bench trials or plea bargains. Held, conviction affirmed.

J. CONSTITUTIONAL LAW

J.3. Freedom of speech (1st Amend; IndConst Art 1, 9)

TITLE: Butterworth v. Smith
INDEX NO.: J.3.
CITE: 494 U.S. 624, 110 S. Ct. 1376, 108 L.Ed.2d 572 (1990)
SUBJECT: Grand Jury (GJ) secrecy
HOLDING: Statute criminalizing disclosure of GJ witness' own testimony even after GJ discharged violates 1st Amend. Here, reporter sought declaratory relief where he sought to write news story about his testimony & experiences with GJ investigating misconduct by police agency & prosecutor's office. GJ secrecy important but does not dissolve all constitutional protections. Speech relating to governmental misconduct lies at core of 1st Amend. protections. Once investigation ends, risk that targeted individual will flee is diminished by exoneration/arrest, concern that targeted individual will attempt to influence GJs nonexistent; risk that witnesses will be deterred from presenting testimony not advanced by statute here. Interest in preventing subornation of perjury by GJ witnesses who will testify at trial adequately protected by perjury statutes. Additionally, most jurisdictions provide discovery of state's witness list anyway. State's interest in seeing that persons who are investigated but exonerated are free from public ridicule is substantial. However, absent exceptional circumstances, reputational interests alone cannot justify proscription of truthful speech. Effect on individual is dramatic: before he is called to testify, he has information of public concern which he is free to disperse, but after testimony statute imposes indefinite ban on speech. Potential for abuse "is apparent." Held, indefinite ban on discussion of GJ witness' own testimony violates 1st Amend. Scalia, CONCURRING.

TITLE: Cavazos v. State
INDEX NO.: J.3.
CITE: (2d Dist. 10/31/83), Ind. App., 455 N.E.2d 618
SUBJECT: Disorderly conduct (DOC) - unreasonable noise
HOLDING: There was insufficient evidence to support D's conviction for DOC where her words did not constitute fighting words, were not obscene, did not invade substantial privacy interests, were not unreasonably loud & did not incite immediate lawless action. Here, officer arrested D's brother in tavern for DOC. D told officer he had grudge against her brother & had no right to arrest him, called officer an ass-hole & continued to debate her brother's arrest after officer told her to be quiet. Application of DOC statute (Ind. Code 35-45-1-3(2)) to speech must be limited to unprotected classes of speech, e.g., obscenity, fighting words, public nuisance speech & incitement to imminent lawlessness. Hess v. IN (1973), 414 U.S. 105, 94 S. Ct. 326, 38 L.Ed.2d 303. Court assumes but does not decide "unreasonable noise" criminalizes foregoing categories of constitutionally unprotected speech. To be obscene, speech must be erotic/appeal to prurient interest in sex. Cohen v. CA (1971), 403 U.S. 15, 91 S. Ct. 1780, 29 L.Ed.2d 284; Roth v. US (1957), 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498. Fighting words are personally abusive epithets which are inherently likely to provoke violent action. Cohen; Chaplinsky v. NH (1942), 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031; Stults, App., 336 N.E.2d 669. Public nuisance speech invades substantial privacy interests in an essentially intolerable manner. Cohen. In order to incite immediate lawless action, speech must be directed to that goal. Hess ("we'll take the fucking street later"); Brandenburg v. OH (1969), 395 U.S. 444, 89 S. Ct. 1827, 23 L.Ed.2d 430; State v. New, 421 N.E.2d 626. Held, conviction reversed. DISSENT by Buchanan agrees with state - speech constituted fighting words.

TITLE: Doe v. Gonzales
INDEX NO.: J.3.
CITE: 500 F.Supp.2d 379 (S.D.N.Y. 2007)
SUBJECT: National security letters for Internet violate First Amendment
HOLDING: U.S. District Court for the Southern District of New York held a federal law authorizing the issuance of "national security letters" to Internet service providers - typically accompanied by a gag order - seeking information about their customers' Internet use violates the ISPs' First Amendment rights. Court noted that the statute creating the NSL process, which gives federal prosecutors the discretion to determine whether a gag order should accompany the surveillance request, is a form of speech licensing prohibited by the U.S. Supreme Court in Freedman v. Maryland, 380 U.S. 51 (1965). Court held that the process by which ISPs can seek judicial review of an NSL gag order violates the constitutional separation-of-powers doctrine because it restricts the circumstances a court may consider when deciding whether a gag order should be lifted in any particular case.

A national security letter authorizes the government to obtain "subscriber information" from an ISP. NSLs cover mundane information such as name and address of the subscriber, as well as other, more revealing information such as the "to," "from," and "time" fields of email messages sent and received, the names of Web sites visited, and the contents of queries sent to search engines. Same court had previously struck down an earlier version of the NSL statute (18 U.S.C. § 2709(c)) in Doe v. Ashcroft, 334 F.Supp.2d 471 (S.D.N.Y. 2004). Court found that the statute's permanent ban on disclosing the existence of a national security letter - in all cases - impaired the ability of the investigation's target to seek judicial review of the surveillance request, in violation of the Fourth Amendment, and that the ban was an unjustified prior restraint and content-based restriction on protected speech, in violation of the First Amendment. Congress subsequently amended the statute to require the government to certify, on a case-by-case basis, the need for nondisclosure. Congress also added a judicial review provision, 18 U.S.C. § 3511(b), in an attempt to address the constitutional problems identified by the Court. Second Circuit then directed Court to look again at the NSL process in light of the changes.

Even in its revised form, Court held that statute "remains a very broad and substantially onerous secrecy provision," agreeing with ACLU that the NSL process still contained insufficient procedural safeguards to pass First Amendment muster. NSL statute still gives the government too much discretion to decide whether, and for how long, to prevent an ISP from disclosing the existence of an NSL.

See also*:* Warshak v. United States, 490 F.3d 455 (6th Cir. 2007) (holding that email users have a reasonable expectation of privacy in the contents of email stored with or sent through a commercial Internet Service Provider. Court approved an injunction that nullified a provision of the 1986 Stored Communications Act that authorized courts to issue email disclosure orders to ISPs with delayed notice to users. Fourth Amendment protects email messages the same way it protects telephone conversations, and the reasonableness of email users' privacy expectations is not undermined by the fact that ISPs are capable of monitoring the contents of email.)

TITLE: Ellis v. State
INDEX NO.: J.3.
CITE: (9/1/2022), Ind. Ct. App., 194 N.E.3d 1205
SUBJECT: Conduct charged as stalking was not constitutionally protected free speech
HOLDING: Ellis was arrested in 2008 for causing a disturbance during a Sunday church service, and Officer Terry Stoffel was called in to transfer Ellis to jail. Stoffel later became Huntington County sheriff. During his term as sheriff, Ellis drove by in her car and yelled obscenities at Stoffel and flipped him off. After Stoffel left the Sheriff's department and became a teacher at a local school, Ellis drove past the school daily during the lunch hour to yell and scream obscenities at Stoffel. Ellis also appeared and verbally abused Stoffel when he was working on a local property renovation. When Stoffel was elected as a Huntington County commissioner, Ellis sent hateful content direct toward Stoffel to a local detective, drove up next to his car at a shopping center parking lot to make gun hand gestures toward him, and followed him to the courthouse while he was inside with a sign in the back of her car saying "F— Terry Stoffel." Ellis was charged with Level 6 felony stalking and one count of Level 6 felony intimidation. Ellis said she was angry that Stoffel transported her to jail rather than a doctor's office in 2008. She also said she was also mad that Stoffel did not take seriously a complaint she made to him in the 1990s about a tanning salon employee rubbing a dirty towel in her face. The trial court denied Ellis's motion for change of venue and instead brought in more jurors than normal because of Stoffel's public status. The trial court also denied Ellis's preliminary instruction regarding the State's duty to prove Ellis was not merely engaged in activity protected by the First Amendment. A jury convicted Ellis on both charges. The Court of Appeals held that denying Ellis's motion for change of venue was not an abuse of discretion because she accepted the jury without exhausting her peremptory challenges. The Court also noted that every juror who admitted to knowing Stoffel was removed from the panel. The Court found no error in the refusal to give the tendered preliminary instruction on the First Amendment, finding it was incoherent and would have confused jurors. The Court rejected Ellis's claim that her conduct was protected under the First Amendment, finding: Ellis's behavior went far beyond distasteful criticism of a public official. She engaged in a targeted campaign of harassment and threats against Stoffel. While, in isolation, a post threatening to smack someone in the face with a can of Twisted Tea or mimicking a gun with one's hand may not cause a reasonable person to fear for the person's safety, when that behavior is combined with frequent, animated yelling, cursing, and honking directed at the victim at locations throughout town and combined with public insults targeting the victim by name, it constitutes an unprotected true threat. The conduct was not protected under Article 1, Section 9 of the Indiana Constitution because it was not unambiguously political speech. Held: convictions affirmed.

TITLE: Erhardt v. State
INDEX NO.: J.3.
CITE: (9/20/84), Ind., 468 N.E.2d 224
SUBJECT: Freedom of speech - nude dancing
HOLDING: Evidence was sufficient to sustain D's conviction for public indecency where D danced nude with nipples covered by transparent tape & buttocks exposed. Court of appeals erred in reversing conviction (on 1st Amend grounds); opinion at 463 N.E.2d 1121 ordered vacated. Here, Ind. S. Ct. finds conduct is squarely within prohibitions of Ind. Code 35-45-4-1. Legislature, not court of appeals, defines what is lewd. Held, no error. Separate DISSENTS by Hunter & DeBruler argue IN statute is unconstitutional on its face, *citing* Schad v. Borough of Mount Ephraim (1981), 452 U.S. 61, 101 S. Ct. 2176, 68 L.Ed.2d 671 (nude dancing upon stage of theatre, if not obscene, is protected against state restriction by 1st Amend).

TITLE: Gilles v. State
INDEX NO.: J.3.
CITE: (4th Dist. 12/6/88), Ind. App., 531 N.E.2d 220
SUBJECT: Disorderly conduct - fighting words
HOLDING: D's conviction for disorderly conduct was supported by evidence & did not violate his constitutional right to free speech. D was arrested while "preaching" to crowd at public festival where band was playing & alcohol was served. D stood on public sidewalk outside entrance could be heard by 200 to 300 of approximately 1,000 people present. D addressed crowd as "fuckers," "sinners," "whores," "queers," "drunkards," "AIDS people," & "scum of the earth." D argues that his "noise" was not unreasonable under circumstances, & that it was constitutionally protected speech. There are 4 types of speech which are not constitutionally protected: (1) obscenity; (2) nuisance speech which interferes with privacy of home or similar competing interest; (3) speech advocating immediate violence or similar lawless action which is likely to follow; & (4) fighting words, personally abusive language likely to provoke violent reaction toward speaker. Mesarosh, App., 459 N.E.2d 426. (card at K.7.a). Thrust of fighting words exception is whether, under objective standard, words were stated as personal insult to hearer in language inherently likely to provoke violent reaction. In terms generally offensive in our culture, D placed listeners in categories defined by sexual activity, sexual orientation, & sexually transmitted disease. This constituted fighting words. Because they were unprotected, they were unreasonable, & D does not deny that he acted intentionally & refused to stop when asked twice to do so. Held, affirmed. Miller, J., DISSENTS.

TITLE: Holder v. Humanitarian Law Project

INDEX NO.: J.3.

CITE: (06-21-10), U.S., 130 S. Ct. 2705

SUBJECT: Ban on material support for terrorist groups survives vagueness, free speech challenges

HOLDING: Neither the First Amendment nor any other provision of the Constitution is violated by a statute that permits the government to block speech and other forms of advocacy supporting a foreign organization that has been officially labeled as terrorist, even though the aim is to support the group's peaceful or humanitarian actions. However, such activity may be banned only if it is coordinated with or controlled by the overseas terrorist group. The case involved terrorist elements in Turkey and Sri Lanka and was focused on the meaning of the term "material support" to a listed foreign terrorist organization. It is the first case in which the Court has addressed aspects of the "war on terror" that are not related to capture and detention of terrorism suspects. Court emphasized the narrow application of the law it does not interfere with the freedom of individuals to "say anything they wish on any topic." It is only when the activity is coordinated with or controlled by a foreign terrorist group that it becomes unlawful. The law further provides as an element of the crime that the person must know the foreign group is on the government's terrorist list. Congress and the Executive Branch are in better positions to determine what needs to be done to protect the U.S. from terrorists. Court noted that a terrorist group may just pretend to be receptive to peaceful means education while biding its time for a violent strike against the U.S. Held, Ninth Circuit Court of Appeals' opinion at 552 F.3d 916 affirmed in part, reversed in part, and remanded. Breyer, J., joined by Ginsburg and Sotomayor, JJ., DISSENTING, pointed out that there is "no practical way to organize classes for a group (say, wishing to learn about human rights law) without 'coordination.'' Also, having accepted the government's argument that supporting the peaceful aims of a terrorist group would help legitimize the group and its violent acts as well, there is "no natural stopping place."

TITLE: Houston v. Hill

INDEX NO.: J.3.

CITE: 482 US. 451, 107 S. Ct. 2502, 96 L.Ed.2d 398 (1987)

SUBJECT: Freedom of speech - overbreadth

HOLDING: Statute that is substantially overbroad may be invalidated on its face; statute not invalid on its face merely because it is possible to conceive of single impermissible application. [Citations omitted.] Statutes which make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application. Here, ordinance proscribed "interrupt[ing] any policeman in the execution of his duty." Ordinance criminalizes speech. 1st Amend. protects significant amount of verbal criticism & challenge directed at police officers. Court finds ordinance criminalizes substantial amount of constitutionally protected speech & accords police unconstitutional discretion in enforcement. Held, ordinance is facially invalid/substantially overbroad. Further, Court refuses to apply limiting construction that would eliminate overbreadth because ordinance's language is plain & unambiguous. "[I]t is doubtful that even `a remarkable job of plastic surgery upon the face of the ordinance' could save it." Smith v. Goguen (1974), 415 U.S. 566, 578, 94 S. Ct. 1242, 39 L.Ed.2d 605. Blackmun, CONCURS; Scalia, CONCURS IN JUDGMENT; Rehnquist, DISSENTS.

TITLE: J.D. v. State

INDEX NO.: J.3.

CITE: (01-05-07), Ind., 859 N.E.2d 341

SUBJECT: Disorderly conduct- loud over-talking of officer not protected-speech: no Miranda required

HOLDING: Because J.D.'s loud yelling obstructed & interfered with the officer's attempts to speak & function as a law enforcement officer, J.D.'s speech amounted to an abuse of the right to free speech & thus subjected her to criminal liability. "No law shall be passed, restraining the free interchange of thought & 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." Ind. Const. art. I, § 9. Here, J.D. lived in the Marion County Guardian's Home, in which a police officer was assigned to maintain order & enforce rules. The officer brought J.D. into her office & attempted to discuss a situation with her, but J.D. continued to loudly talk over the officer. Distinguishing Price v. State, 622 N.E.2d 954 (Ind. 1993), in which the D's profanity & yelling at the police did not interfere with the police, the Ct. found that J.D.'s loud talking prevented the officer from doing her job, & thus, constituted an abuse of J.D.'s freedom of speech. Because J.D.'s loud over-talking of the officer was not constitutionally protected speech, there was sufficient evidence of disorderly conduct.

Further, J.D. was not given Miranda warnings before the officer took her in her office. The purpose of the issuance of Miranda warnings is to secure the constitutional privilege against self-incrimination by providing procedural safeguards to be employed during questioning initiated by officers focusing on a person suspected of wrong doing. Because J.D.'s statements made during the meeting were not used to prove J.D.'s *prior* wrongful conduct & they were voluntarily made, they did not violate Miranda. Held, transfer granted, judgment of trial Ct. affirmed, & opinion at, 841 N.E.2d 204 (Ind. Ct. App. 2006), reversed.

RELATED CASES: Dallaly, 916 N.E.2d 945 (Ind. Ct. App. 2009) (D's loud yelling obstructed and interfered with the officer's ability to function, and it necessitated the officer calling for backup; D's protests also created a traffic hazard; thus, although the D's speech was political, the State proved he abused his right of speech and conviction for disorderly conduct was constitutional); Anderson, App., 881 N.E.2d 86 (D's speech directed at tanning salon's decision to remove him from premises and his right to remain on premises was not political because it was not directed at police); Blackman, App., 868 N.E.2d 579 (Kirsch, J., concurring, believes that Indiana's independent constitutional jurisprudence re: freedom of expression set forth in Price, 622 N.E.2d 957, was tacitly overruled by J.D.; see full review at K.7.a)

TITLE: Mahoney Area School Dist.

INDEX NO.: J.3.

CITE: (06/23/2021), Ind., 169 N.E.3d 397

SUBJECT: First Amendment limits but does not entirely prohibit regulation of off-campus student speech by public school officials

HOLDING: Student used vulgar language when commenting on social media about cheerleading team while outside of school and outside of school hours. *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503 (1969), held that the school could not prohibit a peaceful demonstration consisting of pure speech on school property during the school day. In doing so, the Court explained there was no evidence that the protest would "substantially interfere with the work of the school or impinge upon the rights of other students." However, "[C]onduct by [a] student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the right of others is . . . not immunized by the constitutional guarantee of freedom of speech." The special characteristics that give schools license to regulate student speech do not always disappear when that speech takes place off campus. There would be several exceptions or "carve-outs" to any rule limiting the regulation of off-campus student speech by schools, so the Court refused to articulate a "First Amendment rule stating just what counts as 'off campus' speech and whether or how ordinary First Amendment standards must give way[.]" However, the Court articulated three features which diminish the unique educational characteristics that might call for First Amendment leeway: (1) rarely will the school be acting *in loco parentis* when a student is off-campus; (2) because off-campus speech regulation calls into question the student's speech throughout the entire day, courts should be more skeptical of the schools attempt to regulate; and (3) schools, "as nurseries of democracy," should have an interest in protecting unpopular expressions off campus. Here, B. L.'s words were vulgar, but not obscene or fighting words, and would have received protection had she been an adult. Moreover, there was no evidence of substantial disruption of a school activity or threatened harm to another student's rights that would justify the school's action. Therefore, the alleged disturbance did not meet *Tinker's* demanding standard.

TITLE: McBride v. State
INDEX NO.: J.3.
CITE: (2/13/2018), 94 N.E.3d 703 (Ind. Ct. App. 2018)
SUBJECT: Trespass conviction did not violate right to free speech
HOLDING: D's conviction for class A misdemeanor criminal trespass did not violate his right to speech under Article 1, § 9 of the Indiana Constitution because his statements were not solely political and because it was reasonable for the State to conclude D was abusing his right to speech.

D went to the prosecutor's office to demand dismissal of his old traffic tickets. Several times, Chief Deputy Prosecutor Emily Clarke told D he would need to file something in court. D repeatedly rejected this advice and insisted again and again that the prosecutor dismiss the tickets. Clarke told D to leave because he was disrupting the office; he refused. Several officers eventually escorted D out of the office. Four days later, he returned to drop off some papers. D "went off," again insisting that the prosecutor dismiss the tickets. Clarke gave a trespass warning to D. She asked him to leave at least 15 times; he refused, stating that the office was a public office, so he had a right to be there. Once D refused an officer's request to leave, he was arrested.

First, the conviction did not restrict D's expressive activity because D's statements were, at least in part, concerning his own behavior and thus were not solely political. See Anderson v. State, 881 N.E.2d 86, 90 (Ind. Ct. App. 2008); Blackman v. State, 868 N.E.2d 579, 586 (Ind. Ct. App. 2007) (D's comments were of a "dual nature" and were thus ambiguous because one comment focused on her right to not leave the scene), trans. denied. Second, the State could have reasonably assumed D's speech was an abuse of his rights under Article 1, § 9 because they disrupted office operations, and thus were a "threat to peace, safety, and well-being." See Whittington v. State, 669 N.E.2d 1363, 1371 (Ind. 1996). Held, judgment affirmed.

TITLE: Medellin v. Texas
INDEX NO.: J.3.
CITE: 552 U.S. 491, 128 S. Ct. 1346 (2008)
SUBJECT: State courts not bound by ruling of International Court of Justice
HOLDING: Court held that U.S. states are not bound by a ruling of the International Court of Justice in *Case Concerning Avena and Other Mexican Nationals (*Mexico v. United States*)*, 2004 Ind. Code J. 12 (March 31), that 51 Mexican nationals sentenced to death in state court are entitled to review and reconsideration of their convictions and sentences on the basis of their claims that their consular-notification rights under the Vienna Convention were violated. Court also held that President Bush exceeded his authority in issuing a memorandum directing state courts to give effect to the ICJ decision without regard to their rules regarding procedural default. Case concerned the state habeas corpus petition of one of the Mexican nationals whose rights under the Vienna Convention were adjudicated in Avena. The ICJ held in Avena that the Vienna Convention provides arrested foreign nationals with individual rights, ordering state courts in the United States to review these convictions to determine whether there was any prejudice arising from the treaty violations and specified that regardless of the review process the states chose to employ the usual rules of procedural default were not to apply. Court held that the Avena decision is not directly enforceable as domestic law in a state court in the United States and this is consistent with the enforcement structure established by Article 94(1) of the U.N. Charter, which provides that "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party." Majority relied on its decision in Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) where it noted "nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts." Majority further distinguished between "self-executing" treaties that have automatic domestic effect as federal law and non-self-executing treaties that have domestic effect only insofar as Congress has enacted implementing legislation.

Majority also held that the president's memorandum did not alter its conclusion, noting "the President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress." Stevens, J., filed a concurrence; Breyer, J., joined by Souter, J. and Ginsburg, J., filed a lengthy and detailed dissent, finding the court's jurisprudence in this area makes clear that the relevant treaties are seldom executing and, therefore the judgment of the ICJ is binding on domestic courts. The implementation of that binding legal obligation is left to domestic law.

TITLE: Mesarosh v. State.
INDEX NO.: J.3.
CITE: (2/9/84), Ind. App., 459 N.E.2d 426
SUBJECT: Freedom of speech -- obscene language; fighting words
HOLDING: Freedom of speech is one of fundamental liberties protected from impairment by States. Gitlow, 268 U.S. 652. Similar protection is provided by Art. I, Section 9 of Indiana Constitution. U.S Supreme Ct. has held several categories of "speech" fall outside ambit of its protection. These categories include obscenity; speech in circumstances where its time, place or manner of delivery unduly interfere with privacy of home or similar competing interest, sometimes called "nuisance" speech; speech advocating immediate violence or similar lawless action which is likely to follow; and "fighting words," personally abusive language likely to provoke violent reaction by listeners toward speaker. Thrust of "fighting words" doctrine is whether, under objective standard, words were stated as personal insult to hearer in language inherently likely to provoke violent reaction. Here, D directed obscene language at police officers after his companion was arrested. Examples of his obscene language were: "I'll get you mother f....rs. . . We're going to get your a.." Ct. applied "fighting words" doctrine and held that this obscene language was of sufficient intensity to be likely to provoke violent reaction and, thus, fell within "fighting words" exception. Held, conviction affirmed; Young, J., concurring.

TITLE: Morse v. Frederick

INDEX NO.: J.3.

CITE: 551 U.S. 393, 127 S. Ct. 2618, 168 L.Ed.2d 290 (2007)

SUBJECT: Disruption not necessary to limit speech at school

HOLDING: Court held that because schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use, the school officials in this case did not violate the First Amendment by confiscating a pro-drug banner that said "Bong HiTS 4 JESUS" and suspending Petitioner for displaying the banner during a school outing - the Olympic Torch Relay. Majority rejected Petitioner's argument that this was not a school speech case as the event occurred during normal school hours and was sanctioned by the high-school principal. A principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. Majority rejected Petitioner's argument that the student expression could not be suppressed because school officials could not reasonably conclude that it would "materially and substantially disrupt the work and discipline of the school." Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969). Majority pointed to Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) where the suspension of a student who delivered a high school assembly speech employing "an elaborate, graphic, and explicit sexual metaphor" was upheld. Fraser demonstrates that (1) the constitutional rights of students are not automatically coextensive with the rights of adults in other settings and (2) Tinker's mode of analysis is not absolute, since the Fraser Court did not conduct the "substantial disruption" analysis. Breyer, J., filed an opinion concurring in the judgment in part and dissenting in part; Stevens, J., filed a dissenting opinion, in which Souter and Ginsburg, JJ., joined, in which he had no problem with a principal's action to remove a 14-foot banner when his student body was being reviewed by a potential national audience, no matter the message; noted that marijuana use (in personal amounts) has been found protected by the Alaska Constitution and that medicinal marijuana use was a hot political topic in Alaska at the time; questioned what Court would do if Petitioner flew a "WINE SiPS 4 JESUS" banner, which could be either a religious message or pro-alcohol message; and questioned "whether the fear of disapproval by those in the majority is silencing opponents of the war on drugs."

TITLE: Packingham v. North Carolina
INDEX NO.: J.3.
CITE: (6/19/2017), 137 S. Ct. 1730 (2017)
SUBJECT: Law restricting access of sex offenders to social media violates 1st amendment

HOLDING: North Carolina statute making it a felony for a registered sex offender to access commercial social networking websites that allow children to maintain an account or webpage, such as Facebook and Twitter, impermissibly restricts free speech and thus violates the First Amendment.

Defendant pled guilty to "taking indecent liberties with a child," which required him to register as a sex offender. Several years later, a state court dismissed a traffic ticket against Defendant. In response, he posted the following on Facebook: "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent. . . . . Praise be to GOD, WOW! Thanks JESUS!" Defendant was convicted of violating the statute and was given a suspended sentence.

Assuming the statute is content neutral and thus subject to intermediate scrutiny, it can stand only if it is narrowly tailored to serve a significant governmental interest. McCullen v. Coakley, 134 S. Ct. 2518, 2534-35 (2014). The law must not burden substantially more speech than is necessary to further the government's legitimate interests. Id. Clearly, like other technologies, the Internet may be exploited to commit crimes, including sex-related crimes against children, and the State may restrict Internet use to protect children, but, in doing so, it cannot override, in every context, First Amendment rights. That, though, is what the North Carolina statute does. It is so broad that it might even prohibit access to websites such as Amazon.com, Washingtonpost.com, and Webmd.com. Thus, it is not narrowly tailored to serve its legitimate interests.

Indeed, the statute bars access to what for many are the principal sources for current events, ads for employment, and "otherwise exploring the vast realms of human thought and knowledge." These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. But by foreclosing access to social media for sex offenders, North Carolina has gone too far; its statute prevents sex offenders from engaging in the legitimate exercise of First Amendment rights. Held, cert. granted and judgment reversed. Kennedy, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ; Alito, J., concurring, joined by Roberts, C.J., and Thomas, J. Gorsuch, J., did not participate.

TITLE: R.A.V. v. St. Paul, MN
INDEX NO.: J.3.
CITE: 505 U.S. 377, 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992)
SUBJECT: First Amendment - hate-crimes
HOLDING: Municipal ordinance that prohibits placing, on public or private property, any symbol, object, or writing "which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender," even when construed as limited to fighting words, is facially invalid under First Amendment. Ds were charged under above-described municipal ordinance after they burned cross on lawn of black family. Tr. Ct. granted motion to dismiss, but state Supreme Court reversed, construing ordinance as limited to fighting words. Court here is bound by state court's construction of ordinance. However, while fighting words, like obscenity & defamation, may be constitutionally regulated, they are not wholly outside protection of First Amendment. They are proscribable because their content embodies particularly intolerable & socially unnecessary mode of expressing whatever idea speaker wishes to convey. Ordinance here impermissibly discriminates on basis of content by proscribing only fighting words that communicate messages of racial, gender, or religious intolerance. Because content-neutral alternatives exist, city's compelling interest in protecting hate crimes victims does not justify ordinance. First-Amendment prohibition against content-based regulation is not absolute, however, & Majority reviews ordinance in question against two recognized exceptions: (1) content discrimination based on very reason entire class of speech at issue is proscribable (e.g., proscribing fighting words that communicate ideas in threatening manner); & (2) content discrimination aimed only at secondary effects of expression. [Citations omitted]. Ordinance here falls within neither exception, & majority finds that it violates First Amendment.

TITLE: Shuger v. State
INDEX NO.: J.3.
CITE: (3rd Dist.; 01-17-07), Ind. App., 859 N.E.2d 1226
SUBJECT: Freedom of speech- not violated by regulations in Hunter Harassment Act
HOLDING: Indiana's Hunter Harassment Act does not violate freedom of speech. In order to determine whether a statute regulating speech violates the First Amendment, the Ct. must determine whether the statute is a content-neutral regulation of speech, & if so, whether the statute is a valid time, place, & manner regulation that is "narrowly tailored" to serve a significant interest. Here, the Hunter Harassment Act, Ind. Code 14-22-37-2(b), makes it a Class C misdemeanor for a person to knowingly or intentionally: (1) disturb a game animal; or (2) engage in an activity or place an object or substance that will tend to disturb or otherwise affect the behavior of a game animal; with intent to prevent or hinder the legal taking. Although the Hunter Harassment Act regulates conduct, First Amendment scrutiny does apply because regulating the conduct has the incidental effect of burdening the expression of a particular political opinion. The Act is a content-neutral regulation because it was not adopted because of a disagreement with the message it conveys. The protestor's speech is limited only when it interferes with a lawful hunt on designated lands in order to maintain safe hunts & help control overpopulation of deer. Although the statute may not be the least restrictive means for the State to pursue its interests, the statute is narrowly tailored because it leaves open numerous possibilities for protest, including attending town hall meetings & protesting in other locations besides hunting grounds while a lawful hunt is underway. Further, the Act is not overbroad or vague, & there was sufficient evidence to support the convictions. Held, judgment affirmed; Kirsch, J., dissenting on basis that there was insufficient evidence that the behavior of the deer were disturbed.

TITLE: Snyder v. Phelps
INDEX NO.: J.3.
CITE: (03-02-11), 131 S. Ct. 1207 (U.S. 2011)
SUBJECT: First Amendment shields church's protests at military funerals from tort liability
HOLDING: The Free Speech Clause of the First Amendment protects those who stage a peaceful protest on a matter of public concern near the funeral of a military service member from tort liability. A jury had awarded a deceased Marine's father more than $10 million in compensatory and punitive damages for the protesters' "outrageous" conduct. However, protester's signs condemning U.S. political and moral conduct, homosexuality in the military, and scandals involving Roman Catholic clergy involved matters of public concern. The father's injury and claims arose from the content and viewpoint of the protester's speech. The picketing took place on public land next to a public street and thus was in a traditional forum enjoying "special" First Amendment protection. The picketing was out of sight of those at the funeral and did not disrupt the service. Moreover, church followed instructions and directions of the police. Given those facts, the jury's finding that the church was liable for intentional infliction of emotional distress, intrusion upon seclusion (a form of invasion of privacy) and civil conspiracy could not stand. The protesters, who are members of the Westboro Baptist Church of Topeka, Kan., have picketed nearly 600 funerals, prompting enactment of 43 state and federal laws restricting funeral picketing. Court noted "[t]o the extent that these laws are content neutral, they raise very different questions from the tort verdict at issue in this case," but church would have been in compliance with Maryland's law in any event. Held, Fourth Circuit Court of Appeals' opinion at 580 F.3d 206 affirmed, judgment reversed. Breyer, J., concurring, stressed that the court had "reviewed the underlying facts in detail" in refuting liability and thus had not left the states "powerless to provide private individuals with necessary protection" against the "most horrendous" invasions of personal privacy. Alito, J., dissenting, said that the church had intentionally inflicted "grave injury" by means of a "brutal attack" that, like "fighting words," should be denied First Amendment protection. "Allowing family members to have a few hours of peace without harassment [at a funeral] does not undermine public debate," he said, noting that Nat'l Archives and Records Admin. v. Favish, 541 U.S. 157 (2004), had recognized that exploiting a funeral for the purpose of attracting public attention intrudes upon families' grief.

TITLE: State v. Zidel
INDEX NO.: J.3.
CITE: 940 A.2d 255 (2008)
SUBJECT: Morphed pornography involving real children's heads protected by First Amendment
HOLDING: New Hampshire Supreme Court held a New Hampshire statute that prohibits possession of child pornography is unconstitutional as applied to a D's possession of images that were created by combining photographs of the heads and shoulders of children with photographs of the bodies of adults engaged in sexual activity. Court rejected the idea that the involvement of real children takes this type of pornographic image outside the First Amendment's protection of free speech. Court discussed New York v. Ferber, 458 U.S. 747 (1982) and Osborne v. Ohio, 495 U.S. 103 (1990), cases upholding the government's authority to regulate sexually explicit works depicting actual minors, and Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), which struck down federal statutory provisions authorizing a conviction for possessing pornographic material that "appeared" to portray a minor engaged in sexual activity and included virtual pornography as prosecuted. In present case, D, a photographer at a summer camp, possessed photos of the heads and shoulders of minor campers superimposed over photographs of adults engaged in sexual activity. Majority, based on language from Free Speech Coalition, found that when "a person merely possesses the image, no demonstrable harm results to the child whose face is depicted in the image." Majority conceded that such harm to the children depicted if the images were ever distributed. As in Free Speech Coalition, Court rejected State's argument that the conviction should stand because it prevents harm to children caused by pedophiles whose appetites for child abuse are whetted by viewing virtual child pornography. Court held that the harm to the campers from dissemination of the morphed images is, like the harm discussed in Free Speech Coaltion, "contingent upon the occurrence of another arguably unlawful act" to be committed at some indefinite future time: distribution of the images. Furthermore, Free Speech Coaltion emphasized that the holding in *Osborne* is "anchored" in a concern for the participants in the production of the child pornography.

TITLE: United States v. Alvarez
INDEX NO.: J.3.
CITE: (06-28-12), 132 S. Ct. 2357 (Sup. Ct. 2012)
SUBJECT: Stolen Valor Act violates First Amendment
HOLDING: A four-judge plurality held that the Stolen Valor Act ("the Act"), which criminalizes false statements about whether a person received an award for military service, is an unconstitutional content-based regulation on speech.

Alvarez pleaded guilty to violating the Act (18 U.S.C. §§ 704(b)(c))for his false statement at a public meeting that he held the Congressional Medal of Honor. Under his plea, Alvarez reserved the right to appeal the constitutionality of the Act.

Content-based restrictions are presumed invalid, and the Government bears the burden to show their constitutionality. Ashcroft v. American Civil Liberties Union, 542 U. S. 656, 660 (2004). Such restrictions have been allowed only for a few historic categories of speech, including incitement, obscenity, defamation, “fighting words,” child pornography and fraud. The Court has never authorized restrictions on false statements made without regard for material gain. False speech subject to restriction - such as fraud, perjury, and false statements to government officials - involve "legally cognizable harm associated with a false statement." For instance, perjury is not protected by the First Amendment not simply because the statements are false but because such statements threaten the integrity of judgments.

Further, the Act is too broad. It has not limiting principle. For instance, it would criminalize a false statement whispered in the privacy one's home.

The proper remedy for false speech is more speech, speech that counters false speech and ridicules it, which is what happened here when the falsity of Alvarez's statement was exposed through several media outlets. Cert. granted and Ninth Circuit's reversal of conviction affirmed. KENNEDY, J., joined by ROBERTS, C.J., GINSBURG and SOTOMAYOR, J.J.; BREYER, J., CONCURRING IN JUDGMENT; ALITO, J., DISSENTING, joined by SCALIA and THOMAS, J.J.

TITLE: United States v. Sales
INDEX NO.: J.3.
CITE: 476 F.3d 732 (9th Cir. 2007)
SUBJECT: Computer limitations appropriate for child porn, not counterfeiting
HOLDING: The Ninth Circuit Court of Appeals held that a district court abused its discretion under the federal supervised release statute when it imposed extremely broad restrictions on computer use upon D convicted of using computer equipment to counterfeit currency. Court noted that the sweeping restrictions on computer use courts have routinely approved in cases involving Ds' use of computers to acquire and distribute child pornography are not appropriate in this sort of case.

D was convicted of using his scanner and printer to make counterfeit cash. On appeal, he challenged conditions of his supervised release related to his computer use. One condition required him to obtain approval from his probation officer before using any computer or computer-related devices, screen names, passwords, e-mail accounts, or Internet service providers. The category of computer-related devices was broad enough to encompass cell phones and Internet appliances such as WebTV. The other release condition provided that all computers, computer-related devices, and their peripheral equipment used by D were subject to unannounced searches and seizures, as well as the installation of search and/or monitoring software and/or hardware.

Court held that the release conditions were invalid because they were not reasonably related to the nature and circumstances of D's counterfeiting offense or to his history and characteristics, as required by the supervised release statute, 18 U.S.C. § 3583. Court distinguished case from those involving offenders who were involved in downloading and distributing child pornography. Such broad computer restrictions were appropriate in those cases due to the strong link between child porn and the Internet. However, no suggestion in the record connected the the Internet and D's counterfeiting activities. As for the search and seizure provision, Court found it to be overbroad and insufficiently tailored to D's crime.

TITLE: United States v. Stevens
INDEX NO.: J.3.
CITE: (04-20-10), 130 S. Ct. 1577 (2010)
SUBJECT: Ban on videos of animal cruelty violates First Amendment
HOLDING: Title 18 U.S.C. § 48, which criminalizes the knowing creation, sale, or possession of certain "depictions of animal cruelty," is so overbroad that it violates the First Amendment on its face. The statute does not address underlying acts harmful to animals, but only portrayals of such conduct "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed" if such conduct is illegal where the depiction was created, sold, or possessed. Ordinarily, to succeed in a typical facial attack, D would have to establish "that no set of circumstances exist under which [§48] would be valid," United States v. Salerno, 481 U.S. 739 (1987), or that the statute lacks any "plainly legitimate sweep," Washington v. Glucksberg, 521 U.S. 702 (1997). But, a special facial overbreadth analysis is employed in First Amendment challenges, i.e., a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008).

Here, D, an author and small-time film producer, received a 37-month sentence for compiling and selling videotapes showing dogfights. He argued that §48 applies to common depictions of ordinary and lawful activities, and that these depictions constitute the vast majority of materials subject to the statute. Court affirmed the reversal of D's conviction, finding that the "alarming breadth" of the statute covers too much protected conduct, including "an otherwise-lawful image" of hunting or livestock slaughter if the practice depicted happened to be illegal in the jurisdiction where the depiction was sold or possessed. In striking down the law as overly broad, Court refused to carve out a new First Amendment exception for animal cruelty, finding that a similar exception for child pornography is not analogous. Child pornography is "a special case" because the market for it is "intrinsically related to the underlying offense." Court left open the possibility that a far more narrowly drawn law targeting "crush videos" or other depictions of extreme animal cruelty would be constitutional. Held, conviction reversed, Third Circuit Court of Appeals' opinion at 533 F.3d affirmed. Alito, J, DISSENTING, agreed that banning depiction of animal cruelty was a way to prevent the abuse, and said majority's analysis was built on "fanciful hypotheticals" and would serve to protect "depraved entertainment that has no social value."

TITLE: United States v. Williams
INDEX NO.: J.3.
CITE: 553 U.S. 285, 128 S. Ct. 1830, 170 L.Ed.2d 650 (2008)
SUBJECT: Child porn statute does not violate First Amendment
HOLDING: Majority upheld Congress's most recent effort to constitutionally prohibit offers to provide, and requests to obtain, child pornography, finding the pandering provision of the 2003 PROTECT Act does not cover so much protected speech that it is overbroad in violation of the First Amendment while also rejecting a claim that the statute is facially vague in violation of the Fifth Amendment's due process clause. Under New York v. Ferber, 458 U.S. 747 (1982), non-obscene, sexually explicit works using actual minors may be proscribed without violating the First Amendment due to the state's compelling interest in protecting minors from the harm that occurs both when the porn is produced and when records of children's sexual conduct is disseminated. In Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), Court struck down an anti-pandering provision of a statute that prohibited transactions involving a visual depiction that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct," while also finding that the First Amendment protects the possession of non-obscene material that depicts what appears to be children engaged in sexual activity but that is actually youthful-looking actors or computer-generated images. Under new version of 18 U.S.C. § 2252A(a)(3)(B), provision makes it a crime for someone to knowingly advertise, promote, present, or distribute material or purported material that reflects the belief, or is intended to cause another to believe, that the material or purported material is, or contains (i) an obscene visual of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct. Majority did not believe that the statute would infringe on mainstream works addressing sexual themes involving children, stating "The average person understands that sex scenes in mainstream movies use non-child actors, depict sexual activity in a way that would not rise to the explicit level necessary under the statute, or, in most cases both." Majority also stressed that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection[,]" in that such offers "have no social value and thus, like obscenity, enjoy no First Amendment protection." Majority also noted that terms "promotes" and "presents" require proof that the speech at issue accompanied, or sought to induce, a transfer of child porn from one person to another and agreed with Justice Department that a prosecutor must prove both a subjective and an objective aspect of the "belief" that the depiction falls within one of two categories of bannable material identified in the statute. Majority conceded that the statute could support a conviction based on a documentary that depicts a rape of a minor, noting in such a situation a court would need to weigh "the educational interest in the dissemination of information . . . against the government's interest in preventing the distribution of materials that constitute a 'permanent record' of the child's degradation whose dissemination increases 'the harm to the child.'" In response to dissent, Majority stressed that a "crime is committed only when the speaker believes or intends the listener to believe the subject of the proposed transaction depicts real children." Bader, J., filed a dissent joined by Souter, J.

J. CONSTITUTIONAL LAW

J.4. Freedom of the Press

TITLE: WTHR-TV v. Cline
INDEX NO.: J.4.
CITE: (2-23-98), Ind., 693 N.E.2d 1
SUBJECT: D's discovery of unaired media footage - no reporter's privilege
HOLDING: Neither First Amend. nor Art. I, § 9 of Ind. Const. proscribe disclosure of unaired portions of media interview of D on grounds of privilege. Here, D served subpoenas on several TV stations for whatever they had relevant to her criminal case, including both broadcast & unaired portions of interview conducted while D was in police custody. With respect to interview, D made sufficient showing of materiality for discovery under Ind. Trial Rules, & media failed to show sufficient paramount interest to deny D copy of full interview. However, D's blanket discovery request, except as it pertained to videotaped interview, did not meet standard of Ind. Trial Rules, requiring discovery request to specify item or information sought with reasonable particularity & establish at least its potential materiality to case. Dillard, 274 N.E.2d 387. Materiality need not be shown prior to disclosure where relevance self-evident or precise nature of information unknown. Id.; Jorgensen, 574 N.E.2d 915. However, where materiality is challenged or unknown, showing of at least "potential materiality" generally required to obtain in camera review of disputed items. Following holding in Branzburg v. Hayes, 92 S. Ct. 2646, Ct. also concluded First Amend. does not require in every case a special showing of need & relevance beyond those imposed under discovery procedures when information in criminal case is demanded from reporter. Art. 1, § 9 of Ind. Const. likewise does not recognize qualified "reporter's privilege" to refuse to give evidence in criminal proceeding. Even if "material burden" on newsgathering ability could establish violation of Ind. Const., D's discovery demand in this case did not rise to level required to establish a § 9 violation. Held, transfer granted, cause remanded for in camera inspection of videotaped interviews by Tr. Ct.

RELATED CASES: Crawford, 948 N.E.2d 1165 (Ind. 2011) (the three-step test set forth in Cline applies only to requests for non-privileged materials; here, some of D's requests for footage from police show regarding this case were not sufficiently specific; Tr. Ct. properly granted the show's motion to quash those requests); Milam, App., 690 N.E.2d 1174 (D's discovery request failed entirely due to non-compliance with Trial Rules' requirement of reasonable particularity & materiality).

J. CONSTITUTIONAL LAW

J.5. Freedom of association (1st Amend.; Ind.Const. Art. 1, 31)

TITLE: Dawson v. Delaware
INDEX NO.: J.5.
CITE: 503 U.S. 159, 112 S. Ct. 109, 117 L.Ed.2d 309 (1992)
SUBJECT: 1st Amend. - Gang membership; inadmissible at capital sentencing where irrelevant
HOLDING: Admission of evidence, at capital sentencing, of D's gang membership, which was neither tied to crime nor probative of anything other than D's abstract beliefs, violated 1st Amend. D, who was white, was convicted of murdering white woman during prison escape. At penalty phase of D's capital trial, state filed notice that it intended to offer expert testimony about origin & nature of Aryan Brotherhood, of which D was member, as well as evidence of various tattoos, including swastikas, on D's body. In exchange for agreement not to present this evidence, D stipulated that "[t]he Aryan Brotherhood refers to a white racist prison gang that began in the 1960s in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware." Despite stipulation, D has continued to assert that admission of stipulated facts into evidence violated his 1st Amend. rights. Despite 1st Amend. freedom of association, U.S. S. Ct. has upheld consideration, in capital sentencing proceeding, of evidence of racial intolerance & subversive activity, where such evidence was relevant to issues involved. Barclay v. FL (1983), 463 U.S. 939. Here, however, narrowness of stipulation left Aryan Brotherhood evidence totally without relevance to D's sentencing proceeding. Stipulation was not relevant to help prove any aggravator or to rebut good character mitigation. Whether this improper admission was harmless error is left open to consideration on remand. Blackmun, J., CONCURS separately to note that he understands that the majority opinion does not require application of harmless-error review on remand. Thomas, J., DISSENTS.

TITLE: Doe v. Prosecutor, Marion County

INDEX NO.: J.5.

CITE: (1/23/2013), 705 F.3d 694 (7th Cir. 2013)

SUBJECT: Statute prohibiting sex offenders from using social networking websites unconstitutional - facially overbroad

HOLDING: Ind. Code. 35-42-4-12, which prohibits registered sex offenders from using social networking websites, instant messaging services or chat programs that "the offender knows allows a person who is less than eighteen (18) years of age to access or use the web site or program," is unconstitutional. Though content neutral, the statute is not narrowly tailored to serve the State's legitimate interest in protecting children from harmful online communications. It broadly prohibits substantial protected speech rather than specifically targeting the evil of improper communications to minors.

Court noted that Indiana continues to possess existing alternative tools to combat sexual predators and precisely target illicit communications (e.g., child solicitation and inappropriate communication with child statutes). "The penal system offers speech-restrictive alternatives to imprisonment. Regulations that do not implicate the First Amendment are reviewed only for a rational basis. The Constitution even permits civil commitment under certain conditions. But laws that implicate the First Amendment require narrow tailoring. Subsequent Indiana statutes may well meet this requirement, but the blanket ban on social media in this case regrettably does not." Held, judgment reversed and remanded with instructions to enter permanent injunction.

Note: Court noted this opinion should not be read to affect district court's latitude in fashioning terms of supervised release, 18 U.S.C. § 3583(a) or States from implementing similar solutions.

RELATED CASES: Harris, 985 N.E.2d 767 (Ind. Ct. App. 2013) (following Doe and reversing D's conviction for sex offender internet offense because statute violates First Amendment; see full review at K.3.e.12).

TITLE: Helton v. State
INDEX NO.: J.5.
CITE: (12/1/93), Ind. App., 624 N.E.2d 499
SUBJECT: Freedom of association -- gang activity
HOLDING: Indiana and federal constitutional protections of free speech and free association do not provide protection for associations made in furtherance of crimes or criminal conspiracy. Indiana Bell, 402 N.E.2d 962. Moreover, act of associating with compatriots in crime is not protected associational right. Choate, 576 F.2d.165 (9th Cir.). Gang Statute requires that person actively participate in group which promotes, sponsors, assists in, or participates in, and requires its members to commit felonies or batteries, with knowledge of group's criminal advocacy, and requires that active member with guilty knowledge also have specific intent or purpose to further group's criminal conduct before he may be prosecuted.

Here, D participated in gang activity in that he beat gang initiate as part of gang initiation. Ct. held that Gang Statute does not impermissibly establish guilt by association alone, but requires that D's association pose threat feared by legislature in proscribing it. Held, conviction affirmed.

TITLE: United States v. Soltero

INDEX NO.: J.5.

CITE: 510 F.3d 858 (9th Cir. 2007)

SUBJECT: Supervised release condition prohibiting association with 'any disruptive group' violated First Amendment

HOLDING: Ninth Circuit Court of Appeals held that a condition of supervised release that required a street gang member convicted of being a felon in possession of a firearm to refrain from "associating with any known member of any . . . disruptive group" violated his First Amendment right to free association. Court held the substantial encroachment upon D's First Amendment rights created by the condition was unjustified and had to be struck., noting "the term 'disruptive group' has a broad meaning and could reasonably be interpreted to include not only a criminal gang, but also a labor union on strike, a throng of political protestors, or a group of sports fans celebrating after their team's championship victory." Court did uphold a release condition that prohibited D from associating with members of the particular gang to which he belonged or "any criminal street gang."

J. CONSTITUTIONAL LAW

J.6. Freedom of religion (1st Amend; IndConst Art 1, 2, 3, 4, 5, 6, 7) (in jail/prison, see S.7)

TITLE: Cosby v. State

INDEX NO.: J.6.

CITE: (5th Dist., 11-27-00), Ind. App., 738 N.E.2d 709

SUBJECT: Driving without having ever received valid license - claim of infringement on free exercise of religion

HOLDING: D's right to free exercise of religion as protected by Indiana Constitution was not infringed by his conviction of driving without having ever received valid driver's license. D's claim on appeal was based on fact that he was driving to his place of worship at time he was pulled over by police. Because Indiana's law requiring use of driver's license to drive vehicle on public roads is neutral law of general applicability, Ct. found no constitutional infirmity in D's conviction. There is no evidence that State police & other law enforcement bodies have set out to enforce motor vehicle laws only against Christians driving to church. Held, judgment affirmed.

TITLE: Griffin v. Coughlin
INDEX NO.: J.6.
CITE: 88 N.Y.2d 674; 673 N.E.2d 98; 649 N.Y.S.2d 903 (N.Y. Ct. App. 1996)
SUBJECT: Prison Benefit Cannot Be Tied to Participation in Alcoholics Anonymous
HOLDING: Alcoholics Anonymous 12-step protocol is sufficiently imbued with religious message that requiring atheist or agnostic inmate to participate as prerequisite for eligibility in extended family visit program violates 1st Amendment Establishment Clause. Dominant theme of AA doctrinal writings is "unequivocally religious: and "proselytizing."

TITLE: Holt v. Hobbs
INDEX NO.: J.6.
CITE: (1/20/2015), 135 S. Ct. 853 (U.S. Supreme Court 2015)
SUBJECT: Arkansas DOC's beard-grooming policy violated inmate's rights
HOLDING: The Arkansas Department of Correction's ("Department") policy of restricting beard length to 1/4 inch violated Petitioner's rights under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") because it burdens the Petitioner's ability to practice his Muslim faith. It burdens the exercise of faith even though Petitioner may manifest his faith in other ways. Also, the policy is not the least restrictive means to furthering the Department's objective of regulating contraband and preventing inmates from disguising themselves. For instance, even if an inmate could hide contraband in a 1/2-inch beard, the Department could simply search the inmate's beard. And while the Department's concern that an escaped inmate could disguise himself by shaving off his beard is legitimate, the Department could alleviate that concern by taking two pictures of such an inmate, one with facial hair and the other without. Held, cert. granted, Eight Circuit opinion at 509 Fed. Appx. 561 vacated, judgment vacated, and matter remanded. Alito, J., for the unanimous Court. Ginsburg, J., concurring, joined by Sotomayor, J.; Sotomayor, J., concurring.

TITLE: Johnson v. State.
INDEX NO.: J.6
CITE: (12/18/95), Ind. App., 659 N.E.2d 194
SUBJECT: Freedom of religion -- forcing Ds to attend reproductive health lecture
HOLDING: Ds were convicted of trespassing at Planned Parenthood Clinic and ordered to attend reproductive health lecture sponsored by Planned Parenthood. Ds claimed that lecture provision of sentencing violated Establishment Clause of 1st Amendment of U.S. Constitution because it either favored another religion over theirs, or in alternative, favored existence of non- religion over their religion. Ct. held that there was no Establishment Clause violation because Planned Parenthood is purely secular organization. Inasmuch as Planned Parenthood does not affiliate itself with any religion or faith, lecture provision does not amount to governmental choice between two religions. In addition, fact that Planned Parenthood offers its family planning services to general public without inquiry into religious faith means it is religiously neutral or purely secular. It does not mean organization opposes existence of religious faith in general. Held, convictions affirmed, length of sentences modified.

TITLE: Kerr v. Farrey
INDEX NO.: J.6.
CITE: 95 F.3d 472 (7th Cir. 1996)
SUBJECT: Establishment Clause Bars Requiring Inmate to Attend Narcotics Anonymous Meetings
HOLDING: Seventh Circuit joins jurisdictions which have held that attendance at substance abuse programs with explicit religious content cannot be made a condition of probation, parole, or inmate security classification. Here, prison officials required inmate to attend Narcotics Anonymous, upon pain of being rated a higher security risk and suffering adverse effects for parole eligibility. Court finds that religious content permeates meetings and program, constituting coerced religious practice.

TITLE: Terpstra v. State
INDEX NO.: J.6.
CITE: (4th Dist. 10/20/88), Ind. App., 529 N.E.2d 839
SUBJECT: Free exercise of religion - no defense to knowing violation of statute
HOLDING: D's conviction for violating driver & motor vehicle licensing statutes did not abridge his free exercise of religion. D was charged with (1) failure to display vehicle registration (2) failure to display license plate; (3) display of false license plate; & (4) failure to have driver's license. At trial, D admitted these charges, but argued that, under his religious beliefs, complying with such licensing & registration constituted forbidden contracts with a foreign sovereign. D argued at trial & on appeal that forcing him to comply with these statutes abridged his free exercise of religion, in violation of U.S. & IN constitutions. D *cites* Thomas v. Review Bd. of Ind. Employment Sec. (1981), 450 U.S. 707, 101 S. Ct. 1425, 67 L.Ed.2d 624, involving denial of unemployment benefits to individual who left job for religious reasons. However, D's case does not involve denial of license or registration. Case more nearly parallels Reynolds v. US (1878), 98 U.S. 145, 25 L. Ed. 2d 244 & progeny. Reynolds claimed religious beliefs requiring practice of polygamy constituted valid defense to bigamy charge. U.S. S. Ct. held that, when offense consists of positive act knowingly done, D cannot escape punishment because he/she religiously believed that law which he/she broke should not have been enacted. In Warren v. US (CA10 1948), 177 F.2d 596, court distinguished between interference with religious beliefs, which state may not do, & interference with religious practices, which state may do in furtherance of compelling state interest. Statutes in question here promote compelling state interest of highway safety. See Ruge v. Kovach, 467 N.E.2d 673. Held, conviction affirmed.

J. CONSTITUTIONAL LAW

J.8. Privilege against self-incrimination (5th Amend; IndConst Art 1, 14)

TITLE: Binegar v. Eighth Judicial District Court
INDEX NO.: J.8.
CITE: 112 Nev. 544; 915 P.2d 889 (Nev. 1996)
SUBJECT: Reciprocal Discovery -- Privilege Against Self-Incrimination
HOLDING: Provisions of Nevada's reciprocal discovery law which would require defense to turn over names of witnesses, expert's reports, and other materials even if the defense does not intend to call those witnesses or introduce those materials at trial violates 5th Amendment privilege against self-incrimination.

TITLE: Ex parte Sneed
INDEX NO.: J.8.
CITE: 783 So.2d 863 (Ala. 2000)
SUBJECT: Bruton Statement -- Editing Unduly Prejucial to Declarant
HOLDING: Editing of statement of nontestifying co-D to render it admissible under Bruton altered it to such an extent as to render make it unduly prejudicial to declarant in capital murder trial. In statement, declarant admitted participation in robbery, but claimed he did not intend for anyone to get hurt, that co-D drove car, brought weapon, chose robbery target, provided masks, and did the shooting. Statement was edited so that all references to coD were removed, and word "we" was changed to "I." D's theory of defense mirrored his original statement. Viewed in that light, majority finds that admission of edited confession was so prejudicial as to constitute abuse of Tr. Ct.'s discretion. From the edited version, it appeared that declarant drove the car, obtained the weapon, selected the target, devised the masks, and induced his co-D to cary the weapon into the store. Other evidence, including a videotape showing the declarant opening the convenience store door and co- D immediately shooting clerk, did not overcome the "distorted statement's" contradiction of declarant's claim of lack of intent to kill. Majority holds that redaction violates rule of completeness where it distorts statement's meaning or excludes substantially exculpatory information. Majority further concludes that admission of the edited statement violated the declarant's 5th Amendment privilege against compelled self-incrimination. Although the declarant's statement was voluntary, the significant alteration effectively compelled his testimony as to matters to which he did not agree when he gave the statement. Declarant's rights cannot be sacrificed merely to serve state's interest in joint trial. Held: Murder conviction and death sentence reversed.

TITLE: People v. Pokovich
INDEX NO.: J.8.
CITE: 39 Cal. 4th 1240 (Cal. 2006)
SUBJECT: Fifth Amendment protects statements during competency exam
HOLDING: California Supreme Court held Fifth Amendment's prohibiton against compelled self-incrimination bars prosecutors from impeaching a D with statements he made during a court-ordered competency examination. The majority decided that the impairment of the competency examination process that would result if such statements were available for impeachment outweighs the potential risk to the justice system's truth-seeking function posed by forbidding such testimony. A state statute forbids the state from trying a mentally incompetent person. Therefore, if a Tr. Ct. has any doubt about a D's competency, it must order a competency examination. The court initiates the competency-determination process, and the D has no right to refuse to submit to an evaluation. Partial dissents were filed on two separate grounds. One dissent maintained that if no coercion or compulsion was involved in obtaining a D's statements in a competency evaluation, then the statements should be admissible for impeachment purposes, as the Firth Amendment bars the use of statements that were truly involuntary. Another dissent stated that the majority did not need a federal constitutional analysis because the state statutes authorizing competency evaluations also grant immunity to any statements made during evaluations.

TITLE: State v. Samuels
INDEX NO.: J.8.
CITE: 965 S.W.2d 913 (Mo. Ct. App. 1998)
SUBJECT: Self-Incrimination -- Statements Made to Support IAC Claim
HOLDING: Self-incriminating statements made during post-conviction (PCR) hearing in support of IAC claim cannot be used against him at retrial. D alleged IAC for failure to present self-defense claim, and in support of this gave detailed account of what he told trial counsel happened between him and victim. PCR court set aside conviction on other grounds, and at retrial, his admissions at the hearing were admitted as a statement against interest, and he was convicted again. Court of appeals reverses, holding that, while not technically compelled, neither were D's statements at PCR hearing voluntary, because without making them he would have had to forego his 6th amendment right to effective assistance of counsel claim. The Court took guidance from Simmons v. U.S., 390 U.S. 377 (1968), in which U.S. S. Ct. held that statements made at hearing on motion to suppress on 4th amendment grounds cannot be used at trial, because D should not be forced to choose between 4th amendment rights and 5th amendment rights. Similarly here, D should not be forced to choose between 6th amendment and 5th amendment rights.

TITLE: State v. Shepherd
INDEX NO.: J.8.
CITE: (2d Dist. 04/09/91), Ind. App., 569 N.E.2d 683
SUBJECT: Admission of D's testimony from prior trial
HOLDING: At D's retrial, admission of D's testimony from prior trial, offered by State in its case in chief, is not error solely because record does not establish that D was advised before prior testimony of her right against self-incrimination. D's original conviction for murder was reversed on appeal & she was retried. She testified on her behalf at first trial & record from that trial was silent as to whether she was advised of her right against self-incrimination prior to testifying. At 2nd trial, Ct. granted D's motion to suppress prior testimony on ground she did not intentionally relinquish, or abandon known right or privilege when she testified previously, & State took interlocutory appeal. Court found there was no per se exclusion of testimony because of present assertion of 5th Amend., (Harrison v. US (1968), 392 U.S. 219, US v. Anderson (4th Cir. 1973), 481 F.2d 685, & US v. McClellan (7th Cir. 1989), 868 F.2d 210). Miranda, 384 U.S.436, was inapplicable because D's prior testimony was not product of custodial interrogation, & testimony was not "compelled" within meaning of 5th Amend., because D was no different than any other witness with choice to invoke 5th Amend., (Minnesota v. Murphy (1984), 465 U.S. 420, & Ledford (1989), Ala. Ct. of Crim. Appeals, 551 So.2d 1138). Because prior testimony was not compelled, failure of record to show advisement of right against self-incrimination prior to testifying, did not render testimony inadmissible at second trial. **NOTE:** Court specifically held decision was limited to issue raised, & that whether there were other grounds for objecting to testimony was not considered. Held, judgment of Tr. Ct. excluding testimony reversed.

J. CONSTITUTIONAL LAW

J.8. Privilege against self-incrimination (5th Amend; IndConst Art 1, 14)

J.8.a. In general

TITLE: Allen v. Illinois
INDEX NO.: J.8.a.
CITE: 478 U.S. 364, 106 S. Ct. 2988, 92 L.Ed.2d 296 (1986)
SUBJECT: Self-incrimination - applicability of privilege
HOLDING: Privilege against self-incrimination "not only permits a person to refuse to testify against himself at a criminal trial in which he is a D, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." MN v. Murphy, (1984), 465 U.S. 420, 426, 104 S. Ct. 1136, 1141, 79 L.Ed.2d 409. Here, persons whom state attempts to commit under Sexually Dangerous Persons Act are protected from use of compelled answers in any subsequent criminal case. D claims 5th Amend. privilege applies to commitment proceedings under Act itself. Act provides that proceedings under it are "civil in nature." However, where D can show that "statutory scheme [is] so punitive either in purpose or effect as to negate [state's] intention" that proceeding be civil, it must be considered criminal & privilege must be applied. U.S. v. Ward, (1980), 448 U.S. 242, 248-49, 100 S. Ct. 2636, 2641, 65 L.Ed.2d 742. Upon commitment under Act, state provides treatment & has established system for possible release after briefest time in confinement. Act does not promote traditional aims of punishment - retribution & deterrence. Requirement that state prove that D has at least one act of or attempt at sexual assault or molestation does not transform proceeding because state must also prove existence of mental disorder & propensity to commit sexual assaults. Fact that proceedings under Act are accompanied by procedural safeguards usually found in criminal trials cannot turn proceedings into criminal prosecution requiring full panoply of rights applicable there. Held, proceedings under Act are not criminal; privilege against self-incrimination does not apply. Stevens, joined by Brennan, Marshall, & Blackmun, DISSENTS.

TITLE: Bleeke v. Lemmon
INDEX NO.: J.8.a.
CITE: (4/16/2014), 6 N.E.3d 907 (Ind. 2014)
SUBJECT: SOMM program constitutional – no compulsion to participate
HOLDING: Requirements of Sex Offender Management and Monitoring program (SOMM) that parolee admit his guilt to the underlying conviction and answer potentially incriminating questions about his prior sexual history or face re-incarceration, do not violate the Fifth Amendment's privilege against self-incrimination. While incarcerated, the State was permitted to present Bleeke - and all SOMM inmates - with a constitutionally permissible choice: participate in the SOMM program and maintain a more favorable credit status and/or privileges within the prison system or a favorable assignment in a community transition program, or refuse to participate and instead serve out the full term for which he had been lawfully convicted. Court agreed with other state and federal courts applying McKune v. Lile, 536 U.S. 24 (2002), and holding that this form of disciplinary response does not constitute a "penalty" such that Bleeke would have been compelled to yield his Fifth Amendment privilege. The SOMM program is a valuable tool aimed at the legitimate purpose of rehabilitating sex offenders before they are fully released from State control. Held, transfer granted, Court of Appeals' opinion at 982 N.E.2d 1040 vacated, judgment affirmed in part and reversed in part.

RELATED CASES: Lacy, 2015 U.S. Dist. LEXIS 132678 (U.S. District Court, S. Ind. 2017) (Requirement of SOMM program that incarcerated sex offenders admit their guilt for both offense for which they were convicted and other uncharged crimes - or lose earned credit time - violates 5th Amendment right to be free from compelled self-incrimination; see full review, this section), Patrick, 12 N.E.3d 270 (Ind. Ct. App. 2014) (order that D participate in SOMM program did not violate Indiana's prohibition of ex post facto laws).

TITLE: Brewer v. State
INDEX NO.: J.8.a.
CITE: (3/6/81), Ind., 417 N.E.2d 889
SUBJECT: Privilege against self-incrimination -- sentencing hearing
HOLDING: At his trial for murder, D did not take stand. However, he claimed that he took stand at sentencing hearing because of trial judge's alleged informal recommendation and assurance that judge would not permit extensive cross-examination. At sentencing hearing, State was allowed to extensively cross-examine D. Ct. held that D's privilege against self- incrimination was not denied in consequence of defense counsel's putting him upon witness stand, because D's taking stand was only way to submit mitigating evidence, and defense counsel thus had no alternative but to put D on stand. Held, conviction affirmed; DeBruler, J., dissenting.

TITLE: Brown v. State
INDEX NO.: J.8.a.
CITE: (4th Dist., 12-29-95), Ind. App., 659 N.E.2d 671
SUBJECT: PSI - use of D's statements in determining sentence
HOLDING: In making sentence determination, Tr. Ct. properly considered statements made by D during his pre-sentence interview (PSI). During interview, D stated that he would kill again under certain unspecified circumstances. D further made statements to pre-sentence investigator regarding his lack of remorse. Two of six circumstances cited by Tr. Ct. to support D's enhanced sentence referenced D's PSI statements. D was not deprived of his privilege against self-incrimination by Tr. Ct.'s use of unwarned statements. Limp v. State, (1983), Ind., 457 N.E.2d 189; Gardner v. State, (1979), Ind., 388 N.E.2d 513. Ct. held that Tr. Ct. is justified in relying on voluntary statements made to pre-sentence investigator where, as here, D is aware of purpose of pre-sentence report, has been fully advised of his or her rights, has been presented copy of report, & has voiced no objection to its contents. Held, no error.

RELATED CASES: Hines, App., 856 N.E.2d 1275 (in child molesting prosecution, Tr. Ct. did not err in ordering D to undergo a psychosexual evaluation as part of the pre-sentence investigation, or in relying upon such during sentencing; see full review at E.2.a).

TITLE: Buchanan v. Kentucky
INDEX NO.: J.8.a.
CITE: 483 U.S. 402, 107 S. Ct. 2906, 97 L.Ed.2d 336 (1987)
SUBJECT: Psychiatric testimony re interview with D
HOLDING: Admission of excerpts from psychiatrist's report does not violate 5th Amend. where D's counsel requested psychiatric examination & excerpts set forth only general observations about D's mental state. Court distinguishes from Estelle v. Smith, (1981), 451 U.S. 454, 101 S. Ct. 1866, 68 L.Ed.2d 359, where state presented testimony of psychiatrists' testimony concerning non-Mirandized D's statements to him in capital sentencing proceeding. Here, D's attorney joined in motion for psychiatric evaluation. Further, defense here was "mental status" defense of severe emotional disturbance. Since D did not testify, state could not respond to defense unless it presented other psychological evidence. Evidence presented here consisted of witness reading excerpts of psychiatrist's report which set forth his general observations about D's mental state but did not describe statements by D dealing with crimes with which he was charged. Held, admission of this testimony did not violate 5th Amend. Marshall, joined by Brennan, DISSENTS.

TITLE: Bussberg v. State
INDEX NO.: J.8.a.
CITE: (4th Dist., 05-3-05), Ind. App., 827 N.E.2d 37
SUBJECT: Immunity forces D's admission to probation violation
HOLDING: D challenged his probation revocation based on self-incrimination & chain of custody grounds. At revocation hearing, State asked D if he ingested methamphetamine prior to submitting a urine specimen. State requested & Tr. Ct. granted use immunity to D so that an affirmative answer could not be used against him in a future prosecution. D's counsel objected on self-incrimination grounds which was overruled by Tr. Ct. & D answered he had used meth prior to giving the urine specimen. *Citing* Minnesota v. Murphy, 465 U.S. 420 (1984), Ct. determined a probationer only has a limited Fifth Amendment right against self-incrimination. He could only invoke the Fifth Amendment if he were exposed to future prosecution & not if the answer simply is in relation to the alleged probation violation. The granting of use immunity removed the danger of future prosecution against D & thus the Tr. Ct. did not err in ordering D to answer the question. The testimony also did not run afoul of Ind. Code 35-37-3-3, the immunity statute, which states any evidence given "may not be used in any criminal proceeding against that witness" as a probation revocation hearing is not a criminal proceeding. Held, judgment affirmed.

RELATED CASES: Williams, App., 883 N.E.2d 192 ((no error in failing to advise D at change of placement hearing that admitting to day reporting program rule violation could also amount to a finding that she violated probation conditions).

TITLE: Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.
INDEX NO.: J.8.a.
CITE: 542 U.S. 177, 124 S. Ct. 2451, 159 L.Ed.2d 849 (2004)
SUBJECT: Failure to identify, Terry stops, search & seizure, self-incrimination
HOLDING: D was convicted under a state statute requiring persons detained on suspicion of committing a crime to identify themselves to law enforcement. D argued that the conviction violated his 4th and 5th Amendment rights.

Held: The officer had reasonable suspicion to justify a brief detention and investigation under Terry v. Ohio, 392 U.S. 1 (1968). "[Q]uestions concerning a suspect's identity are a routine and accepted part of many Terry stops'. Obtaining a suspect's name in the course of a Terry stop serves important government interests'. The principles of Terry permit a State to require a suspect to disclose his name in the course of a Terry stop."

The conviction also did not violate the 5th Amendment. D's refusal to disclose his name was not based on any articulated fear that his name would be used to incriminate him. The Court left open the possibility that in some future case, requiring a suspect to disclose his name might be found to violate the 5th Amendment.

Distinguished: Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (vagrancy statute was void for vagueness); Brown v. Texas, 443 U.S. 47 (1979) (conviction of violating a Texas stop-and-identify statute overturned where initial stop was not based on objectively reasonable suspicion of criminal activity); and Kolender v. Lawson, 461 U.S. 352 (1983)(California stop-and-identify law requiring suspects to produce 'credible and reliable' identification invalidated for vagueness).

TITLE: Highbaugh v. State
INDEX NO.: J.8.a.
CITE: (8-15-02), Ind., 773 N.E.2d 247
SUBJECT: Self-incrimination - after sentencing; contempt finding upheld
HOLDING: Privilege against self-incrimination exists until possibility of further incrimination ceases, i.e., when sentence has been fixed & judgment of conviction has become final. Mitchell v. United States, 526 U.S. 314 (1999). Here, in exchange for dismissal of charges, D pled guilty to murder & attempted murder. Plea agreement contained provision requiring D "to appear & be interviewed to give sworn & unsworn statements or testimony as required." After D was sentenced, he declined to answer any questions beyond his name, date of birth, & place of residence, & indicated that he would be appealing imposition of a life sentence. Attorney for Co- D moved that D be held in contempt for his refusal to answer any questions. Affirming Tr. Ct.'s finding of contempt, Ct. held that because D expressed his intent to appeal his life sentence, he may have retained his Fifth Amendment privilege with regard to statutory aggravator, but privilege only extended to questions that could incriminate him on that matter. D could have answered any number of questions without further incriminating himself. Held, judgment affirmed; Boehm, J., dissenting on this issue.

TITLE: Houchin v. State
INDEX NO.: J.8.a.
CITE: (11/25/91), Ind., 581 N.E.2d 1228
SUBJECT: Privilege against self-incrimination -- admission of edited confession at joint trial
HOLDING: D and two co-Ds were tried jointly in murder and robbery prosecution. Edited version of D's confession, which omitted all references to co-Ds' participation, pursuant to Bruton, 391 U.S. 123, was admitted into evidence after Tr. Ct. concluded statement was properly obtained. D objected to admission, claiming that edited version of statement gave jury impression that it was complete statement and that D was sole participant in crime. He claimed that as result, he was forced to testify at trial so jury would know entire story, and that because his testimony implicated co-Ds but edited confession did not, he appeared evasive before jury. Ct. held that use of redacted statement did not compel D to testify because there was other evidence at trial incriminating D. Where State's evidence is strong, D may be faced with dilemma demanding him to choose between complete silence and presenting defense, but such dilemma has never been thought to be invasion of privilege against self-incrimination. Williams, 399 U.S. 78. Held, conviction affirmed.

TITLE: In re S.H.
INDEX NO.: J.8.a.
CITE: (3/27/2013), 984 N.E.2d 630 (Ind. 2013)
SUBJECT: Self-incrimination - prosecutor cannot request use immunity before filing charges
HOLDING: Where no charges have been filed and no grand jury has been convened, a prosecutor may subpoena witnesses pursuant to Ind. Code 33-39-1-4. However, if those witnesses invoke their constitutional right against self-incrimination, the prosecutor cannot petition for use immunity and compel them to testify without first filing charges or convening a grand jury. Court disapproved of any contradictory language in In re Order for Indiana Bell Telephone to Disclose Records, 274 Ind. 131, 409 N.E.2d 1089 (1980), which involved a subpoena duces tecum to a non-party, not the target of the prosecutor's investigation.

In this case, soon after S.C. gave birth at home, the father (S.H.) took S.C. and the infant to the hospital because S.C. was bleeding and infant had multiple puncture wounds. The prosecutor petitioned for subpoenas to compel the parents to testify about the circumstances of the infant's birth, but Tr. Ct. granted the parents' motion to quash the subpoenas on Fifth Amendment grounds. Tr. Ct. then erroneously granted State's request to grant use immunity to parents and ordered them to testify. Held, transfer granted, Court of Appeals' opinion at 969 N.E.2d 1048 vacated, judgment reversed and remanded for further proceedings.

TITLE: Kansas v. Cheever
INDEX NO.: J.8.a.
CITE: (12/11/2013), 134 S. Ct. 596
SUBJECT: Admission of Evidence From Court-ordered Psychiatric Exam
HOLDING: Where a defense mental health expert who has examined the D testifies that D lacked requisite mental state, the prosecution may offer evidence from a court-ordered mental health exam for limited purpose of rebutting D's evidence. Here, D was first charged with capital murder in state court. After the State Supreme Court struck down its death penalty statute, prosecutors dismissed state charges and allowed federal capital murder prosecution. D gave notice that he would offer mental health expert testimony to negate mens rea, and Federal Court ordered that he submit to examination by State mental health expert. During trial, defense counsel became ill and could not continue. By this point, this Court had reinstated state death penalty statute, and federal prosecutors allowed state prosecutors to refile capital murder charges. At his state trial, D presented mental health expert testimony on voluntary intoxication, for purpose of showing that his methamphetamine use before the crime negated requisite mens rea. After the defense rested its case, the State called the mental health expert who had conducted the federal court-ordered examination to rebut this testimony. D argued that the 5th Amendment prohibited this testimony because he had not agreed to the exam and had not put his mental capacity in dispute at trial, *citing* Estelle v. Smith. 451 U.S. 454 (1981). The Tr. Ct. rejected this argument, but the Kansas Supreme Court reversed his conviction and sentence on this ground. The Kansas Supreme Court distinguished Buchanan v. Kentucky, which held that a State may introduce results of a court-ordered mental exam for the limited purpose of rebutting a mental-status offense, holding that voluntary intoxication was not a mental disease or defect under Kansas law. This Court reversed, arguing that Buchanan applies because D did in fact put his mental status in dispute, by presenting evidence that his voluntary intoxication on meth rendered him unable to form the requisite mens rea for capital murder. The Court points out that Buchanan was not limited to evidence of mental disease or defect, nor was it limited to long-term conditions. Held, Kansas Supreme Court's reversal of D's conviction and sentence reversed. However, because the Kansas Supreme Court reversed on this ground, it declined to address D's other argument, that the testimony of the prosecution's mental health expert exceeded the limited purpose of rebuttal. The U.S.Supreme Court declines to address this issue in the first instance and remands to the Kansas Supreme Court for further proceedings.

TITLE: Lacy, et al. v. Keith Butts

INDEX NO.: J.8.a

CITE: (9/27/2017), 2015 U.S. Dist. LEXIS 132678 (U.S. District Court, S. Ind. 2017)

SUBJECT: SOMM program violates 5th Amendment privileged against compelled self-incrimination

HOLDING: The requirement of the Indiana SOMM program that incarcerated sex offenders admit their guilt for both the offense for which they were convicted and other uncharged crimes - or lose earned credit time and be assigned to a less favorable credit class - violates their Fifth Amendment right to be free from compelled self-incrimination.

The petitioners filed a habeas class action. They are Indiana inmates who have lost earned credit time and/or been demoted in credit earning class based on their refusal to participate in the SOMM program.

In 2014, the Indiana Supreme Court agreed that the disclosure requirements create a risk of self-incrimination. See Bleeke v. Lemmon, 6 N.E.3d 907 (Ind. 2014). Indeed, requiring such disclosures is "starkly incriminating." See United States v. Antelope, 395 F.3d 1128, 1138 (9th Cir. 2005). However, because good time credits are not "constitutionally required," Bleeke ruled that taking away credit time does not violate the privilege against compelled self-incrimination; the adverse consequences an inmate faces for not participating in the SOMM program "are related to the program's objectives and do not constitute significant hardships in relation to the ordinary incidents of prison life." See McKune v. Lile, 536 U.S. 24, 37-38 (2002).

Bleeke was wrong to conclude that deprivation of credit time is not a significant hardship. Taking away credit time, and foreclosing the opportunity to earn credit time in the future, poses a significant hardship; it greatly increases the term of an inmate's incarceration. Further, depriving inmates of credit time impinges on their liberty interest in credit time. This is a liberty interest because credit time is a matter of statutory right; a trial court has no discretion to deny credit time to a person who is in a credit-eligible class. Held, petitioners' motion for summary judgment granted and Department of Correction must vacate disciplinary actions against the petitioners.

TITLE: Lykins v. State
INDEX NO.: J.8.a.
CITE: (1st Dist., 4-18-00), Ind. App., 726 N.E.2d 1265
SUBJECT: Self-incrimination - Tr. Ct.'s questioning at sentencing hearing
HOLDING: Tr. Ct.'s questioning of D regarding his finances during his sentencing did not result in violation of his Fifth Amendment right not to incriminate himself. D argued that before Tr. Ct. placed him under oath & questioned him about his finances, it should have advised him of his Fifth Amendment right to refuse to become witness against himself. In criminal case, Fifth Amendment privilege must be accorded same protection in sentencing phase as that which is due in trial phase of same case. United States v. Mitchell, 526 U.S. 314, 119 S. Ct. 1307 (1999). Here, when D was questioned by Tr. Ct. regarding his finances, he did not assert his Fifth Amendment right to remain silent. Therefore, by choosing to answer questions without objection he waived his Fifth Amendment privilege to remain silent. Moreover, defense counsel did not object to Tr. Ct.'s questioning of him. D cited no authority to support his proposition that Tr. Ct. had affirmative duty to inform him of his Fifth Amendment right to remain silent before questioning him about his finances during sentencing hearing. Held, judgment affirmed.

TITLE: Mahaffey v. State
INDEX NO.: J.8.a.
CITE: (2/10/84) Ind., 459 N.E.2d 380
SUBJECT: Self-incrimination - psychiatric examination
HOLDING: Tr. Ct. did not err in using pretrial psychiatric report in setting sentence where D initiated psychiatric examination by raising insanity defense. Court distinguishes Estelle v. Smith (1981), 451 U.S. 454, 101 S. Ct. 1866, 68 L.Ed.2d 359 (prosecution initiated psychiatric exam of D to determine his competence to stand trial) & Haskett, 263 N.E.2d 529 (prosecution initiated psychiatric exam to determine if D was a criminal sexual psychopath & subject to indefinite confinement in state mental hospital). D cannot be compelled to respond at psychiatric examination initiated by prosecution. Where D initiates psychiatric exam, D may not complain that privilege against self-incrimination was violated. Held, no error.

RELATED CASES: Hayes, App., 667 N.E.2d 222; Taylor, 659 N.E.2d 535 (where D interposed defense of insanity, he was not entitled to Miranda warnings prior to his interview with State's psychiatrist. See card at L.1.b.1)

TITLE: Mitchell v. U.S.

INDEX NO.: J.8.a.

CITE: 526 U.S. 314; 119 S. Ct. 1307; 143 L.Ed.2d 424 (1999)

SUBJECT: Self-Incrimination -- Guilty Plea Colloquy Does Not Waive 5th Amendment Privilege at Sentencing

HOLDING: D does not waive 5th Amendment privilege against self-incrimination at sentencing by pleading guilty in federal court. Sentencing judge violated D's 5th Amendment rights by drawing adverse inferences from D's refusal to testify at sentencing. D here pleaded guilty, without plea agreement, to charges arising from participation in cocaine distribution conspiracy. At plea hearing, judge asked D whether she had committed all of the acts alleged by the government, & D answered that she had done "some of it." At sentencing, government presented testimony of three co-conspirators regarding D's participation in particular transactions & amounts of cocaine involved. D did not testify. Relying in part on D's refusal to rebut co- conspirators' testimony, judge determined that D's offense involved an amount of cocaine making her eligible for 10-year mandatory minimum sentence. Five justice majority reverses, noting first that while it is true that, in a single proceeding, a witness may not testify voluntarily about a subject & then claim privilege against cross-examination when questioned about the details, concerns about selective disclosure & possibility for misleading are not present at plea colloquy, where D takes things out of dispute rather than putting them in dispute. The privilege against self-incrimination extends beyond trial to sentencing. Estelle v. Smith, 451 U.S. 454, 462 (1981). Finally, majority reasons that drawing adverse inferences from refusal to testify at sentencing impermissibly burdens exercise of privilege, just as drawing adverse inferences from refusal to testify at trial does. See Griffin v. California, 380 U.S. 609 (1965). Scalia, Rehnquist, O'Connor, & Thomas, JJ., DISSENT, arguing that Griffin was wrongly decided, & that drawing of adverse inferences from D's decision not to testify is natural & permissible consequence of decision, but does not "compel" D to testify & does not violate 5th Amendment.

TITLE: M.K. v. DCS

INDEX NO.: J.8.a.

CITE: (3/18/2014), 6 N.E.3d 952 (Ind. Ct. App. 2014)

SUBJECT: Tr. Ct. in CHINS matter could infer respondent's guilt from her invocation of 5th Amendment right against self-incrimination

HOLDING: Tr. Ct. did not err by inferring that Mother caused A.G.'s cyanotic episodes, based in part on her refusal to testify at the CHINS hearing under her 5th Amendment right against self-incrimination.

DCS asked the Tr. Ct. to declare A.G. a CHINS based on its belief that A.G.'s life-threatening cyanotic episodes were caused by Mother. During a cyanotic episode, low oxygen saturation causes a person's skin to appear blue or purple. DCS argued, and the Tr. Ct. found, that Mother caused the cyanotic episodes to gain attention, a condition called "factitious disorder by proxy," a disease where "caretakers . . . harm their children for attention." The Tr. Ct. based its CHINS finding, in part, on the fact that Mother refused to testify. "Mother's refusal to testify in the state's case in chief draws a negative inference that Mother was concerned about incriminating herself through her testimony, further indicative of mother's guilt."

The Tr. Ct. correctly found that a trier of fact in a CHINS case, a civil matter, may draw a negative inference about a respondent's culpability based on their refusal to testify. See Gash v. Kohm, 476 N.E.2d 910, 913 (Ind. Ct. App. 1985). Held, judgment affirmed.

TITLE: Ohio Adult Parole Authority v. Woodard
INDEX NO.: J.8.a.
CITE: 523 U.S. 272, 118 S. Ct. 1244, 140 L.Ed.2d 387 (1998)
SUBJECT: Self-Incrimination -- Participation in Clemency Interview Not Compelled
HOLDING: Providing capital clemency petitioner with opportunity for non-immunized participation in clemency interview, without benefit of counsel, was not compelled testimony so as to invoke the 5th Amendment. Petitioner argues that because he has a right to only one clemency review, his decision to participate is not truly voluntarily. Further, at the interview he may be forced to answer questions or to have his silence used against him. Finally, because the interview is scheduled while post-conviction proceedings are still pending, he faces substantial risk of incrimination regarding other crimes. Petitioner concludes that the interview unconstitutionally conditions his right to seek clemency on his waiver of the right to remain silent. The Court unanimously rejects this argument, holding that, while this choice may put pressure on petitioner, it does not create compulsion for purposes of the 5th Amendment.

TITLE: Ohio v. Reiner
INDEX NO.: J.8.a.
CITE: 532 U.S. 17, 121 S. Ct. 1252, 149 L.Ed.2d 158 (2001)
SUBJECT: Fifth Amendment, self-incrimination, transactional immunity
HOLDING: A witness who denies all culpability may still assert the Fifth Amendment privilege against self-incrimination and refuse to testify unless granted immunity, where the witness's answers could reasonably furnish a link in the chain of evidence against her, and the witness has reasonable cause to fear that her answers at trial might incriminate her.

TITLE: Roark v. State
INDEX NO.: J.8.a.
CITE: (12/19/94), Ind., 644 N.E.2d 565
SUBJECT: Self-incrimination -- limited intelligence; police coercion
HOLDING: In order for D to have waived or relinquished right against self-incrimination, record must show that he knowingly, intelligently and voluntarily relinquished that right. Burden is on State to prove beyond reasonable doubt that waiver was knowingly and voluntarily made. Miranda, 384 U.S. 436. Such claims are reviewed considering totality of circumstances, based on review of entire record. Blackburn, 361 U.S. 199. Here, while reading from form with correct statement of his rights, D was assured by police officer that he really would not be giving up any of his rights if he gave statement. D contends that this would be confusing to person of average intelligence, let alone man of D's limited intelligence. Ct. held that limited intelligence alone does not render confession involuntary and noted that U.S. Supreme Ct. has stated that purpose of Fifth Amendment's testimonial privilege against self-incrimination and requirements of Miranda are to protect against police misconduct. Connelly, 479 U.S. 157. Although person's mental condition is relevant to issue of susceptibility to police coercion, where person voluntarily makes confession without police coercion, confession may be considered in spite of mental condition. Pettiford, 619 N.E.2d 925. D was not coerced by police in that he had full advisement of his rights and acknowledged that he understood that he was agreeing to use of his statements against him at trial. Held, conviction affirmed; Givan, J., dissenting.

TITLE: Seo v. State
INDEX NO.: J.8.a.
CITE: (06-23-20), Ind., 148 N.E.3d 952
SUBJECT: Compelling D to unlock iPhone was testimonial and violated Fifth Amendment
HOLDING: After the trial court ordered the Defendant to unlock her smartphone and a divided panel of the Court of Appeals reversed, the Indiana Supreme Court accepted transfer and held that the compelled production of an unlocked smartphone is testimonial and entitled to Fifth Amendment protection—unless the State demonstrates the foregone conclusion exception applies. A suspect surrendering an unlocked smartphone implicitly communicates that the suspect knows the password, the files on the device exist, and the suspect possessed those files. And, unless the State can show it already knows this information, the communicative aspects of the production fall within the Fifth Amendment's protection. Here, the court concluded that the State did not. Instead, law enforcement sought to compel Defendant to unlock her iPhone so that it could then scour the device for incriminating information, providing the State with information that it did not already know. The court also noted that extending the foregone conclusion exception to the compelled production of an unlocked smartphone is concerning because such an expansion fails to account for the unique ubiquity and capacity of smartphones, may prove unworkable, and runs counter to U.S. Supreme Court precedent. Massa, J, joined by Slaughter, J, dissented because the resolution of the underlying criminal case rendered the issue moot and to resolve it under Indiana's "great public interest" exception would violate the core principles of federalism and leave our state's court as the final arbiter of our nation's fundamental law. Slaughter, J., wrote separately to express his view that the mootness standard of "novel, important issue of great public interest that will surely recur" cannot be reconciled with the actual-injury requirement implicit in our constitution's separation-of-powers command. Instead, he would adopt "capable of repetition, yet evading review" as the court's mootness standard.

RELATED CASES: Kerner, 178 N.E.3d 1215 (Ind. Ct. App. 2021) (because D voluntarily gave his pass code to law enforcement instead of timely asserting his 5th Amendment privilege, his disclosure was not a compelled incrimination).

TITLE: State v. Cass
INDEX NO.: J.8.a.
CITE: (3rd Dist., 06-16-94), Ind. App., 635 N.E.2d 225
SUBJECT: Limited self-incrimination (SI) right at probation revocation
HOLDING: Tr. Ct. erred in allowing D to invoke privilege against SI & refuse to answer any questions at probation violation (PV) hearing. While on probation, D committed misdemeanor & State filed PV. At hearing, State called D as witness. After she gave her name, Tr. Ct. advised her of SI right, & she refused to answer question regarding her date of birth. Tr. Ct. certified question of whether State can require probationer to answer questions that do not subject her to further criminal proceedings, but may prove PV. Extent of 5th Amend. privilege depends in part on type of proceeding where it is claimed. PV proceeding is civil in nature, there is no formal finding of guilt, & violation need only be proved by preponderance. Therefore, probationers are not entitled to full array of trial rights. Ct. concluded that probationer is not entitled to same SI right as D at criminal trial, but may invoke privilege concerning any questions whose answers could lead to subsequent prosecution. Probationers can, however, be forced to answer questions that identify them as violators. Because D had already been convicted of crime that violated her probation, she could be made to identify herself as perpetrator of that crime, even though question would lead to PV. PV proceeding does not deprive individual of absolute liberty, only conditional liberty granted as part of probation. Sanctions imposed flow from original crime, not new criminal allegations, & hearing threatens no punishment other than that to which probationer was already exposed as result of earlier offense. Relying on Minnesota v. Murphy, 465 U.S. 420, & State v. Heath, Fla., 343 So.2d 13, Ct. concluded that while probationer can invoke privilege regarding any question that could incriminate him in subsequent prosecution, he cannot invoke it with regard to basic identifying information or disclosures necessary to monitor probation.

TITLE: State v. Easter
INDEX NO.: J.8.a.
CITE: 130 Wash.2d 228; 922 P.2d 1285 (Wash. 1996)
SUBJECT: Pre-Arrest Silence Cannot Be Used in State's Case-In-Chief
HOLDING: Washington Court holds that police officer violated a vehicular assault D's Fifth Amendment privilege against self-incrimination by testifying about the D's pre-arrest silence and evasiveness. The prosecutor exacerbated that problem by referring to the D as a "smart drunk" during closing argument. The state argued that because the D had not been given Miranda warnings regarding his right to remain silent, his pre-arrest silence could be used against him. The Court disagrees, finding that the right to remain silent is derived from the Fifth Amendment, not from Miranda, and that it attaches prior to the time that warnings must be given. The majority of federal circuits agree. See, e.g., Savory v. Lane, 832 F.2d 1011, 1017-18 (7th Cir. 1987).

TITLE: State v. Johnson
INDEX NO.: J.8.a.
CITE: 950 P.2d 981 (Wash. Ct. App. 1998)
SUBJECT: Self-Incrimination -- Use of Notice of Self-Defense Claim as Substantive Evidence
HOLDING: D's 5th Amendment privilege against self-incrimination was violated when his required pretrial notice of intent to claim self-defense was used against him as substantive evidence after he decided, four days before trial, to present alibi defense. Under trial rules, criminal Ds are required, on pain of contempt, to disclose general nature of their defense at omnibus hearing. Tr. Ct. sanctioned D for late alibi notice by ruling that state could use prior self-defense claim to impeach him if he testified, and also to cross-examine two defense alibi witnesses. D did not testify, but his alibi witnesses were asked if they were aware that he had filed a notice of intent to claim self-defense. Since witnesses cannot be impeached by statements of others for which they are not responsible or have not approved, only purpose for these questions was to present as substantive evidence fact that D had committed the charged acts. Trial rules may properly compel disclosure of information which will ultimately come to light at trial, but court may not sanction D for late disclosure by allowing use, as substantive evidence, of inculpatory information which would not otherwise come to light.

TITLE: Stolarz v. State
INDEX NO.: J.8.a.
CITE: (4th Dist. 2/16/83), Ind. App., 445 N.E.2d 114
SUBJECT: Self-incrimination - psychiatric examination
HOLDING: Tr. Ct.'s order requiring D, who filed insanity defense, to submit to examination by psychiatrists employed by prosecution did not violate D's 5th Amend right against self-incrimination. Court finds when D filed insanity defense, Ind. Code 35-5-2-2 (repealed) became effective, requiring psychiatric examination of D by court-appointed psychiatrists as well as by psychiatrists employed by prosecution. Such psychiatric examinations do not violate 5th Amend right against self-incrimination. Weaver, 215 N.E.2d 533; Noelke, 15 N.E.2d 950; Berwanger, App., 307 N.E.2d 891. 5th Amend prohibits only compelled self-incrimination. Right attaches to person, not to incriminating information. D was not compelled to file insanity defense. Psychiatric exams were to determine sanity, not to extract incriminating statements. Court compares exam to compelled speaking or physical display at trial. Court finds Tr. Ct. admonished prosecution not to ask testifying psychiatrist questions concerning crime itself. Held, no error.

TITLE: Weedman v. State
INDEX NO.: J.8.a.
CITE: (11/26/2014), 21 N.E.3d 873 (Ind. Ct. App. 2014)
SUBJECT: Admission of withdrawn insanity defense did not constitute fundamental error
HOLDING: In aggravated battery prosecution, Tr. Ct. erred in admitting evidence that D had pursued and later withdrew an insanity defense. D asserted self-defense at trial and insanity was not at issue. Where, as here, D withdraws his defense of insanity before trial, the latitude in admitting D's other prior conduct becomes substantially limited. Cardine v. State, 475 N.E.2d 696 (Ind. 1985); see also Taylor v. State, 659 N.E.2d 535 (Ind. 1995) (D's mental condition may be relevant, but State may not misuse its access to D by attempting to prove his guilt through testimony of its physician).

Here, the State was improperly attempting to prove D's guilt through the discussion of his withdrawn insanity defense and the doctors' testimony. D failed to object, and Court could not say that admission of this evidence resulted in fundamental error, because evidence supporting jury's verdict was overwhelming. Held, judgment affirmed.

Note: Court recognized that a significant amount of evidence was improperly admitted at trial. "At some point, the cumulative effect of the improper evidence would reach a tipping point and make a fair trial impossible…However, given the avalanche of evidence of Weedman's excessive force, we conclude that the tipping point was not reached here."

TITLE: Wilke v. State
INDEX NO.: J.8.a.
CITE: (1st Dist. 9/20/86), Ind. App., 496 N.E.2d 616
SUBJECT: Self-incrimination - simple denial subject to perjury prosecution
HOLDING: Court rejects D's argument, raised first time on appeal, that her simple denial (that burglary occurred during drug transaction) falls under "exculpatory no" exception. Federal courts have almost unanimously accepted "exculpatory no" doctrine as defense to 18 U.S.C. Section 1001. Thrust of theory is that if person answers with simple denial in response to investigator's question, which would otherwise yield incriminating answer if answered truthfully, person cannot be convicted under Section 1001. Prevailing rationale is that application of Section 1001 to simple denial would violate individual's right against self-incrimination. [Citations omitted.] Court observes "exculpatory no" doctrine is not without limitation. Situation must involve incriminating questions & if questioning is part of administrative function, defense fails. Court declines to adopt "exculpatory no" doctrine as defense to perjury statute (Ind. Code 35-44-2-1) for 2 reasons: (1) federal courts have not adequately explained absence of "exculpatory no" defense to convictions under 18 U.S.C. Section 1621, the federal perjury statute; (2) case under consideration presents an appropriate factual posture inasmuch as D, not police, initiated investigation. Held, perjury conviction affirmed.

J. CONSTITUTIONAL LAW

J.8. Privilege against self-incrimination (5th Amend; IndConst Art 1, 14)

J.8.b. Post-arrest silence

TITLE: Beach v. State
INDEX NO.: J.8.b.
CITE: (1st Dist. 8/31/87), Ind. App., 512 N.E.2d 440
SUBJECT: Pre-arrest silence - used to impeach
HOLDING: 5th Amend. is not violated when pre-arrest silence is used for impeachment purposes. State may not use post-arrest, post-Miranda warnings for impeachment. Doyle v. OH (1976), 426 U.S. 610. However, pre-arrest silence, where there is no state assurance of right to remain silent, may be used to impeach D's testimony at trial. Jenkins v. Anderson (1980), 447 U.S. 231, 100 S. Ct. 2124, 65 L.Ed.2d 86.

RELATED CASES: Salinas v. Texas, 133 S. Ct. 2174 (2013) (unless a D expressly invokes 5th Amendment right against self-incrimination, use of pre-arrest silence as substantive evidence of guilt does not violate 5th Amendment right – see full review, this section); Fletcher v. Weir (1982), 455 U.S. 603, 102 S. Ct. 1309, 71 L.Ed.2d 490 (even post-arrest silence may be used to impeach if no Miranda warnings were given).

TITLE: Cameron v. State
INDEX NO.: J.8.b.
CITE: (10/11/2014), 22 N.E.3d 588 (Ind. Ct. App. 2014)
SUBJECT: D opened door to comment on post-arrest, pre-Miranda silence
HOLDING: State did not violate D's Fifth Amendment right against self-incrimination by commenting on his post-arrest, pre-Miranda silence, see Peters v. State, 959 N.E.2d 347, 353 (Ind. Ct. App. 2011), because D opened the door to the State's comments. See Ludack v. State, 967 N.E.2d 41, 45 (Ind. Ct. App. 2012), trans. denied.

D lived at his girlfriend's residence. One evening, he battered his girlfriend and her daughter. At trial, D claimed his girlfriend and her daughter attacked him with a knife, even though there was no evidence to support this allegation. D made the same allegation in closing argument. In response, both during testimony and closing argument, the State alleged that when the arresting officer asked D at the scene whether he was wounded during the incident, D said nothing. Because D's allegations left the jury with a misleading impression, Ludack, 967 N.E.2d at 46, the State's questions and comments about D's silence to the arresting officer's questions were a "fair response to the evidence elicited by the D." See Id. Held, judgment affirmed.

TITLE: Charton v. State
INDEX NO.: J.8.b.
CITE: 716 So.2d 803 (Fla. Ct. App. 1998)
SUBJECT: Comments about D's Silence During Terry Stop
HOLDING: Prosecutor's comments to jury about D's silence in response to police questions during investigative detention violated D's 5th Amendment privilege against self-incrimination. Although the stop and questioning were not custodial and did not require Miranda warnings, 5th Amendment still applied, and prosecutor's comments violated it.

TITLE: Commonwealth v. Johnson

INDEX NO.: J.8.b.

CITE: 2001 Pa. Super. 328, 788 A.2d 985 (Pa. Super. Ct. 2001)

SUBJECT: Post-Arrest Silence May Not Be Used to Impeach Alibi Witness

HOLDING: Privilege against self-incrimination is implicated not only by express mention of fact that D remained silent after arrest, but by questions or comments that highlight that a defense offered at trial could have been proffered during interrogation but was not. Here, D's girl-friend testified that he had been at her home at time of robbery, and had gone out for cigarettes only moments before police stopped him. On cross, prosecutor asked girl-friend whether she could and would have confirmed that if police had contacted her after they picked up D, and when she said yes, prosecutor continued, "So he could have just told the police, 'Hey, you can go see my fiancé right up here."

TITLE: Combs v. Coyle
INDEX NO.: J.8.b.
CITE: 205 F.3d 269 (6th Cir. 2000)
SUBJECT: Use of Unwarned, Pre-Arrest Silence in Case-in-Chief
HOLDING: Sixth Circuit joins jurisdictions holding that unwarned, pre-arrest silence cannot be used against D at trial in state's case-in-chief. While such unwarned silence can be used to impeach testifying D, see Jenkins v. Anderson, 447 U.S. 231 (1980), Court here finds significant difference between use for impeachment and use as substantive evidence again non-testifying D. Sixth Circuit agrees with other circuits that the latter would be akin to substantive use of D's refusal to testify at trial, held impermissible in Griffin v. California, 380 U.S. 609 (1965). Accord, United States ex rel. Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir.1987)

TITLE: Greer v. Miller
INDEX NO.: J.8.b.
CITE: 483 U.S. 756, 107 S. Ct. 3114, 97 L.Ed.2d 618 (1987)
SUBJECT: Post-arrest silence
HOLDING: Prosecutor's question concerning post-arrest silence did not violate due process. Due process is violated when prosecution calls attention to D's post-arrest post-Miranda silence. Doyle v. OH (1976), 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 91. Doyle rests on fundamental unfairness of implicitly assuring suspect that silence will not be used against him & then using silence to impeach explanation subsequently offered at trial. Wainwright v. Greenfield (1986), 474 U.S. 284, 291, 106 S. Ct. 634, 639, 88 L.Ed.2d 623. Here, court distinguishes Doyle because Tr. Ct. did not permit prosecution to use D's silence; Tr. Ct. explicitly sustained objection to only question that touched upon post-arrest silence. No further question or argument concerning D's silence occurred & Tr. Ct. specifically advised jury that it should disregard any questions to which objection was sustained. Nor did question constitute prosecutorial misconduct that so infected trial with unfairness as to make resulting conviction a denial of due process. Held, no Doyle violation. Stevens CONCURS IN JUDGMENT; Brennan, joined by Marshall, & Blackmun, DISSENTS.

TITLE: Harris v. State
INDEX NO.: J.8.b.
CITE: 726 So.2d 804 (Fla. Ct. App. 1999)
SUBJECT: Use of Unwarned Silence
HOLDING: Florida Supreme Court holds that, as a matter of state constitutional law, police officers' withholding of Miranda warnings from D who was entitled to them prevents state from making use at trial of D's silence during unwarned questioning. In State v. Hoggins, 718 So.2d 761, Fla. S. Ct. held that, while federal constitutional case law held that right to silence was triggered by Miranda warnings, state constitution precluded state from using D's post-arrest, pre-warning silence at trial. Here, D was not under arrest, but he was undergoing custodial interrogation and was entitled to Miranda warnings. Officers could not avoid triggering D's right to silence by withholding Miranda warnings.

TITLE: Johnson v. State

INDEX NO.: J.8.b.

CITE: (3rd Dist.; 03-06-09), 901 N.E.2d 1168 (Ind. Ct. App. 2009)

SUBJECT: Improper comments on post-arrest silence and request for attorney - no fundamental error

HOLDING: Although prosecutor's repeated references to D's invocation of his right to an attorney constituted misconduct, the error did not rise to fundamental error and defense counsel's failure to object did not constitute IAC. Court should consider five factors to determine whether a Doyle violation is harmless: (1) use to which the prosecution puts the post-arrest silence; (2) who elected to pursue the line of questioning; (3) the quantum of other evidence indicative of guilt; (4) the intensity and frequency of the reference; and (5) the availability to the trial judge of an opportunity to grant a motion for mistrial or to give curative instructions. Bieghler v. State, 481 N.E.2d 78, 92 (Ind. 1985).

Here, during trial, the prosecutor, without any objection by D, referred to D's invocation of his right to an attorney at least six times. During State's closing argument, the Tr. Ct. interrupted the prosecutor when she argued that "you need a lawyer when you know you've done something wrong." Tr. Ct. recessed the jury, explained to the prosecutor the multiple instances she had referenced D's invocation of his right to counsel and admonished her not to mention it again. Although Tr. Ct. expressed concern about how to handle the situation since D had not objected, D only asked for an admonishment and not a mistrial. Tr. Ct. gave the jury a thoughtful and thorough admonishment carefully designed to cure the Doyle violation. Although the prosecutor's frequent use of D's post-arrest invocation of his right to an attorney was egregious, thus making factors 1, 2 and 4 weigh against finding harmless error, the quantum of evidence of D's guilt was substantial and the Tr. Ct.'s admonishment cured the prejudice. Moreover, despite defense counsel's failure to object falling below an objective standard of reasonableness, there was no prejudice from his failure to object. Had counsel objected, the result of trial would not have been different. Held, judgment affirmed.

TITLE: Nichols v. State

INDEX NO.: J.8.b.

CITE: (5/31/2016), 55 N.E.3d 854 (Ind. Ct. App. 2016)

SUBJECT: Testimony about D's pre-arrest silence did not violate 5th Amendment where he did not invoke right to silence

HOLDING: In sexual misconduct with a minor prosecution, Tr. Ct. did not abuse its discretion in admitting evidence that D did not attend an interview with a detective or ask about the investigation. The Fifth Amendment allows prosecutor to elicit testimony about a person's pre-arrest, pre-Miranda silence unless the person explicitly invokes his right to silence. Salinas v. Texas, 133 S. Ct. 2174, 2180 (2013). Here, D did not invoke the privilege against self-incrimination. Failing to follow up with or contact the detective does not support a finding that he invoked his right to remain silent. Held, judgment affirmed.

TITLE: Pennycuff v. State
INDEX NO.: J.8.b.
CITE: (4-18-01), Ind., 745 N.E.2d 804
SUBJECT: Use of D's post-arrest silence for impeachment - claim of cooperation by D
HOLDING: In child molesting prosecution, trial counsel was not ineffective for failing to object to State's references to D's non-responsiveness during police interview. Post-arrest silence may be used to contradict D who testifies to exculpatory version of events & claims to have told police same version upon arrest. Doyle v. Ohio, 462 U.S. 610 (1976). Silence may only be used to rebut impression of cooperation, & use of silence cannot be obvious reach beyond fair limits to impeach D's explanatory story as recent fabrication. United States v. Shue, 766 F.2d 1122 (7th Cir. 1985). Here, no such overreaching occurred. D specifically claimed credit not just for general cooperation in investigation, but for having answered each of detective's questions. Prosecutor's brief comments during closing arguments & questions to D & to detective regarding D's failure to respond were relevant to counter defense claim that D openly answered all queries. Even assuming typed version of audio tape recording of D's interview with detective reflects nonverbal negative responses, & not silence, D was not prejudiced, because jury would not have changed its verdict had this clarification occurred. Held, transfer granted, Ct. App.' opinion at 727 N.E.2d 723 vacated, judgment affirmed. Dickson & Boehm, JJ., dissenting, argued that counsel was ineffective for failing to make coherent response to State's portrayal of D as liar in his claim at trial to have cooperated with investigation.

RELATED CASES: Vitek, 750 N.E.2d 346 (prosecutor was permitted to bring in evidence of D's refusal to give videotaped statement because it was defense counsel's intent on cross-examination to suggest that D cooperated with police).

TITLE: Splunge v. State
INDEX NO.: J.8.b.
CITE: (10-25-94), Ind., 641 N.E.2d 628
SUBJECT: References to post-Miranda Silence
HOLDING: Because of overwhelming evidence of D's guilt, Tr. Ct. did not commit reversible error by allowing prosecution to comment on D's exercise of his right to remain silent both before & during trial. During presentation of State's case, police officer testified that when first advised of Miranda rights, D refused to sign waiver & indicated he wished to exercise his Fifth Amendment right to remain silent. Ct. found no harm from reference to D's exercise of right to remain silent, because officer was not making reference to impeach D as prohibited by Doyle v. Ohio, 96 S. Ct. 2240, but was merely reciting chronology of events which led to D eventually making his statement to police. Ct. then concluded that during closing argument, prosecutor improperly attempted to remind jury that D had not testified when he said: "Think about the victim. The victim in this case has the right to remain silent, too. And he will for all eternity, thanks to [D]." Ct. noted, however, that misconduct did not constitute reversible error because prosecutor did not make direct reference & did not dwell on fact D did not testify, & evidence of guilt was overwhelming, as in Bernard v. State, Ind., 540 N.E.2d 23. Ct. also characterized prosecutor's conduct as "deplorable" when he observed during closing argument that "defense counsel does not want the jury to know the truth." Held, conviction affirmed, Sullivan, J., & DeBruler, J., dissenting.

RELATED CASES: Moore, 669 N.E.2d 733 (even if prosecutor's remark was improper, error was harmless; see card at D.15.e); White, App., 647 N.E.2d 684 (prosecution's repeated reference to D's post-Miranda silence was reversible error; because no objection was made, Tr. Ct. had no opportunity to admonish jury).

TITLE: State v. Rodrigues
INDEX NO.: J.8.b.
CITE: 113 Haw. 41, 147 P.3d 825 (Haw. 2006)
SUBJECT: Refusal to record confession equates to right to remain silent
HOLDING: Hawaii Supreme Court held a criminal suspect's refusal to repeat an incriminating statement for recording purposes functions as an invocation of the Fifth Amendment right to remain silent if it occurs at the close of the interview. D argued that, by refusing to repeat his statement on tape, he asserted his right to remain silent where officer testified to D's refusal to be taped and the officer's notes of the interview were admitted into evidence with the defense questioning their accuracy. Court found that, because the D's refusal to be taped caused the termination of all questioning by the police, it acted as a de facto invocation of his right to remain silent and refrain from answering further inquiries. Two other jurisdictions analyzing this question are split on the issue. See State v. Woods, 542 N.W.2d 410 (Neb. 1996) (finding Fifth Amendment right); Ball v. State, 699 A.2d 1170 (Md. 1997) (not finding). Court here noted that the record did not reflect whether the D was willing to continue the interview so long as it was not taped. Even so, it decided that the facts were closer to those in Woods than in Ball. Court also pointed to language in Miranda v. Arizona, 384 U.S. 436 (1966), to the effect that a D may answer some questions from police without giving up his right to stop providing information at any time and invoke his right to counsel. The Court continued, a D's mere refusal to allow an interview to be recorded, by itself, does not render any part of his statement inadmissible. "If the refusal to permit the interview to be electronically recorded is incidental to the suspect's general willingness to speak with police and answer questions, there is no invocation of a right to remain silent." However, the Court also held that it was not plain error for the Tr. Ct. in this case to allow the State to bring out the fact that the D refused to reiterate an inculpatory statement on tape, as the information was part of the prosecution's effort to convince the jury of the reliability of the officer's recollections of the interview, to clarify why the interview was memorialized solely by the officer's notes instead of a recording, and was unaccompanied by any implication of guilt.

TITLE: State v. Ward
INDEX NO.: J.8.b.
CITE: 354 N.C. 231, 555 S.E.2d 251 (N.C. 2001)
SUBJECT: Prosecutor's Comments on D's Silence
HOLDING: Prosecutor's comments about D's silence, made during closing argument at capital penalty phase, violate 5th amendment privilege against self-incrimination and require new penalty phase. During argument, the prosecutor described D's conduct while hospitalized after arrest for mental evaluation. "We know [D] could talk, but he decided to just sit quietly. He didn't want to say anything that would 'incriminate himself.' So he appreciated the criminality of his conduct all right. He was mighty careful with whom he would discuss that criminality, wasn't he? He wouldn't discuss it with the people at [the hospital.]" State argued comments were intended to undermine defense's reliance on statutory mitigating factor relating to impairment of D's capacity to appreciate criminality of his conduct, but majority disagreed. Despite lack of objection from defense, majority finds that Tr. Ct. abused its discretion by not intervening on its own.

TITLE: Sulie v. State
INDEX NO.: J.8.b.
CITE: (5/4/88), Ind., 522 N.E.2d 380
SUBJECT: Post-arrest silence - evidence of sanity; harmless error
HOLDING: Tr. Ct.'s admission of evidence re D's post-arrest, post-Miranda request for counsel, as evidence of sanity, was harmless error. D, convicted in 1976, seeks PCR relief based on retroactive application of Wainwright v. Greenfield (1986), 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 623. In Greenfield, U.S. S. Ct. held that D's post-arrest, post-Miranda silence was inadmissible at trial as evidence of D's sanity. Court stated that state's legitimate interest in proving that D's behavior at time of arrest was rational could be served without mention of D's exercise of rights to remain silent or to consult counsel. Id. Rehnquist, J., joined by Burger, C.J., Concurred in result, noting that admission of statements made in exercise of these rights may constitute harmless error. Ind. S. Ct. says issue is resolved by determining whether state exploited D's silence. Rather than traditional harmless error analysis, court puts burden on D, PCR petitioner, to show that "there is a serious question . . . which persuasively affects the determination of his guilt." See Rowley 483 N.E.2d 1078, McPhearson 318 N.E.2d 355 (both are retroactive application, rather than harmless error, cases). Here, Tr. Ct. permitted only one question on D's request for counsel. Two psychiatrists testified D was sane. Another witness testified that D had boasted he could "beat a murder rap" by pleading insanity. In context of this evidence, D "fails to present reversible error." Shepard, J., CONCURS separately using harmless error analysis. DeBruler, J., & Dickson, J., DISSENT, finding error is not harmless beyond reasonable doubt.

TITLE: Teague v. State
INDEX NO.: J.8.b.
CITE: (2nd Dist., 08-15-08), Ind. App., 891 N.E.2d 1121
SUBJECT: Improper use of D's post-arrest silence for impeachment - reversible error
HOLDING: In dealing in cocaine prosecution, Tr. Ct. erred in permitting State to use D's post-arrest silence to impeach his exculpatory story for first time at trial. D testified at trial and implied that the cocaine found in his garage belonged to a convicted drug dealer who had been in the garage and residence on the morning of the search and had used D's home that day while D and his wife were gone. Over D's objection, State was permitted to ask him on cross-examination whether he had told his version of events to the police anytime since the arrest and leading up to trial. State can impeach D at trial based on pre-arrest, pre-Miranda silence, but using a D's post-arrest, post-Miranda silence to impeach a story told for the first time at trial violates due process under Doyle v. Ohio, 426 U.S. 610 (1976). Here, State's questions on cross-examination and in its closing argument to the jury were not limited to D's pre-Miranda silence. Rather, State specifically referred to D's entire period of pre-trial, post-Miranda silence. State wholly failed in its burden of showing that Doyle violation did not influence jury's verdict. Held, convictions reversed and remanded for new trial.

RELATED CASES: Owens, 937 N.E. 2d 880 (Ind. Ct. App. 2010) (Tr. Ct. properly allowed State to use as substantive evidence D's failure to respond to a detective's efforts to contact him before he was arrested or charged did not); Barton, 936 N.E. 2d 842 (Ind. Ct. App. 2010) (where State's comments focused on D's pre-Miranda failure to disclose exculpatory story and responsive to D's closing argument suggesting that the State should never have charged him, the State's comments did not rise to the level of a Doyle violation).

TITLE: Trice v. State
INDEX NO.: J.8.b.
CITE: (4-30-02), Ind., 766 N.E.2d 1180
SUBJECT: No Doyle violation - D's prior inconsistent statements
HOLDING: Although prosecutor may not use D's post-arrest silence for impeachment, Doyle v. Ohio, 426 U.S. 610 (1976), does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a D who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. Anderson v. Charles, 447 U.S. 404 (1980).

Here, D waived her rights & made several statements to police about evening victim died, then invoked her constitutional right to counsel. In contrast to her initial police statement, in which she stated that she did not know what happened & could not remember anything about gun, D testified at trial that shooting was accidental. Where, as here, a D speaks to police after having received Miranda warnings, a prosecutor may impeach D by pointing out inconsistencies between story she told to police & story she tells to jury. United States v. Scott, 47 F.3d 904 (7th Cir. 1995). Held, judgment affirmed.

TITLE: U.S. v. Velarde-Gomez
INDEX NO.: J.8.b.
CITE: 269 F.3d 1023 (9th Cir. 2001)
SUBJECT: Testimony Regarding D's Lack of Reaction to Accusation
HOLDING: A prosecutor who elicited testimony regarding the fact that D did not respond when told at police station that 63 pounds of marijuana had been found in his car violated D's 5th amendment privilege against self-incrimination. State argues this was "demeanor" evidence, rather than comment on D's post-arrest silence. However, witness' testimony was that D "just sat there," didn't respond, and did not "say anything" or "deny knowledge." Each of these comments described D's silence.

TITLE: Wainwright v. Greenfield
INDEX NO.: J.8.b.
CITE: 474 U.S. 284, 106 S. Ct. 634, 88 L.Ed.2d 623 (1986)
SUBJECT: Use of post-arrest silence as proof of sanity
HOLDING: Cross-examination of D at trial concerning post-Miranda invocation of right to remain silent is unfair & violates Due Process Clause of 14th Amend. Doyle v. OH (1976), 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 91. The source of unfairness is implicit assurance in Miranda warnings that silence will carry no penalty. It is equally unfair to breach this implicit promise by using silence to overcome D's plea of insanity. In both instances, state gives warnings to protect constitutional rights & implicitly promises that any exercise of those rights will not be penalized. In both situations, state then seeks to make use of the D's exercise of those rights in obtaining conviction. Held, use of D's post-Miranda silence to rebut D's claim of insanity violates due process. Rehnquist, joined by Burger, CONCURS IN RESULT.

RELATED CASES: Myers, 27 N.E.3d 1069 (Ind. 2015) (where request for attorney was made to mom and before D was read his Miranda rights, it was not a due process violation to use the request as evidence of sanity); Barcroft, 26 N.E.3d 641 (Ind. Ct. App. 2015) (Tr. Ct. committed fundamental error by relying on D's post-Miranda request for counsel as evidence of D's sanity).

TITLE: White v. State
INDEX NO.: J.8.b.
CITE: (3rd Dist., 3-15-95), Ind. App., 647 N.E.2d 684
SUBJECT: Improper use of Post-Miranda silence
HOLDING: Prosecution's repeated references to D's post-Miranda silence was reversible error under Doyle v. Ohio, 426 U.S. 610. Prosecutor used post-arrest silence at trial in three ways: 1) through investigator, to emphasize D's failure to respond to incriminating questions while responding to the mundane; 2) through D, to imply that D demonstrated his guilt by not denying allegations; & 3) during closing arguments, to emphasize implication of guilt & to point out that D did not deny guilt to police but denied allegations at trial. Quantum of evidence in this case was not so overwhelming as to render error harmless, & because no objection was made, Tr. Ct. had no opportunity to warn jury of these impermissible references. Held, reversed.

RELATED CASES: Hightower, App.735 N.E.2d 1209 (using factors set forth in White, Ct. held that Doyle violation was not fundamental error); Lane, 925 F.2d 198 (7th Cir. 1991) (no Doyle error where inadvertent mention of D's request for counsel was not argued to jury or used to impeach D); Wilson, App., 688 N.E.2d 1293 (Doyle protection does not extend to post arrest statements, only to post arrest silence).

TITLE: Wilson v. State
INDEX NO.: J.8.b.
CITE: (10/28/87), Ind., 514 N.E.2d 282
SUBJECT: Post-arrest silence - evidence of sanity
HOLDING: Admission of testimony re D's exercise of his rights to remain silent & to consult with attorney, presented as evidence of D's sanity, constituted fundamental error. Police detective testified that, after interview started, D indicated he wanted to talk to lawyer before he continued. In closing argument, prosecutor cited that testimony as evidence of D's sanity. Since D's trial, U.S. S. Ct. has ruled that use of post-arrest, post-Miranda silence as evidence of sanity violates due process. Wainwright v. Greenfield (1986), 474 U.S. 284, 106 S. Ct. 634, 88 L.Ed.2d 623. It is fundamentally unfair to promise arrested person his/her silence will not be used against him/her & then use it to rebut insanity defense. Id. State argues it is not D's silence that is being used, but rather his statement of desire to remain silent until consulting attorney. However, silence includes such statements. Id. State also argues waiver, because D objected on different ground at trial. However, error is fundamental. See Shoulders 480 N.E.2d 211. Finally, state argues that Greenfield should not be applied retroactively. U.S. S. Ct. in Griffith v. KY (1987), 107 S. Ct. 708, 93 L.Ed.2d 649 held that a new rule for conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final. Held, reversed & remanded for new trial.

RELATED CASES: Barcroft, 26 N.E.3d 641 (Ind. Ct. App. 2015) (Tr. Ct. committed fundamental error by relying on D's post-Miranda request for counsel as evidence of D's sanity); Miller 518 N.E.2d 794 (D gave statement, but wrote "refused" across waiver form; form admissible as evidence of D's sanity).

TITLE: Yurina v. State
INDEX NO.: J.8.b.
CITE: (2/21/85), Ind., 474 N.E.2d 93
SUBJECT: Self-incrimination - use of post-arrest silence
HOLDING: Any error arising from officer's comment re D's post-arrest silence was harmless beyond a reasonable doubt. See US v. Hasting (1983), U.S., 103 S. Ct. 1974, 76 L.E.2d 96 (card at G.5.g). Here, officer stated Ds did not provide any voluntary statements re case during trip from UT to IN. D contends comment violated 5th Amend privilege against self-incrimination because it referred to his post-arrest silence, *citing* Doyle v. OH (1976), 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 91. See Jones 355 N.E.2d 402. But see Carlyle 428 N.E.2d 10 & Nelson 401 N.E.2d 666. Court finds much direct evidence of armed robbery from which jury could properly find D guilty beyond a reasonable doubt without regard to comment on D's failure to give post-arrest statement to police. Officer's comment was not deliberate attempt by state to use D's silence to indicate guilt. Held, conviction affirmed.

RELATED CASES: Salinas v. Texas, 133 S. Ct. 2174 (2013) (unless a D expressly invokes 5th Amendment right against self-incrimination, use of pre-arrest silence as substantive evidence of guilt does not violate 5th Amendment right – see full review, this section); Miller, App., 542 N.E.2d 1378 (playing of unedited DUI arrest videotape for purpose of showing D was intoxicated is not improper use of post-arrest silence); McChristion, 511 N.E.2d 297 (in disposing of D's contention that trial counsel provided ineffective assistance of counsel for failing to object to officer's testimony, but D did not offer statement to police after his arrest, court finds Doyle applies only in cases were post-arrest silence is used to impeach D; Burdine, 477 N.E.2d 544 (officer's testimony that D would not give his name or any statement & was not talkative was improper, but was harmless beyond a reasonable doubt); Burris, 444 N.E.2d 1187 (Doyle is inapplicable where D has made prior inconsistent statement).

J. CONSTITUTIONAL LAW

J.8. Privilege against self-incrimination (5th Amend; IndConst Art 1, 14)

J.8.c. Comment on D's silence at trial (see D.15.e)

TITLE: Bevis v. State
INDEX NO.: J.8.c.
CITE: (1st Dist., 05-26-93), Ind. App., 614 N.E.2d 599
SUBJECT: Use of post-arrest silence for impeachment is reversible error
HOLDING: Prosecutor's repeated questioning of testifying D concerning her post-arrest silence violated Due Process right to fundamental fairness. At D's trial for aiding, inducing, or causing escape of her husband, she was CXed by prosecutor concerning fact she had not previously given her story to anyone. D's objection that questions violated presumption of innocence & 5th Amend. right to remain silent was sustained, but later in CX, prosecutor again opened subject. D's objection was again sustained, but Ct. did not admonish jury or take any other curative action.

State's use of questions violated principle that using D's post-arrest, post-Miranda silence to impeach is violation of Due Process. State tried to impeach D's exculpatory testimony by making direct reference to her post-arrest silence when she was previously advised she had right to remain silent. Violation was not harmless under five-factor test of Bieghler (1985), 481 N.E.2d 78, cert. denied: use of post-arrest silence; who pursued line of questioning; other evidence of guilt; intensity & frequency of reference; & availability of granting mistrial or other curative action.

Only inference to be made from questions was that D had fabricated her entire story, & they were not inadvertent references to her silence, unconnected to charged conduct, nor simple inquiry as to whether she had invoked her rights. Other evidence of guilt was not so great as to outweigh harmful effect of error, & State pursued questioning with considerable frequency & intensity. Although D twice objected to questions, Ct. did not admonish jury or explain that D had right to remain silent, even though it had opportunity to do so. Because error was fundamental, D did not waive error by failing to request admonishment or mistrial.

RELATED CASES: Rowe, App., 717 N.E.2d 1262 (Doyle violation in this case was harmless because references to D's silence during direct examination of officer were few & brief in context of entire trial; & there was substantial quantum of other evidence of D's guilt); Higgins, App., 690 N.E.2d 311 (5-part criteria set forth in Bieghler may be applied whether or not D takes stand in his own defense); Jewell, App., 672 N.E.2d 417 (line of questioning was proper & officer's response was not direct comment on D's post-Miranda silence).

TITLE: Brown v. State
INDEX NO.: J.8.c.
CITE: (02-10-21), Ind. Ct. App., 164 N.E.3d 153
SUBJECR: Erroneous admission of pre-Miranda silence
HOLDING: In a civil forfeiture proceeding, trial court abused its discretion by admitting Defendant's pre-Miranda statements from a traffic stop in violation of his Fifth Amendment right against self-incrimination. While forfeiture proceedings are civil in nature, there is a punitive nature to them because the State uses them to confiscate property associated with criminal activity. Here, Defendant was in custody and questioned without receiving Miranda warnings, thus his pre-Miranda statements should not have been admitted. Court also found that the State failed to put forth sufficient evidence to sustain the forfeiture order because it did not establish a nexus between the $32,000 found in Defendant's pocket and the illegal activity because Defendant had only a small amount of marijuana in his possession, which without more is not enough to support the inference that drug dealing occurred, much less activity to yield or require over $30,000. The State did not present evidence regarding the quantity of illegal drugs allegedly being trafficked, the number of drug transactions the money allegedly facilitated, the identity of any drug purchasers or suppliers, or the location where any transaction occurred or was intended to occur.

TITLE: Delarosa v. State
INDEX NO.: J.8.c.
CITE: (12-21-2010), Ind., 938 N.E.2d 690
SUBJECR: Comment on D's Admissions to others but not to officer
HOLDING: In murder prosecution, prosecutor's comment in closing argument that "it would have been nice if he had admitted to this officer... He admitted to [Co-D,] he admitted to [other Co-D,] and he admitted to his cellmate...," was not an improper comment on D's failure to testify. Prosecutor is explaining that confession to officers was not necessary because D had already confessed to three people. Even if D had preserved the claim, prosecutor's statement is far too attenuated to warrant reversal. Held, judgment affirmed.

TITLE: Lynch v. State
INDEX NO.: J.8.c.
CITE: (03-28-94), Ind., 632 N.E.2d 341
SUBJECT: Invocation of right to counsel inadmissible to rebut insanity
HOLDING: Tr. Ct. erred in admitting tape recording containing D's invocation of right to counsel, even though D's sanity was central issue in trial. After D's initial conviction was reversed, Lynch, 571 N.E.2d 537, tape of initial police interrogation was admitted on retrial with instruction that it was to be considered for limited purpose of establishing his state of mind, i.e., his sanity. At one point on tape D invoked his right not to be questioned without attorney present. Doyle v. Ohio (1976), 426 U.S. 610, held that state violates D's due process rights when it uses his silence after Miranda warnings to impeach him. Decision to remain silent is "`insolubly ambiguous' evidence," & use of silence for impeachment is fundamentally unfair because persons are advised that they will not be penalized for exercise of rights, Wainwright v. Greenfield (1986), 474 U.S. 284; Brecht v. Abrahamson (1993), 113 S. Ct. 1710. Ct. acknowledged that in Turner, 428 N.E.2d 1244, it appeared to hold exercise of Miranda rights could be introduced at trial as evidence of sanity. Ct. noted, however, that in Wainwright, U.S. S. Ct. resolved issue by holding such evidence was inadmissible & it is now well established that post-Miranda requests for counsel cannot be used to show sanity. In Wilson, 514 N.E.2d 282, Ct. recognized effect of Wainwright when it held D's statement that he wouldn't answer any more questions was inadmissible to demonstrate sanity. Rationality of D's behavior could be demonstrated through questions that did not mention exercise of constitutional rights & playing entire tape in D's case did not reflect such effort.

RELATED CASES: Barcroft, 26 N.E.3d 641 (Ind. Ct. App. 2015) (Tr. Ct. committed fundamental error by relying on D's post-Miranda request for counsel as evidence of D's sanity).

TITLE: Reynolds v. State
INDEX NO.: J.8.c.
CITE: 797 N.E.2d 864 (Ind. Ct. App. 2003)
SUBJECT: Improper reference to D's invocation of Fifth Amendment at trial
HOLDING: In attempted murder & burglary prosecution, State engaged in prosecutorial misconduct by commenting in closing argument about D's invocation of Fifth Amendment at trial during cross examination. During closing, prosecutor stated: "You take the 5th Amendment when you got something to be concerned about ... My constitutional right not to incriminate myself.... So, in order for that to apply you have to have done something to incriminate yourself." State argued that although D objected to this comment, error was waived because he did not request an admonishment. Ct. disagreed, concluding that prosecutor's argument included a direct & deliberate comment upon D's exercise of his right against self-incrimination, & constituted fundamental error. Griffin v. California, 380 U.S. 609 (1965). Held, judgment reversed & remanded for new trial.

RELATED CASES: Thomas, 9 N.E.3d 737 (Ind. Ct. App. 2014) (State committed prosecutorial misconduct during closing argument when it made a direct reference to D's decision not to testify, but error was harmless given strength of State's case and Tr. Ct.'s firm admonishment); M.K., 6 N.E.3d 952 (Ind. Ct. App. 2014) (In CHINS civil matter, Tr. Ct. did not err by inferring respondent's guilt based on her refusal to testify under her 5th Amendment right against self-incrimination).

TITLE: Salinas v. Texas

INDEX NO.: J.8.c.

CITE: (6/17/2013), 133 S. Ct. 2174 (US Sup. Ct. 2013)

SUBJECT: Use of pre-Miranda silence doesn't violate 5th Amendment right against self-incrimination

HOLDING: Where petitioner had not been put under arrest or in custody and had not been given Miranda warnings, his silence in response to a question from police does not violate the 5th Amendment privilege against self-incrimination. Petitioner voluntarily answered several questions from a police officer who was investigating a murder. When the officer asked whether a ballistics test would show that shell casings found at the scene would match his shotgun, petitioner balked, looking down at the ground, biting his lip and generally tightening up but saying nothing. After a few moments, the officer asked additional questions and petitioner answered them. At petitioner's later trial on the murder charge, over his objection, his silence in response to the question about the shotgun shells was admitted as evidence of guilt. Petitioner argued on appeal that this use of his pre-arrest, pre-Miranda silence violated his 5th Amendment privilege against self-incrimination. The Court does not reach that issue, finding that petitioner did not invoke the privilege during his interview. The 5th Amendment privilege against self-incrimination is not self-enforcing, and an individual seeking its protection must invoke it at the time he relies upon it. This requirement puts the government on notice that a witness intends to rely on the privilege, so that they can either argue that the testimony sought is not self-incriminating or cure any potential self-incrimination through a grant of immunity. The Court has recognized two exceptions to the requirement that a witness invoke the privilege, neither of which applies here. The first is a recognition that a D need not take the stand to assert the privilege at his own trial, but rather has an absolute right not to testify. The second exception applies where government coercion renders forfeiture of the privilege involuntary. Neither of these exceptions applies here. Petitioner argues that a third exception should be recognized where police have reason to believe that a response to their question(s) would be incriminating. The Court rejects this invitation, noting that petitioner may have remained silent for other reasons, such as embarrassment, a desire to protect someone else, or needing time to think up a "good lie." Petitioner alone knew why he did not answer the officer's question, and it was his burden to put the state on notice if he was invoking the privilege.

RELATED CASES: Mira, 3 N.E.3d 985 (2014) (testimony about D's pre-arrest, Pre-Miranda silence did not violate his 5th Amendment right against self-incrimination; such testimony violates this right only if D unambiguously invoked his right to remain silent).

TITLE: Stout v. State
INDEX NO.: J.8.c.
CITE: (1st Dist. 10/08/91), Ind. App., 580 N.E.2d 676
SUBJECT: Use of D's request for lawyer to rebut insanity improper
HOLDING: During direct examination, investigating officer was asked if he asked D if he'd done what was claimed. Officer stated that D first denied allegation & when questioned further, said "I think I want an attorney." Officer then was asked how D appeared to him at that time, & he responded that D looked worried & that his characteristics & expression had changed dramatically from first contact. In closing argument, prosecutor commented that when asked about incident, D didn't say he'd tell the truth, but instead said he wanted a lawyer. Prosecutor then discussed how D knew his rights & how to work the system. D had raised insanity defense, as suffering from Post-Traumatic Shock Disorder, & there was some conflict in the evidence on this issue. This use of post-arrest silence as evidence of sanity was clearly erroneous. Wainwright v. Greenfield (1986), 474 U.S. 284.

While court found there was sufficient evidence to sustain guilty verdict, it also found that likelihood of erroneous admission of evidence influencing jury was not insubstantial. Therefore, despite fact D did not raise issue on direct appeal, error was fundamental & not waived. Held, denial of PCR petition & conviction reversed & remanded for new trial.

RELATED CASES: Willsey, 698 N.E.2d 784 (D may not package confession of guilt with request for counsel & then seek to exclude confession).

J. CONSTITUTIONAL LAW

J.8. Privilege against self-incrimination (5th Amend; IndConst Art 1, 14)

J.8.d. Non-testimonial compulsion (see M.5.d. and M.5.e)

TITLE: Baltimore City Dept. of Social Services v. Bouknight

INDEX NO.: J.8.d.

CITE: 493 U.S. 549, 110 S. Ct. 900, 107 L.Ed.2d 992 (1990)

SUBJECT: Non-testimonial compulsion - order to produce child adjudicated CHINS

HOLDING: 5th Amend. does not prohibit order compelling custodial parent to produce child adjudicated CHINS. 5th Amend.'s protection "applies only when the accused is compelled to make a testimonial communication that is incriminating." [Citations omitted.] When government demands that item be produced only thing compelled is act of producing item. Fisher v. U.S. (1976), 425 U.S. 391, 96 S. Ct. 1569, 48 L.Ed.2d 39. However, 5th Amend.s protection may be implicated if act of complying testifies to existence, possession or authenticity of things produced. [Citations omitted.] Incrimination that may result from contents/nature of thing demanded is not protected. Even if act of complying, here, is sufficiently testimonial for 5th Amend. purposes, D may not resist order to produce because she assumed custodial duties pursuant to agreed order which required production & production required as part of non-criminal regulatory regime. When person assumes control over items that are legitimate object of government's non-criminal regulatory powers, ability to invoke 5th Amend. privilege is reduced. Government powers to oversee children is not criminal in nature. Court explicitly does not decide what, if any, limitations may be imposed upon state's ability to use testimonial aspects of production in subsequent criminal prosecution. Held, 5th Amend. does not prohibit compelled production of child adjudicated CHINS. Marshall, joined by Brennan, DISSENTING.

TITLE: Criswell v. State
INDEX NO.: J.8.d.
CITE: (10/13/2015), 45 N.E.3d 46 (Ind. Ct. App. 2015)
SUBJECT: Officer's statement in internal investigation inadmissible
HOLDING: Tr. Ct. should have granted D's motion to suppress his incriminating statement given in an internal affairs police investigation because if D refused to give the statement, he was subject to losing his job, making his statement involuntary and inadmissible at trial.

D, a Fort Wayne police officer, attended a party at the home of a fellow officer when he, and the wives of two other officers, allegedly broke into a nearby home and removed a chain saw and several gas cans. When the Fort Wayne Police Department initiated an internal affairs investigation, it asked D to give a statement, but before doing so, asked him to review and sign a "Garrity Notice," which advised him that failure to give a statement could result in his termination, but that the statement could not be used in a subsequent criminal investigation. D gave a statement. About six months letter, the State requested and the Tr. Ct. granted a subpoena for materials from the internal affairs investigation, including D's statement, as well as the statements of the two women who allegedly accompanied him. The State eventually charged D with criminal conversion and criminal trespass, both Class A misdemeanors. D asked the Tr. Ct. to suppress his statement, but it declined.

The Tr. Ct. should have granted D's motion to suppress because his statement was coerced, not voluntary, under the Fourteenth Amendment. See Garrity v. New Jersey, 385 U.S. 493 (1967). "The option [for the officers] to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent [; therefore,] . . . . [w]e think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary . . . . "[T]he protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." Id. at 497-98 (footnote omitted).

As to the State's claim that the statements of the two women had a source independent from D's statement, the matter is remanded for further consideration. See Kastinger v. United States, 406 U.S. 441 (1972) (the Fifth Amendment privilege against self-incrimination "has never been construed to mean that one who invokes it cannot subsequently be prosecuted . . . ." Id. at 453. The government bears the burden of proving "that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." Id. at 460.) Held, judgment reversed and remanded for further proceedings.

TITLE: McKune, Warden et al. v. Lile

INDEX NO.: J.8.d.

CITE: 536 U.S. 24; 122 S. Ct. 2017; 153 L.Ed.2d 47 (2002)

SUBJECT: Fifth Amendment, self-incrimination, sex offender treatment, prisoner sanctions

HOLDING: Lile, an inmate convicted of rape and related crimes, was ordered to participate in a Sex Abuse Treatment Program (SATP). As part of the SATP, inmates are required to complete and sign a statement admitting responsibility for the crime for which they are serving a sentence, and to complete a sexual history form detailing all their prior sexual activities, including uncharged prior criminal acts. The information disclosed is not privileged. Inmates who refuse to disclose this information lose "visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, access to a personal television,and other privileges" and are subject to transfer to a potentially more dangerous maximum-security unit. Lile, who had testified in his own defense at trial, sought injunctive relief, claiming that being compelled to disclose this information and admit guilt would violate his Fifth Amendment privilege against self-incrimination and could potentially subject him to further prosecution either for unrelated crimes, or for perjury based on his trial testimony. The district court granted him summary judgment and the 10th Circuit affirmed, but the U.S. Supreme Court reversed in a 4-1-4 decision. Kennedy, joined by Rehnquist, Scalia and Thomas, concluded that the SATP served a vital penological purpose and characterized the sanctions as 'minimal incentives to participate.' Kennedy also wrote that the Sandin v. Conner, 515 U.S. 472, 485 (1995) 'atypical and significant hardship' test for violations of due process was a reasonable means for assessing whether the sanctions in this case were so 'out of the ordinary' that they constituted compulsion for purposes of the Fifth Amendment. O'Connor, concurring, disagreed with the plurality about the use of the Sandin 'atypical and significant hardship' test to assess Fifth Amendment 'compulsion' violations but concurred that the penalties assessed against respondent did not constitute compulsion under any reasonable test.

TITLE: Murray v. State
INDEX NO.: J.8.d.
CITE: (02/11/2022), 182 N.E.3d 270 (Ind. Ct. App.)
SUBJECT: Compelling defendant to show his teeth to jury did not violate 5th Amendment
HOLDING: At a trial for dealing methamphetamine, the State entered a video of a controlled buy into evidence, which showed the person who entered the informant's car wore sunglasses, a hat, and a hood. He also had crooked teeth. Near the end of its case-in-chief, the State asked the trial court to direct Defendant (who was wearing a mask under COVID restrictions) to show the jury his uncovered face and his teeth to show that he had the same distinctive set of teeth as the person in the video. Defendant objected on the basis that being compelled to do so would constitute a violation of his Fifth Amendment right against self-incrimination. The trial court initially ruled Defendant would have to take off his face mask and face the jury, but not show his teeth. Then, after learning he was wearing a "homemade" retainer in his mouth, the State renewed its motion and the court ruled he would be required to take the appliance out and smile for the jury. The Court of Appeals held that the trial court did not violate Defendant's Fifth Amendment protection against compulsory self-incrimination when it required him to show his teeth to the jury. Unlike compelling the defendant to unlock a smartphone in Seo v. State, the act of showing teeth did not convey information that the State does not already know. "While smiles can convey messages in the ordinary course of life, any such emotional context is removed when the subject smiles because he is directed to do so." Even assuming error in requiring Defendant to show his teeth, the Court would find it harmless beyond a reasonable doubt in light of the other evidence against Defendant.

TITLE: People v. Havrish
INDEX NO.: J.8.d.
CITE: 834 N.Y.S.2d 681, 866 N.E.2d 1009 (N.Y. 2007)
SUBJECT: 5th Amendment protected turning over unlicensed pistol
HOLDING: The New York Court of Appeals held that D's act of producing an unlicensed pistol in compliance with a protective order directing him to "surrender any and all firearms owned or possessed" was protected by his Fifth Amendment right against compelled self-incrimination. Court noted the case differs from others in which the compelled production of physical evidence has been held to fall outside the boundaries of the Fifth Amendment in that D's act of turning over the gun -- whose existence was unknown to the police at the time -- was both testimonial and incriminating. Distinguishing from Schmerber v. California, 384 U.S. 757 (1966), which allows the production of real or physical evidence such as fingerprints, handwriting samples, or a blood sample, Court held that here "the item produced is distinct from the act of production itself." Thus, "even when the thing demanded is not privileged, the act of production may be." The surrender of evidence -- even that which is not privileged -- may fall within the protection of the Fifth Amendment "if the very act of production has communicative or testimonial aspects."

The act of production doctrine is often applied to the surrender of subpoenaed documents, but the Supreme Court made clear in U.S. v. Fisher, 425 U.S. 391 (1976), that the Fifth Amendment privilege does not come into play where the existence and possession of the subpoenaed records are a "foregone conclusion." Thus, whether D's act of producing the unlicensed handgun was privileged turned on: (1) whether the compelled act of production was sufficiently testimonial, and (2) whether the act was incriminating.

Evidence is testimonial for purposes of the Fifth Amendment "when it reveals a D's subjective knowledge or thought processes -- when it expresses the contents of the D's mind." Court noted that the act of surrendering evidence can itself be testimonial if it confirms that the item demanded exists or is in the D's possession when those facts are unknown to the authorities and would not have been discovered by them through independent means. If the authorities know that a D possesses a certain item, then its production will not be sufficiently testimonial to implicate the Fifth Amendment. However, if it is not a "foregone conclusion" that the physical evidence is within D's control, then the act of production itself may be testimonial. Court also found that the surrender of the handgun to police was sufficiently incriminating to give rise to Fifth Amendment protection.

TITLE: Sargent v. State
INDEX NO.: J.8.d.
CITE: (2nd Dist., 11-07-07), Ind. App., 875 N.E.2d 762
SUBJECT: Nontestimonial compulsion - Tr. Ct. could consider D's lack of eye contact with victim
HOLDING: In incest prosecution, Tr. Ct. did not err in considering D's lack of eye contact & demeanor with daughter/victim during victim's testimony. The Fifth Amendment prohibits compulsion of statements of actions by a D that constitute communications, or are testimonial in nature. In order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Non-verbal conduct contains a testimonial component whenever the conduct reflects the actor's communication of his thoughts to another. Here, one of the reasons why Tr. Ct. found the victim credible & D not credible was because D avoided eye contact with the victim during her testimony. However, D was not compelled by State to make eye contact, or refrain from making eye contact with the victim. Thus, Tr. Ct. did not err in considering D's demeanor when finding that D committed incest against the victim. Held, judgment affirmed.

TITLE: U.S. v. Hubbell
INDEX NO.: J.8.d.
CITE: 530 US. 27, 120 S. Ct. 2037, 147 L.Ed.2d 24 (2000)
SUBJECT: Self-incrimination, documents
HOLDING: The Fifth Amendment protects a person from being compelled, in any criminal case, to be a witness against himself. Only compelled "testimonial" communications are privileged. The act of producing subpoenaed documents may have a compelled testimonial aspect. In this case, the Independent Counsel served D with a subpoena for production of 11 categories of documents before a grand jury. D invoked the Fifth Amendment privilege against self-incrimination and refused to state whether he had the documents until he was granted immunity, when he produced 13,120 pages of documents. The Independent Counsel used the contents of those documents in an investigation of D which led to an indictment by another grand jury on new tax and fraud charges. Held, the indictment was tainted because the Government could not demonstrate a prior awareness that the documents sought existed and were in D's possession.

RELATED CASES: Seo v. State, 109 N.E.3d 418 (Ind. Ct. App. 2018) (Tr. Ct. may not order a criminal defendant to unlock her smartphone, even in the presence of probable cause because such an order violates her guarantee against self-incrimination under the 5th & 14th amendments; see full review at J.8.a), Fisher v. U.S., 425 U.S. 391, 411, U.S. v. Doe, 465 U.S. 605.

TITLE: U.S. v. Montgomery

INDEX NO.: J.8.d.

CITE: 100 F.3d 1404 (8th Cir. 1996)

SUBJECT: Fifth Amendment Does Not Preclude D from Asking Witnesses to Try on Shirts In Which Drugs Were Wrapped

HOLDING: Tr. Ct. should not have allowed witnesses' invocation of fifth amendment to preclude D from directing them to try on shirts, in which cocaine was found wrapped, in front of jury. D was charged with cocaine possession after cocaine was found wrapped inside two shirts in suitcase he was carrying. D claimed that he did not knowingly possess cocaine, because cocaine and shirts belonged to two brothers, and he had not seen bundle until police removed it from his suitcase. At D's trial, state directed him to try on shirts in front of jury. D called two brothers and attempted to direct them to try on shirts, but Tr. Ct. refused to order them to do so after their invocation of fifth amendment. Fifth amendment protects individuals from compelled testimonial communications, not from the production of physical evidence.

J. CONSTITUTIONAL LAW

J.9. Confrontation/ cross-examination (6th Amend; Ind.Const. Art 1, 13)

TITLE: Ackerman v. State
INDEX No.: J.9.
CITE: (4/5/16), Ind. 51 N.E.3d 171
SUBJECT: Admission of non-testimonial autopsy report did not violate right to confrontation
HOLDING: Addressing an issue of first impression, Court held that an autopsy report explaining the manner and cause of death, prepared by a doctor who is now deceased was not testimonial, thus Defendant's Sixth Amendment confrontation right was not violated when the report was admitted into evidence. Forensic lab reports are "testimonial" when circumstances objectively indicate that they are being made for the primary purpose of preserving evidence for criminal litigation. Bullcoming v. New Mexico, 131 S. Ct. 2705, 2716-17 (2011).

Here, the report only confirmed that the pathologist performed the autopsy, not the accuracy of its conclusions or descriptions. Two police officers were present during the autopsy, but there were no references to aiding law enforcement, and the report is not labeled as a report, but as an "Anatomical Diagnosis." "Significantly, this seems to best capture what an autopsy report truly is, a medical diagnosis, not a formal attestation of fact 'bearing indicia of solemnity.'" Williams v. Illinois, 132 S Ct. 2221, 2229-33 (2012) (Thomas, J., concurring).

Although an autopsy could aid in the investigation or prosecution of a criminal case, Ind. Code § 36-2-14-6 does not suggest that assisting in a criminal case is the primary purpose of an autopsy. And the Indiana Coroner's Guidebook emphasizes that the coroner/law enforcement relationship should be cooperative, but independent. Unlike Court in Bull coming, Indiana Supreme Court concluded that the objective circumstances surrounding autopsy report in this case demonstrated that it was not prepared for the primary purpose of aiding a police investigation, and thus was non-testimonial.

Court also found that the surrogate pathologist's testimony about information contained in the autopsy report did not violate Defendant's confrontation rights. Under Indiana Evidence Rule 703, pathologist could give his own independent opinion regarding the cause of victim's death based on his review of the 1977 autopsy report and photographs. Held, judgment affirmed.

TITLE: Bishop v. State
INDEX NO.: J.9.
CITE: (7/31/2015), 40 N.E.3d 935 (Ind. Ct. App. 2015)
SUBJECT: Sixth Amendment does not bar dying declarations
HOLDING: In a matter of first impression, Court of Appeals held that dying declarations (Ind. Rule Evidence 804(b)(2)) are excepted from the Sixth Amendment's right of confrontation. Here, D shot Khalfani Shabazz five times. When paramedics arrived, Shabazz was sweating profusely, struggling to breathe, and was unable to speak complete sentences. At one point, he had no blood pressure. While awaiting surgery, two IMPD officers asked Shabazz who shot him, and each time he responded "Zimbabwe," which is D's nickname. Shabazz died later that day. His statements identifying D as the perpetrator were admitted at trial.

A historical exception to the right of confrontation "involves dying declarations." Crawford v. Washington, 124 S. Ct. 1354, 1367 n.6 (2004). Giles v. California said that under Crawford, "the Confrontation Clause is 'most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.'" Giles v. California, 128 S. Ct. 2678, 2682 (2008) (quoting Crawford, 124 S. Ct. at 1354). Giles observed that the Court had "previously acknowledged that two forms of testimonial statements were admitted at common law even though they were unconfronted" and that "[t]he first of these were declarations made by a speaker who was both on the brink of death and aware that he was dying." Giles, 128 S. Ct. at 2682. Thus, the Court of Appeals joined the "chorus of jurisdictions" that have held the Confrontation Clause does not apply to dying declarations. Accordingly, the Court said it was not necessary to decide whether Shabazz's statements were testimonial, and concluded that the Tr. Ct. did not abuse its discretion in admitting Shabazz's statements identifying D as the perpetrator. Held, judgment affirmed.

TITLE: Boatner v. State
INDEX NO.: J.9.
CITE: (09-22-10), 934 N.E.2d 184 (Ind. Ct. App. 2010)
SUBJECT: Crawford confrontation claim - statements to police officer nontestimonial
HOLDING: In domestic battery prosecution, admission of hearsay evidence did not violate D's confrontation rights. Police officer testified that complaining witness (CW) was disoriented, crying, without shoes, and almost ran to him in her attempt to find help. CW told officer that D pushed her down and hit her. D waived his Crawford confrontation issue by objecting at trial based solely on hearsay. Regardless, even if D properly preserved this issue for appeal, he would not prevail. Crawford v. Washington, 541 U.S. 36 (2004), applies only to testimonial hearsay. Here, CW's statement to officer was not testimonial. There is no indication that officer's primary purpose in speaking with CW was to establish or prove past events potentially relevant to later prosecution. Thus, admission of CW's statement did not violate D's confrontation rights. Held, judgment affirmed.

RELATED CASES: Sandefur, 945 N.E.2d785 (Ind. Ct. App. 2011) (battery victim's statement was nontestimonial because it was made in an attempt to gain police assistance for an ongoing emergency; she had been recently injured, and D had her cornered when officer arrived on the scene; D told officer that someone else had attacked victim, and she furtively indicated that this was not true so that officer would provide the assistance that she needed).

TITLE: Brittain v. State
INDEX NO.: J.9.
CITE: (1/31/2017), 68 N.E.3d 611 (Ind. Ct. App. 2017)
SUBJECT: Admission of deposition testimony did not violate D's confrontation rights
HOLDING: In murder and attempted murder prosecution, admission of State witness' deposition did not violate Defendant's confrontation rights under Sixth Amendment and Article 1, Section 13 of Indiana Constitution. Witness, who was the victim of a shooting and who witnessed the shooting of her companion, died after defense counsel deposed her; thus she was "unavailable" as a witness at trial for purposes of Ind. Evidence Rule 804. Defendant was afforded the opportunity to and did cross-examine the witness; thus trial court's decision to admit a redacted version of the two-hour deposition at trial did not violate Defendant's right of confrontation. The Indiana right to meet witnesses face-to-face is secured where the witness' testimony at a former hearing or trial on the same case is reproduced and admitted, where Defendant either cross-examined such witness or was afforded an opportunity to do so, and the witness cannot be brought to testify at trial again. Berkman v. State, 976 N.E2d 68 (Ind. Ct. App. 2012).

Because Defendant did not object at trial based upon violation of Ind. Trial Rule 30 (no review/signature and lack of proper certification by court reporter), he waived this issue on appeal. Finally, trial court did not abuse its discretion in admitting written answers the victim gave to a police officer at the hospital immediately after the shooting because this qualified as an excited utterance and, in any event, such error would have been harmless. Held, judgment affirmed.

TITLE: C.C. v. State
INDEX NO.: J.9.
CITE: (4th Dist., 04-27-05), Ind. App., 826 N.E.2d 106
SUBJECT: Crawford inapplicable in juvenile disposition hearing
HOLDING: Sixth Amendment right to confront witnesses under Crawford v. Washington, 124 S. Ct. 1354 (2004), was not violated when juvenile Ct. admitted disciplinary report from juvenile detention center that included hearsay statements from psychiatrist stating that juvenile should be placed in the DOC if he reoffended. Under Crawford, State must show two things pursuant to Confrontation Clause when it attempts to admit "testimonial" hearsay against a criminal D: 1) that the witness who made the statement is unavailable; & 2) that the D had a prior opportunity to cross-examine the witness. Here, juvenile D had previously been adjudicated a delinquent & placed in an alternative education program. Probation department filed a petition for modification of the dispositional decree due to violations of his commitment. During a hearing on this motion, State filed the disciplinary report that included the psychiatrist comments through the chief probation officer. While hearsay rules apply in juvenile proceedings to determine a child delinquent, excluding hearsay evidence in disposition hearings would in many cases disserve the child by excluding relevant information that might support a less restrictive disposition. *Citing* Matter of L.J.M., 473 N.E.2d 637 (Ind. Ct. App. 1985) (Ct.'s emphasis). Held, judgment affirmed; Barnes, J., concurring on other grounds with separate opinion.

TITLE: Collins v. State
INDEX NO.: J.9.
CITE: 873 N.E.2d 149 (Ind. Ct. App. 2007)
SUBJECT: Admission of 911 tape- ongoing emergency of apprehending murderer
HOLDING: Tr. Ct. did not err in admitting a 911 tape of an eye-witness to a murder. The Sixth Amendment prohibits the admission of testimonial statements of a witness who does not appear at trial unless the witness is unavailable & D had a prior opportunity to cross-examine the witness. Non-testimonial statements are made to police under circumstances objectively indicating that the primary purpose of the interrogation is to enable police to meet an ongoing emergency. Testimonial statements occur when the circumstances objectively indicate that the primary purpose is to establish or prove past events potentially relevant to later prosecution. Here, after D shot the victim in a car in front of Downs, D drove Downs home, threatened to kill him if he told anyone, & Downs gave D gasoline. Downs then removed fifty to sixty marijuana plants from his garage & then called the police to report the murder. Despite the delay between the murder & the 911 call, there was still an ongoing emergency & present danger of Downs' & others' safety due to an unapprehended murderer. Because the primary purpose was to assist police in meeting an ongoing emergency, the admission of the hearsay did not violate the Sixth Amendment. Held, judgment affirmed.

RELATED CASES: Wallace, 79 N.E.3d 992 (Ind. Ct. App. 2017), (911 call admissible under excited utterance exception, as it is apparent throughout the call that witness was not reflecting prior to making any of his statements, but was speaking in the heat of the moment in response to the excitement of an unfolding altercation), Martin, App., 885 N.E.2d 18 (statement of witness who had blood all over her face, was hysterical and sitting on side of road concerning the D's prior act of hitting her and taking off in his car with her children was necessary to resolve an ongoing emergency and thus was non-testimonial).

TITLE: Danforth v. Minnesota
INDEX NO.: J.9.
CITE: 552 U.S. 264, 128 S. Ct. 1029, 169 L.Ed2d 859 (2008)
SUBJECT: Crawford not retroactive although States can interpret differently
HOLDING: Court held that Teague v. Lane, 489 U.S. 288 (1989) does not constrain the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion. Court was reviewing a decision by the Minnesota Supreme Court that found that Crawford v. Washington, 541 U.S. 36 (2004) as a "new rule" in relation to evaluating the reliability of testimonial statements in criminal cases did not have retroactive effect and that state courts were not free to give a decision of the U.S. Supreme Court announcing a new constitutional rule of criminal procedure broader retroactive application than that given by the U.S. Supreme Court. Court agreed that Crawford announced a new rule under Teague and that on federal habeas review could not be applied retroactively as it neither placed certain primary individual conduct beyond the States' power to proscribe nor was it a "watershed" rule of criminal procedure. However, neither Linkletter v. Walker, 381 U.S. 618 (1965) nor Teague explicitly or implicitly constrained the States' authority to provide remedies for a broader range of constitutional violations than are redressable on federal habeas. Since Teague is based on statutory authority that extends only to federal courts applying a federal statute, it cannot be read as imposing a binding obligation on state courts. The federal interest in uniformity in the application of federal law does not outweigh the general principle that States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees. Roberts, C.J., filed a dissenting opinion, in which Kennedy, J., joined.

TITLE: Davis v. Washington/Hammon v. Indiana
INDEX NO.: J.9.
CITE: 126 S. Ct. 2266 (2006)
SUBJECT: Confrontation Clause, 6th Amendment
HOLDING: In a consolidated opinion, Court further defined what constitutes "testimonial" statements for purposes of the confrontation clause of the Sixth Amendment following the significant change in interpretation in Crawford v. Washington, 541 U.S. 36 (2005). *Davis* addressed whether questions posed and answered during a 911 call involving a domestic dispute produced testimonial statements. Court noted that complaining witness in Davis was speaking of events as they were actually happening, and the initial statements elicited were necessary to enable the police to resolve the present emergency rather than simply to learn what happened in the past. In contrast, there was no emergency in progress in Hammon, which also involved a domestic dispute although with police officers intervening at the scene. The complaining witness initially told officers everything was fine, and after that the officer questioning her was seeking to determine not what was happening but what had happened. However, the Court did remand for Indiana courts to determine whether a claim of forfeiture by wrongdoing - under which one who obtains a witness's absence by wrongdoing, forfeits the constitutional right to confrontation - remained available, and, if so, whether it was meritorious.

As in Crawford, Court did not attempt to produce an exhaustive classification of all conceivable statements that could be considered testimonial. But in relation to the present cases it suffices to say,

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers and for purposes of this decision Court considers their acts to be acts of the police. Thus, holding made it unnecessary to consider whether and when statements made to those other than the police are testimonial. Court did not find it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. A 911 call is ordinarily not designed primarily to "establish or prove" some past fact, but to describe a current circumstance requiring police assistance. Although one might call 911 to provide a narrative report of a crime absent any imminent danger, the complaining witness's call in Davis was plainly a call for help against a bona fide physical threat. Further, the questions initially asked were necessary to resolve the present emergency rather to learn what happened in the past. "This is not to say that a conversation which begins as an interrogation to determine the need for an emergency assistance cannot . . . evolve into testimonial statements, once that purpose has been achieved.@ Court noted that it could readily be maintained that once Davis left the residence of the domestic disturbance the exigency had ended and the complaining witness's answers to the 911 operator would be

considered testimonial. No great problem is presented in such situations because through *in limine* procedures portions of such statements can be redacted or excluded.

In Hammon, it was a "much easier task" finding the statements testimonial as they were not much different from those in Crawford minus the formality. There was no emergency in progress and the officer was not seeking to determine "what is happening" as in Davis, but rather "what happened.@ The primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime. Complaining witness's narrative of past events "was delivered at some remove in time from the danger she described." Although Court necessarily rejected the Indiana Supreme Court's implication that virtually any "initial inquiries" at the crime scene will not be testimonial, this did not mean that the opposite was true. Exigencies in assessing a situation may produce testimonial statements. An officer's "saying that an emergency exists cannot make it to be so." The Confrontation Clause in no way governs police conduct because it is the trial use of, not the investigatory collection of, ex parte testimonial statements which offends the provisions. However, Court noted that domestic violence is notoriously susceptible to intimidation or coercion of victims. When Ds seek to undermine the judicial process by such coercion, the Sixth Amendment does not require courts to acquiesce. As noted in Crawford, "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds." Court took no position on the standard of review as to such forfeiture, but noted courts using FRE 804(b)(6) have generally held the government to a preponderance standard and State courts have tended to follow the same practice. Held, judgment of the Supreme Court of Washington affirmed; judgment of the Supreme Court of Indiana reversed and remanded for proceedings not inconsistent with this opinion; Thomas, J., concurring in part and dissenting in part, agreed with holding in Davis, but dissented as to resolution of Hammon because he believes charging courts to divine the "primary purpose" of police interrogations to be unworkable and burdensome for courts.

TITLE: Everroad v. State
INDEX NO.: J.9.
CITE: (11/27/2012), 998 N.E.2d 739 (Ind. Ct. App. 2013)
SUBJECT: Legend used to guide interpretation of cell phone bill not testimonial
HOLDING: D was not denied his Sixth Amendment right of confrontation when prosecutor's investigator testified regarding cell phone records that placed D near the scene of a robbery. Witness referred to a "Legend for At & T Mobility Records," a glossary of terms which he used to interpret short hand abbreviations in cell phone records. D argued that the legend was hearsay upon which witness relied to support his conclusion of location, the drafter of the legend should have been called to testify, and the omission violated his right to confrontation as recognized in Crawford v. Washington, 541 U.S. 36 (2004). *Citing* Williams v. Illinois, 132 S. Ct. 2221 (2012), where a declaration of fact rested in part on reporting of an analysis of DNA performed by another analyst and lab, Court held that the "legend" in cell phone records was not testimonial in nature, so D was not denied his right of confrontation. Held, judgment affirmed.

TITLE: Fathke v. State
INDEX NO.: J.9.
CITE: 951 P.2d 1226 (Alaska Ct. App. 1998)
SUBJECT: Compulsory Process -- Palm Prints of Victim
HOLDING: Tr. Ct. abused its discretion in denying D's motion to compel victim to furnish palm prints, which could have supported inference that third person committed robbery. Victim, a sandwich shop employee, identified D in show-up shortly after robbery in which masked perpetrator displayed gun and took $80 and a sandwich. There were discrepancies between victim's original description and D's appearance, money was not found, but sandwich was found near shop, with bag bearing palm print not belonging to D. Taking of palmprints would have constituted only minimal intrusion on victim's privacy.

TITLE: Fowler v. State
INDEX NO.: J.9.
CITE: (2nd Dist., 6-16-05), Ind., 829 N.E.2d 459
SUBJECT: Reluctant witness available under Crawford -- D's burden to subpoena, compel testimony
HOLDING: Tr. Ct. admitted statements made to police from alleged domestic battery victim as "excited utterances" after victim refused to answer anything but preliminary questions. Victim initially took stand, but after answering some preliminary questions refused to answer any further questions & the State ended its questioning. At that time, defense counsel asked the witness if anyone had intimidated her & witness said "I don't want to testify. ... It's too much pressure … I want to go home. I can't do this." The witness was released & neither State nor defense attempted to compel her to testify further. "Crawford reexamined & redefined the scope of the Confrontation Clause, but it did nothing to alter the principles governing declarants who are available for cross-examination at trial." Ct. adheres to the view that a witness is not unavailable simply because the witness does not take the stand. If attendance of witness can be obtained through subpoena or otherwise, that person is available. Thus, tools to compel attendance must be exhausted before a Confrontation Clause violation will be entertained. Ct. looked at issue in terms of whether refusal to answer barred a D's access to meaningful cross-examination but did not resolve the issue because here D did not seek order compelling a response. Both federal & Ind. Evid. Rule 804 define "unavailability as a witness" as including a witness who persists in refusing to testify despite an order of a Ct. to do so. Crawford took a historical perspective to confrontation & the evidence rules embody common law principles & provide guidance to the meaning of "available for cross-examination." However, because Crawford endorsed California v. Green, 399 U.S. 149 (1970) which dealt with a witness who claimed not to recall an answer & found no confrontation violation, evidence rules are not sole source in determining availability.

Ct. concluded that a witness who is present & responds willingly to questions is "available for cross-examination" under Crawford. Ct. places burden on D to subpoena witness & if witness is present but will not answer questions to request the Ct. to compel the witness's testimony prior to their being declared unavailable for Crawford purposes. Like the Ct. App., Ct. strongly denounced practice of officer threatening an alleged domestic abuse victim with false informing charges if she does not testify. An officer appropriately can point out a witness's potential criminal exposure, but to "encourage" a witness by threatening prosecution of a person believed to be innocent is not only inappropriate, it is a crime [intimidation]." Held, judgment affirmed.

[Ed. **note**: Cts. in at least two other jurisdictions have held contrary on the burden shifting issue. *See* State v. Cox, 876 So.2d 932 (La.Ct. App.2004); Bratton v. State, 156 S.W.3d 689 (Tex.App.2005) (in case where State deliberately did not have witness testify preferring to enter his statements through a police officer). The burden shifting issue & other Crawford related topics are addressed by a University of Michigan law professor at http://confrontationright.blogspot.com/].

NOTE: In Melendez-Diaz (also at J.9), the U.S. Supreme Court makes clear that the Fowler Court's burden-switching to the D to prove a State's witness is unavailable in order to support a Sixth Amendment objection is erroneous. The Melendez-Diaz Court holds that "[c]onverting the prosecution's duty under the Confrontation Clause into the D's privilege under state law or the Compulsory Process Clause shift the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to

present its witnesses, not on the D to bring those adverse witnesses into court. Its value to the D is not replaced by a system in which the prosecution presents its evidence via ex parte affidavits and waits for the D to subpoena the affiants if he chooses."

RELATED CASES: McGaha, 926 N.E.2d 1050 (Ind. Ct. App. 2010) (where state failed to take any efforts to obtain expert for trial, State failed to show that expert was unavailable and the admission of the expert's deposition violated the Sixth Amendment even though D had a prior opportunity to cross the expert; harmless error); Tiller, App., 896 N.E.2d 537 (implicitly requiring State to prove that the victim was unavailable for trial, court of appeals held that state's efforts at securing the victim's attendance at trial were sufficient to find the victim unavailable under both the US and Indiana Constitutions and to allow the victim's deposition to be read into evidence); Edwards, App., 862 N.E.2d 1254 (Ct. App. bound by prior unpublished decision between same parties that D did not forfeit confrontation right by murdering witness); Howard, 853 N.E.2d 461 (distinguishing Fowler, when the reluctant witness is a child, the court must find the child meets the definition of unavailable under Ind. Code 35-37-4-6, requiring testimony of a psychiatrist, physician or psychologist).

TITLE: Gaines v. State
INDEX NO.: J.9.
CITE: (12/20/2013), 999 N.E.2d 999 (Ind. Ct. App. 2013)
SUBJECT: Return of service on protective order did not violate Confrontation Clause
HOLDING: In invasion of privacy prosecution, admission of certified copy of ex parte protective order did not violate D's rights under the Confrontation Clause of the Sixth Amendment. Return of Service that indicated D was personally served with a copy of the order along with certified printout is not testimonial, but is admissible under public records hearsay exception, so its admission at trial did not violate D's rights under the Confrontation Clause. The primary purpose of the return of service is administrative - ensuring that the D received notice of the protective order. See Ind. Code 34-26-5-9(e). Although the return of service may be used later in a criminal prosecution, the return of service was not created solely for use in a pending or future criminal prosecution. Held, judgment affirmed.

TITLE: Gardner v. State
INDEX NO.: J.9.
CITE: (1st Dist., 10-18-94), Ind. App., 641 N.E.2d 641
SUBJECT: No violation of right to confrontation
HOLDING: Where D who was absent from co-D's competency hearing had sufficient opportunity to cross-examine co-D face-to-face at trial or by requesting subsequent competency hearing, no violation of confrontation right under federal & Ind. constitutions. Because of Tr. Ct.'s oversight, incarcerated D was not transported to hearing to determine co-D's competency to testify at trial. After objecting to D's absence from hearing, defense counsel presented evidence & indicated that additional medical evidence regarding co-D's competency might be obtained. Tr. Ct. stated that hearing would continue at later date if D so requested. After discussing Ind. right to cross-examination & face-to-face confrontation during trial, Ct. concluded that D had ability to re-open competency hearing & cross-examine co-D in his presence. Ct. also noted that D had sufficient opportunity at trial to show incompetency or to impeach credibility of co-D, finding situation analogous to Lee v. State, Ind., 526 N.E.2d 963, where witnesses subpoenaed after ex parte pretrial proceeding were subject to cross-examination at trial. Ct. discussed limited nature of witness competency hearing & found it to be similar to deposition of witness to extent D will not suffer grievous loss of liberty or property as he may at trial. **Note:** D filed motion for continuance of trial on grounds that he had not received medical report from doctor who had examined co-D. In affirming Tr. Ct.'s denial of motion, Ct. found that D failed to show he was prejudiced by denial of motion because he did not explain what report would prove.

TITLE: Gayden v. State

INDEX NO.: J.9.

CITE: (3rd Dist., 04-05-07), Ind. App., 863 N.E.2d 1193

SUBJECT: Admission of 911 recording - Davis & Crawford; D must specify objectionable portions of call

HOLDING: In domestic battery prosecution, Tr. Ct. did not err by admitting recording of complaining witness's (CW's) 911 call. D argued that admission of 911 recording violated his Sixth Amendment right to confrontation under Crawford v. Washington, 541 U.S. 36 (2004), which held that out-of-court testimonial hearsay statements of unavailable witnesses may not be admitted unless the adverse party has had an opportunity to cross-examine. In Davis v. Washington, 126 S. Ct. 2266 (2006), Court held that CW's initial statements, in which she told 911 operator name of her assailant, were not "testimonial" because operator was questioning CW at that time for primary purpose of enabling police assistance to resolve an "ongoing emergency."

Here, operator initially questioned CW about perpetrator's identity & location of incident for apparent purpose of dealing with present emergency, thus this portion of 911 call was non-testimonial under Davis. However, portions of 911 recording contained arguably testimonial evidence, e.g., CW's statement that police would find ammunition shells in D's yard, that gun might be in D's car, & that D was ex-boyfriend of one of CW's friends, had "got mad" at CW but she did not know why. At trial, D purposefully objected to entire 911 recording as testimonial, on basis that CW's purpose in making call, from the beginning, was to make incriminating statements about D.

To preserve a claim of error regarding exclusion of evidence, trial objection must include specific ground for exclusion of evidence. See Coates v. State, 650 N.E.2d 58 (Ind. Ct. App. 1995). Also, the objector must be specific as to the part or parts of the evidence being objected to. Baker v. Wagers, 472 N.E.2d 218, 220 n.2 (Ind. Ct. App. 1984). Because at least a portion of the recording included non-testimonial evidence, Tr. Ct. did not abuse its discretion by overruling D's objection to entire recording. Held, judgment affirmed.

RELATED CASES: Collins, App., 873 N.E.2d 149 (eyewitnesses' 911 call about murder was admissible under Crawford & Davis because, although murder occurred a while earlier the emergency of apprehending a murderer still was ongoing); Gamble, App., 831 N.E.2d 178 (in attempted murder prosecution, two 911 calls from independent third parties reporting shooting were not inadmissible under Crawford because the reports were not testimonial in nature)

TITLE: Gilbert v. State
INDEX NO.: J.9.
CITE: (09-26-11), 954 N.E.2d 515 (Ind. Ct. App. 2011)
SUBJECT: Hearsay; right to confrontation - statements made to prompt D to speak
HOLDING: In prostitution case, Tr. Ct. did not abuse its discretion in admitting police officer's testimony regarding another undercover officer's statements to D that he wanted to receive oral sex from her. Officer's testimony was not inadmissible hearsay, insofar as it was not offered to prove the truth of the matter asserted. Rather, the out-of-court statements were made to prompt D to speak, and it was her statements that constituted the evidentiary weight of the conversation. See Williams v. State, 930 N.E.2d 602 (Ind. Ct. App. 2010). The statement provided context for D's response, which was to ask how much money the officers had. Court rejected D's claim that admission of officer's statements violated her right to confrontation, noting that the Confrontation Clause does not apply to nonhearsay statements, even if those statements are testimonial. Id. Moreover, D was given the opportunity to cross-examine officer who was present during entire time that D was with the officers. Held, judgment affirmed.

TITLE: Giles v. California

INDEX NO.: J.9.

CITE: 554 U.S. 353, 128 S. Ct. 2678 (2008)

SUBJECT: Forfeiture by wrongdoing not an exception to Sixth Amendment confrontation

HOLDING: Majority held that the forfeiture by wrongdoing requirement is not an exception to the Sixth Amendment's confrontation requirement because it was not an exception established at the founding. Common-law courts allowed the introduction of statements by an absent witness who was "detained" or "kept away" by "means or procurement" of the D. Cases and treatises indicate that this rule applied only when the D engaged in conduct *designed* to prevent the witness from testifying. The manner in which this forfeiture rule was applied makes plain that unconfronted testimony would not be admitted without a showing that the D intended to prevent a witness from testifying. In cases where the evidence suggested that the D wrongfully caused the absence of a witness but had not done so to prevent the witness from testifying, un-confronted testimony was excluded unless it fell within the separate common-law exception to the confrontation requirement for statements made by speakers who were both on the brink of death and aware that they were dying. Not only is the proposed exception to the confrontation right plainly not an "exception established at the time of the founding" as noted in Crawford v. Washington, 541 U.S. 36 (2004), it is not established in American jurisprudence since the founding. No case before 1985 applied forfeiture to admit statements outside the context of conduct designed to prevent a witness from testifying. The view that the exception applies only when the D intends to make a witness unavailable is also supported by modern authorities, such as Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine. Acts of domestic violence are often intended to dissuade a victim from resorting to outside help. A D's prior abuse, or threats of abuse, intended to dissuade a victim from resorting to outside help would be highly relevant to determining the intent of a D's subsequent act causing the witness's absence, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify. Here, the state court did not consider Petitioner's intent, which they found irrelevant under their interpretation of the forfeiture doctrine. They are free to consider intent on remand. Scalia delivered the opinion of the Court, except as to one part. Roberts, C.J., and Thomas and Alito, JJ. joined the opinion in full, with Souter and Ginsburg, JJ. joining as to only the opinion delivered by Scalia, J. Thomas and Alito, JJ. filed concurring opinions. Souter, J., filed an opinion concurring in part, in which Ginsburg, J., joined. Breyer, J., filed a dissent, in which Stevens and Kennedy, JJ. joined.

RELATED CASES: Bishop, 40 N.E.3d 935 (Ind. Ct. App. 2015) (6th amendment confrontation clause doesn't bar admission of dying declarations because common law at time of founding held that unconfronted testimonial dying declarations were admissible).

TITLE: Hemphill v. New York
INDEX NO.: J.9.
CITE: (01/20/2022), S. Ct. 681 (S.Ct. 2022)
SUBJECT: "Opening the door" is not an exception to the Confrontation Clause
HOLDING: The trial court allowed the State to introduce parts of the transcript of a co-defendant's plea allocution as evidence to rebut Hemphill's theory that the co-defendant committed the murder (the co-defendant was out of the country and not available to testify). The Supreme Court held the admission of the plea allocation violated Hemphill's Sixth Amendment right to confront the witnesses against him. The Court rejected the State's argument that Hemphill "opened the door" to the introduction of these testimonial statements because they were "reasonably necessary" to "correct" the "misleading impression" Hemphill had created by pursuing a third-party culpability defense, *citing* People v. Reid. The Court acknowledged that the Sixth Amendment leaves States with flexibility to adopt reasonable procedural rules governing the exercise of a defendant's right to confrontation. See Melendez Diaz v. Massachusetts, 557 U.S. 305, 327 (2009). But the door-opening principle incorporated in Reid is not a member of this class of procedural rules. Rather, it is a substantive principle of evidence that dictates what material is relevant and admissible in a case. Here, Hemphill did not forfeit his confrontation right merely by making the plea allocution arguably relevant to his theory of defense.

The Court reiterated that the history, text, and purpose of the Confrontation Clause bar judges from substituting their own determinations of reliability for the method the Constitution guarantees. "The trial court here violated this principle by admitting unconfronted, testimonial hearsay against Hemphill simply because the judge deemed his presentation to have created a misleading impression that the testimonial hearsay was reasonably necessary to correct. For Confrontation Clause purposes, it was not for the judge to determine whether Hemphill's theory that [co-defendant] was the shooter was unreliable, incredible, or otherwise misleading in light of the State's proffered, unconfronted plea evidence. Nor, under the Clause, was it the judge's role to decide that this evidence was reasonably necessary to correct that misleading impression. Such inquiries are antithetical to the Confrontation Clause."

Cases in which the Court has previously permitted a State to impeach a defendant using evidence that would normally be barred from use at trial did not involve exceptions to constitutional requirements. The Court left for another day to decide the validity of the common-law rule of completeness as applied to testimonial hearsay. Reversed and remanded.

TITLE: Isom v. State
INDEX NO.: J.9.
CITE: (5/20/2015), 31 N.E.3d 469 (Ind. 2015)
SUBJECT: By-standers' statements and answers to officer's question not testimonial
HOLDING: Officer's testimony regarding statements of unidentified men who did not appear at trial did not deny the D his right to confrontation, and the Tr. Ct. did not err in denying his motion for mistrial. The D was charged with the shooting death of his wife and two step-children. Officers were called to the scene, heard shots inside an apartment, and also had shots fired in their direction. The shooting and stand-off lasted for approximately three hours. At the same time that Officer Pawlak arrived, two unidentified men arrived, got out of their car, and started yelling toward the building for "Kevin" to stop shooting. Officer Pawlak asked them who was shooting, and the men told him it was their cousin, Kevin Isom, and that he was inside the apartment with his wife and two children. The men then left the scene and did not return. Police did not obtain their names and they were not present at trial. Officer Pawlak testified to both their initial statement and their response to his question. D objected to the admission of both statements on hearsay and confrontation grounds, and on appeal raised the confrontation issue. The Court found that the initial statement was not made in response to any police questioning, but rather an attempt to stop the shooting. As such, this statement was not testimonial, and D's confrontation right was not implicated. As to the second statement in response to Officer Pawlak's question, the Court wrote that the question to be resolved was whether the "circumstances objectively indicat[e] that the primary purpose of the interrogation [wa]s to enable police assistance to meet an ongoing emergency." Davis v. Washington, 547 U.S. 813, 822 (2006). The information Officer Pawlak sought concerned events as they were actually happening," and was necessary to aid officers who were facing an ongoing emergency. Id., at 827. "Officers called to investigate [ongoing] disputes need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." Hiibel v. Sixth Judicial Dist. Ct. of Nevada, Humboldt Cnty., 542 U.S. 177, 186 (2004). The Court concluded that the men's identification of D as the shooter was a nontestimonial statement and the Tr. Ct. did not violate D's right to confrontation by allowing it at trial.

TITLE: Jackson v. State
INDEX NO.: J.9.
CITE: (2nd Dist., 08-12-08), Ind. App., 891 N.E.2d 657
SUBJECT: Right to confrontation - lab report in drug case testimonial
HOLDING: D was denied his Sixth Amendment right to confront witnesses where the Tr. Ct. admitted a laboratory report prepared by a technician who did not testify. Where testimonial statements are at issue, the only indicum of reliability sufficient to satisfy constitutional demands is confrontation. Crawford v. Washington, 541 U.S. 36 (2004). Federal courts of appeals and state courts of last resort are now almost evenly divided over whether state forensic laboratory reports prepared for use in criminal prosecutions are testimonial, and this issue will soon be addressed by the U.S. Supreme Court. Here, D was charged with Class A felony cocaine dealing. At trial, the Indiana State Police Lab supervisor, and not the lab tech who performed the analysis and prepared the lab report establishing that the substance was cocaine and the weight of the substance, testified. Because the lab report was prepared pursuant to a police investigation and was introduced by the prosecution to establish an element of a charged crime, the lab report was testimonial. The testimony of the lab supervisor was insufficient to satisfy D's right to confrontation. The nature of the testing at issue is such that only the technician who performed the testing could testify whether she correctly followed each step in the testing process. Thus, Tr. Ct. abused its discretion in admitting the lab report into evidence. Held, judgment reversed.

RELATED CASES: Koenig, 933 N.E.2d 1271 (Ind. 2010) (allowing lab report showing methadone in deceased victim's blood admitted through coroner rather than analyst was constitutional error, but harmless beyond a reasonable doubt); McMurrar, App., 905 N.E.2d 527 (because the quality assurance manager was merely a sponsoring witness of the lab report and did not perform the tests herself, her testimony did not satisfy D's right of confrontation under Crawford).

TITLE: Johnson v. State

INDEX NO.: J.9.

CITE: (01-24-23), Ind. Ct. App., 201 N.E.3d 1198

SUBJECT: Mask requirement for testifying witnesses violated federal and state constitutional confrontation rights - harmless error

HOLDING: At her trial for criminal recklessness, Defendant objected to the trial court requiring witnesses to wear opaque face masks during their testimony as a violation of her federal and state constitutional rights of confrontation. The trial court interpreted the Marion County Court's COVID-19 policy to exclude the use of face shields and to mandate the use of face masks and did not make case-specific findings of necessity for the face coverings.

The Court of Appeals noted stemming the spread of COVID-19 is a compelling interest and that other jurisdictions have determined defendants' confrontation rights were not violated by allowing or requiring masking. But following In re B.N. v. Health and Hospital Corporation, 199 N.E.3d 360 (Ind. 2022), the Court found trial court's determination it was required to follow the masking order was not a sufficient finding of good cause or necessity, but that the error was harmless. Under the Sixth Amendment, even though masked, the witnesses testified in open court and, "the jury was able to observe their demeanor and body language, and because the witnesses were subject to cross-examination, we conclude that the trial court's error by failing to make a case-specific finding of necessity was harmless." In its separate analysis under Article I, section 13 of the Indiana Constitution, the Court likewise noted Defendant was "still able to look at the masked witnesses in the eye and observe their demeanor and body language, as was the trier of fact." Held, judgment affirmed.

RELATED CASES: Johnson, 201 N.E.3d 1198 (Ind. Ct. App. 2023) (Rehearing granted to clarify harmless error standard (see review at G.5.g) but Court reaffirms that constitutional violations were harmless).

TITLE: Jones v. State
INDEX NO.: J.9.
CITE: (3rd Dist., 09-14-05), Ind. App., 834 N.E.2d 167
SUBJECT: Right to confrontation - co-conspirator hearsay exception
HOLDING: In murder & attempted murder prosecution, Tr. Ct. did not err in admitting testimony relating a statement made by a co-conspirator during commission of crimes for which D was convicted. D argued that admission of co-conspirator's statement denied him the right to cross examine co-conspirator as guaranteed by Sixth & Fourteenth Amendments to U.S. Constitution & that it violated Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004). Crawford held that out-of-Ct. testimonial statements of unavailable witnesses may not be admitted unless the adverse party has had an opportunity to cross-examine. Although Crawford declined to specifically define "testimonial," it cited Dutton v. Evans, 400 U.S. 74, 87-89 91 S. Ct. 210, 219 (1970), for proposition that co-conspirators' statements are nontestimonial. Thus, Tr. Ct. properly admitted co-conspirator's statement pursuant to Indiana Evidence Rule 801(d)(2)(E), which categorizes a statement by a co-conspirator of a party during course of & in furtherance of conspiracy as non-hearsay. Held, judgment affirmed.

RELATED CASES: Cardosi, 128 N.E.3d (Ind S. Ct. 2019) (D's right to confrontation was not violated by admission of co-conspirator’s post-crime text messages because the messages were not testimonial but were created for primary purpose of planning and covering up crimes).

TITLE: Lane v. State

INDEX NO.: J.9.

CITE: (10/25/2013), 997 N.E.2d 83 (Ind. Ct. App. 2013)

SUBJECT: D did not open the door to admission of testimonial hearsay evidence - "clear & intentional waiver" required

HOLDING: In murder prosecution, Tr. Ct. erred in concluding that D opened the door to admission of evidence of phone number, which was testimonial hearsay. During trial, evidence was admitted that one of the shooting victims called a number with a (678) area code four times on the night of the shooting, but that number was not initially linked a particular person. But evidence linking D to that number was introduced through detective, who said that number beloned to D's cousin, whom he had interviewed shortly after the shooting. The issue arose during defense counsel's cross-examination of detective.

Tr. Ct. erroneously concluded that D had opened the door to this hearsay evidence linking him to the (678) phone number. Court found D's cousin's statement to police regarding the number was testimonial. A D can open the door to admission of evidence otherwise barred by the Confrontation Clause, but that waiver must be "clear and intentional," which was not the case here. Because of overwhelming evidence placing D at the scene of shooting, Court concluded that admission of hearsay was harmless beyond a reasonable doubt.

TITLE: Lehman v. State
INDEX NO.: J.9.
CITE: (04-13-10), 926 N.E.2d 35 (Ind. Ct. App. 2010)
SUBJECT: Confrontation Clause- audiotapes of controlled buys
HOLDING: Tr. Ct. properly admitted the deceased confidential informant's statements at trial. An informant's statements made during taped conversations with the D is not hearsay when they are not admitted for the truth of the matter, but rather designed to prompt D to speak. Williams v. State, 669 N.E.2d 956, 958 (Ind. 1996). Here, an informant conducted two controlled buys with D which were taped. The informant later died of an overdose and thus was unavailable to testify at the trial. The conversations between D and the informant were short and referenced street drug-dealing terminology. The informant was questioning D with regard to drugs. Thus, the informant's statements were not hearsay because they were not introduced for the truth of the matter.

However, statements made by the informant prior to and after the drug transactions describing the transactions were testimonial and their admission violated the Sixth Amendment. A declarant who does not testify at trial violates the Sixth Amendment if: (1) the statement was testimonial and (2) the declarant is unavailable and the D lacked a prior opportunity for cross-examination. Testimonial statements are those that are substitutes for live testimony, i.e., they do precisely what a witness does on direct testimony. Here, the informant described how he arranged the deals in the beginning of the tapes and described the drug transactions at the end of the tapes. Thus, the statements made by the informant at the beginning and end of both audiotapes were made with a view to be used prosecutorially or were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. But, the admission of the statements was harmless. Held, judgment affirmed; Vaidik, J., concurring on basis that the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted and that the informant's statements constituted legally operative conduct, which is not hearsay.

RELATED CASES: Hendricks, 162 N.E.3d 1123 (Ind. Ct. App. 2021) (three recorded jail calls between D and his Co-D admissible to question of whether D attempting to conceal his wrongdoing; D's statements in the calls were not hearsay under Evid. R. 801(d) and Co-D's statements were not admitted for the truth but rather to provide context to make sense of the conversation); Sheckles, 24 N.E.3d 978 (Ind. Ct. App. 2015) (the line of cases that allows the admission of photographs and videos as substantive evidence under the silent witness theory was not overruled by Crawford v. Washington); Williams, 930 N.E.2d 602 (Ind. Ct. App. 2010) (despite fact that tapes of controlled buy included many inaudible statements made by D and long periods of silence, the CI's statements on tape provide context for that silence just as much as they do for D's own admissible statements; thus, admission of CI's statements during controlled buy did not violate the sixth amendment right to confrontation).

TITLE: Marsh v. State
INDEX NO.: J.9.
CITE: (4th Dist., 11-24-04), Ind. App., 818 N.E.2d 143
SUBJECT: Crawford v. Washington does not apply to probation revocation hearings
HOLDING: Based on rationale of Isaac v. State, 605 N.E.2d 144 (Ind.1992), Ct. determines that recent decision of Crawford v. Washington, 124 S. Ct. 1354 (2004) historically interpreting the Confrontation Clause does not apply to probation revocation proceedings. Holding in Isaac was premised upon the fact that revocation proceedings are different from the underlying criminal proceedings, triggering different & less stringent procedural requirements & safeguards. Consequently, Ct. does not see a probation revocation hearing as implicating Crawford. Even if it did, the Ct. found that Crawford likely would not be implicated because the hearsay statement here at issue was not testimonial in nature. While not positively stating that Crawford only applies to testimonial statements, the Ct. cited language from that decision which inferred that it very well might. Assuming that Crawford only applies to testimonial statements, Ct. concluded the statement a girl made at school that her father abused her did not fit the understanding of testimonial.

Besides Crawford, Ct. determined that the challenge to the hearsay statement was waived for failing to properly object at trial. Further, Ct. rejected D's claim of ineffective assistance of counsel because D could not show that a proper objection would have been sustained, as the rule against hearsay does not apply in proceedings relating to probation. Cox v. State, 706 N.E.2d 547 (Ind.1999). In such a proceeding, the reviewing Ct. is to determine whether the evidence was reliable enough to have been admitted over objection & based on several factors, Ct. was satisfied with the reliability of the evidence. Ct. also found sufficient evidence to sustain the revocation. Held, judgment affirmed.

RELATED CASES: Monroe, App., 899 N.E.2d 688 (Crawford does not apply in community corrections revocation placement hearings; hearsay that officers found gun in home where D was staying on home detention was reliable and its admission did not violate the Sixth Amendment).

TITLE: Melendez-Diaz v. Massachusetts
INDEX NO.: J.9.
CITE: (6-22-09), U.S., 129 S. Ct. 2527
SUBJECT: Right to confrontation - lab reports
HOLDING: The Sixth Amendment requires that a lab chemist be called to testify in order to admit the lab analysis into evidence in a trial. A witness's testimony against a D is inadmissible unless the witness appears at trial or, if the witness is unavailable, the D had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36 (2004). Testimonial statements include "ex parte in-court testimony or its functional equivalent-that is material such as affidavits, custodial examinations, prior testimony that the D was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." Id. at 51-52. Here, in a drug prosecution, the State submitted lab reports instead of live testimony of the lab analyst to establish the identity and weight of the cocaine at issue. The lab reports were sworn to before a notary public by analysts at the State Lab and were conclusory in that they identified the material tested as cocaine of a certain weight. The reports were made in response to a police request, and even if they were volunteered, it would not make the reports any less testimonial. These lab reports were affidavits in which the lab analyst provides the precise testimony that he or she would be expected to provide if called at trial. These lab reports are functionally identical to live, in-court testimony, and thus, are testimonial. Moreover, citing to the National Academy of Sciences' Report, Strengthening Forensic Science in the United States: A Path Forward 6-1, the Court reasons that scientific testing by labs run by law enforcement agencies is not as neutral or reliable as the dissent suggests. Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination. Thus, the Sixth Amendment does not permit the prosecution to prove its case via ex parte out of-of-court affidavits, and the admission of the laboratory reports was unconstitutional. Held, judgment of Massachusetts Court of Appeals at 870 N.E.2d 676, reversed and remanded; Thomas, J., concurring with separate opinion; Kennedy, J., dissenting with home Roberts, C.J., Breyer and Alito, J.J, concur.

NOTE: The Court makes clear that the Indiana Supreme Court's burden-switching to the D to prove a State's witness is unavailable in order to support a Sixth Amendment objection is erroneous. See Fowler v. State, 829 N.E.2d 459 (Ind. 2005). The Melendez-Diaz Court holds that "[c]onverting the prosecution's duty under the Confrontation Clause into the D's privilege under state law or the Compulsory Process Clause shift the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the D to bring those adverse witnesses into court. Its value to the D is not replaced by a system in which the prosecution presents its evidence via ex parte affidavits and waits for the D to subpoena the affiants if he chooses."

RELATED CASES: Jones, 982 N.E.2d 417 (Ind. Ct. App. 2013) (D's confrontation rights under 6th Amendment not violated by admission of certificate of inspection about accuracy of chemical breath test device, even though person who certified the device did not testify at trial, because the certificate was non-testimonial); Williams v. Illinois, 132 S. Ct. 2221 (2012) (plurality opinion that expert's testimony that, assuming other analysts' DNA test was accurate, the results matched D's DNA profile did not violate Confrontation Clause because expert was not testifying about actual truth of the results; instead, she testified on a hypothetical question — if the report was accurate, would it provide a DNA match to Williams - not on whether report was true); Bullcoming, 131 S. Ct. 2705 (U.S. 2011)

(Confrontation Clause does not allow introduction of testimonial lab results through supervisor who had no role in testing blood sample); Koenig, 933 N.E.2d 1271 (Ind. 2010) (allowing lab report showing methadone in deceased victim's blood admitted through coroner rather than analyst was constitutional error, but harmless beyond a reasonable doubt).

TITLE: Michigan v. Bryant
INDEX NO.: J.9.
CITE: (02-28-11), 131 S. Ct. 1143 (U.S. 2011)
SUBJECT: Victim's statement near crime scene not testimonial hearsay; ongoing emergency
HOLDING: Mortally wounded crime victim's out-of-court statement identifying and describing shooter and location of shooting were not testimonial statements because they had a primary purpose to enable police assistance to meet an ongoing emergency rather than producing evidence of the crime. Thus, admission of statement at D's trial did not violate the Confrontation Clause. In reaching this conclusion, Court declared that the "primary purpose" inquiry required an objective evaluation of the circumstances and the parties' intent. Here, the setting for the statements was at or near a crime scene, not at a police station. The existence of an "ongoing emergency" encompasses not just the threat to the first victim, but to the public and to the first responders, and can depend on whether a gun is involved. In addition, the informality of the encounter is a factor that can distinguish it from a formal station house interrogation. The motives of a victim in speaking to police must be viewed objectively, by taking into consideration the actions of the police as first responders. The shooting victim's primary motives were not to establish past events potentially relevant to later criminal prosecution. Held, Michigan Supreme Court opinion at 768 N.W.2d 65 vacated and remanded. Kagan, J. RECUSED. Thomas, J., CONCURRING, would have ruled based upon his view that the police questioning lacked sufficient formality and solemnity for the answers to be considered testimonial under Crawford v. Washington, 541 U. S. 36 (2004). Scalia, J., DISSENTING, contended that majority distorted the meaning of existing Confrontation Clause jurisprudence, leaving it in shambles, and making the Court the "obfuscator of last resort." He found the police officers' explanation of an ongoing emergency implausible, rather the facts showed it was five officers conducting successive interrogations of a dying man and preserving his testimony regarding his killer. He sees the majority's decision as a dramatic curtailment of rights under the Confrontation Clause. Ginsburg, J., DISSENTING, agrees with substance of Justice Scalia's dissent, adding that she would have been prepared to decide the continuing viability of the dying declaration exception to the Confrontation Clause, post-Crawford, an exception that may have applied here except the prosecutors expressly abandoned the issue in this case.

RELATED CASES: Ohio v. Clark, 135 S. Ct. 2173 (2015) (child's statement to teacher, i.e., non-law enforcement personnel, was non-testimonial; see full review, this section); McQuay, 10 N.E.3d 593 (Ind. Ct. App. 2014) (officer's testimony about victim's statements identifying D as perpetrator did not violate D's 6th amendment right to confront victim because victim's statements were non-testimonial as they addressed ongoing emergency created by fact that D was still at large and still posed a threat to victim and others).

TITLE: Mills v. State

INDEX NO.: J.9.

CITE: (11/10/2022), 198 N.E.3d. 720 (Ind. Ct. App. 2022)

SUBJECT: COVID face mask requirement did not violate right to confrontation; admission of D's statements after counsel appointed

HOLDING: In burglary and robbery prosecution, Defendant failed to show that the trial court's COVID face mask requirement imposed at the time of his trial denied him his federal and state constitutional right to confront witnesses and was fundamental error. In rejecting Defendant's argument, the Court of Appeals found the trial court explained to the parties and jurors why they had to wear masks, pursuant to an Indiana Supreme Court order and a Wayne County requirement. Also, the trial court explained the judge and attorneys would be permitted to remove their makes when they were socially distanced from others, and there was plexiglass around the witness stand so they could fully view faces. "Moreover, while there are no published Indiana opinions regarding the constitutionality of COVID face mask requirements in courts, other state and federal courts have addressed the issue and determined that such requirements do not violate the defendant's constitutional right to confront witnesses… In fact, courts have found no confrontation clause violation when even the testifying witnesses were required to wear masks."

Defendant also challenged the trial court's order permitting the State to play for the jury the statement he made to law enforcement after counsel had been appointed. Defendant's waiver of this issue notwithstanding, the Court held that Article I, Section 13 of the Indiana Constitution did not prohibit the use of Defendant's statement to impeach his trial testimony where he initiated and knowingly, freely, and voluntarily gave the statement to law enforcement and waived his right to counsel. Defendant failed to show any reason why, unlike the federal constitution, the Indiana Constitution should be interpreted to disallow admission of a statement that a defendant knowingly and voluntarily gave to law enforcement after appointment of counsel.

Finally, Court found sufficient evidence to support Defendant's convictions as an accomplice.

TITLE: Ohio v. Clark
INDEX NO.: J.9.
CITE: (6/18/2015), 135 S. Ct. 2173 (U.S. 2015)
SUBJECT: Child's statement identifying D was non-testimonial
HOLDING: Tr. Ct. did not violate D's Sixth Amendment Right of Confrontation by denying his motion to suppress a three-year-old child's out-of-court statement that D abused him; the statement was non-testimonial, meaning its primary purpose was not to collect evidence but to defuse an on-going emergency. See Crawford v. Washington, 541 U.S. 36 (2004); Michigan v. Bryant, 562 U.S. 344 (2011).

D sent his girlfriend to Washington D.C. to work as a prostitute while he watched her son, L.P, and her eighteen-month-old daughter, A.T. L.P.'s teachers discovered marks on the boy, and he identified D as his abuser. At trial, the State introduced L.P.'s statements, but L.P. did not testify. D was convicted of multiple counts of abusing both children.

Several factors show that L.P.'s statement's primary purpose was non-testimonial. His teachers asked questions to identify and end the threat to both children, not to collect evidence. They did not tell L.P. his statements would be used to arrest or punish D, and L.P. did not hint or suggest he intended his statement to be used in D's prosecution. Also, his statement was spontaneous and informal. His age further confirms his statement was not testimonial. Finally, although statements to people other than law enforcement officials, such as teachers, are not categorically admissible, such statements are much less likely to be testimonial. Held, cert. granted, opinion of the Ohio Supreme Court at 999 N.E.2d 592 reversed and remanded. Alito, J., joined by Roberts, C.J., and Kennedy, Breyer, Sotomayor, and Kagan, JJ; Scalia, J., concurring in judgment, joined by Ginsburg, J.; Thomas, J., concurring in judgment.

TITLE: Ohio v. Clark
INDEX NO.: J.9.
CITE: (6/18/2015), 135 S. Ct. 2173 (2015)
SUBJECT: Child's statement to teacher was non-testimonial
HOLDING: Tr. Ct. did not violate D's Sixth Amendment Right of Confrontation by denying his motion to suppress a three-year-old child's out-of-court statement to a teacher; the statement was non-testimonial because it was made to someone other than a law enforcement officer. See Crawford v. Washington, 541 U.S. 36 (2004); Michigan v. Bryant, 562 U.S. 344, 369 (2011); Giles v. California, 554 U.S. 353, 376 (2008).

D sent his girlfriend to Washington D.C. to work as a prostitute while he watched her son, L.P, and her eighteen-month-old daughter, A.T. L.P.'s teachers discovered marks on the boy, and he identified D as his abuser. At trial, the State introduced L.P.'s statements, but L.P. did not testify. D was convicted of multiple counts of abusing both children.

L.P.'s statement was made to his teacher, not a law enforcement officer. Although statements to people other than law enforcement officials are not categorically admissible, such statements are much less likely to be testimonial. Alito, J., joined by Roberts, C.J., and Kennedy, Breyer, Sotomayor, and Kagan, JJ; Scalia, J., concurring in judgment, joined by Ginsburg, J.; Thomas, J., concurring in judgment.

TITLE: Pendergrass v. State
INDEX NO.: J.9.
CITE: (09-24-09), 913 N.E.2d 703 (Ind. 2009)
SUBJECT: Right to confrontation - no violation by admission of DNA lab report through supervisor
HOLDING: D's Sixth Amendment right to confrontation was not violated by the introduction of a certificate of analysis and DNA profiles through the testimony of a laboratory supervisor and not the analyst who conducted the DNA testing. Because affidavits of State lab analysts are testimonial, a D is entitled to be confronted with the analysts at trial, absent a showing that the analysts were unavailable to testify and the D had a prior opportunity to cross-examine them. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2532 (2009). However, not everyone who laid hands on the evidence must be called. Id. at 2532 n.1.

Here, D was charged with molesting his daughter. His daughter's aborted fetus, along with her and her father's blood, was DNA profiled. The State admitted, over objection, two documents-- a certificate of analysis establishing the evidence submitted and tests performed by the State lab and profiles for paternity analysis providing the DNA profiles for D, his daughter and the fetus. However, the State called the laboratory supervisor rather than the laboratory processor. The laboratory supervisor who took the stand had a direct part in the process by personally checking the lab processor's results. As such, she could testify as to the accuracy of the test as well as standard operating procedure of the laboratory and whether the processor diverged from these procedures. Also, the prosecution called an expert to interpret the test results. Thus, D had the opportunity to confront at trial two witnesses who were directly involved in the substantive analysis, unlike Melendez-Diaz, who confronted none at all. The supervisor's testimony was sufficient for Sixth Amendment purposes, and Tr. Ct. did not err in admitting the documents. Held, judgment affirmed; Rucker and Boehm, JJ., dissenting on basis that majority's opinion is based on isolated comments from Melendez-Diaz taken out of context and misses the holding that the analyst who performed the testing must testify.

RELATED CASES: Speers, 999 N.E.2d 850 (Ind. 2013) (acknowledging that continuing validity of Pendergrass has been undermined by subsequent authority from the U.S. Supreme Court); (Crawford was not violated by State's failure to call a lab technician who transferred blood samples from broken glass to white cloths for DNA testing; DNA analyst who tested the sample testified at trial, which sufficed for Sixth Amendment purposes; Ct. also rejected claim that Pendergrass is no longer good law in light of the U.S. Supreme Court's plurality opinion in Williams v. Illinois, 132 S. Ct. 2221 (2012)); Bullcoming, 131 S. Ct. 2705 (U.S. 2011) (confrontation Clause does not allow introduction of testimonial lab results through supervisor who had no role in testing blood sample); Bond, 925 N.E.2d 773 (Ind. Ct. App. 2010) (admission of expert fingerprint analysis did not violate D's Sixth Amendment confrontation rights, even though one fingerprint analyst did not testify at trial; Results of examiner who did not testify were not introduced).

TITLE: People v. Sharp
INDEX NO.: J.9.
CITE: 155 P.3d 577 (Colo. 2006)
SUBJECT: Court reconsiders confrontation after Davis v. Washington
HOLDING: The Colorado Supreme Court held that evidence of statements made by an alleged child sexual abuse victim to a forensic interviewer during a videotaped interview were testimonial in nature and thus subject to the Sixth Amendment's cross-examination precondition to admission.

Originally, the Court ruled that the statements of the five-year-old whom the D was convicted of molesting were not testimonial because the child did not appear to understand that statements to the interviewer would later be used at the D's trial. However, the Court reconsidered the case in light of Davis v. Washington, 126 S. Ct. 2266 (2006), and reached the opposite conclusion. The Court noted that one of the factors identified in Davis that bears on a determination of testimonial is the purpose for such the statements were elicited. Like the testimonial statements in Davis, the child's statements concerned past events and were elicited by the interviewer for the primary purpose of convicting the perpetrator. The Court also decided that the child's statements were made in circumstances that were the functional equivalent of a police interrogation and, therefore, qualified as testimonial under the state supreme court's pre-Davis ruling in State v. Vigil, 127 P.3d 916 (Colo. 2006).

TITLE: People v. Stechly
INDEX NO.: J.9.
CITE: 225 Ill.2d 246, 870 N.E.2d 333 (Ill. 2007)
SUBJECT: Confrontation - 'forfeiture by wrongdoing' and unavailability
HOLDING: Illinois Supreme Court held that the equitable "forfeiture by wrongdoing" doctrine - under which a D can be deemed to have forfeited his or her rights under the Sixth Amendment's confrontation clause - requires proof that the D's wrongful acts that caused a hearsay declarant to be unavailable were committed with the intent to keep the declarant off the witness stand. Courts across country are divided on the question. In Crawford v. Washington, 541 U.S. 36 (2004), and Davis v. Washington, 126 S. Ct. 2266 (2006), Supreme Court reinterpreted the interpretation of the confrontation clause holding that out-of-court "testimonial" statements by those who do not appear at trial are inadmissible unless the declarant is unavailable to testify and the D had a prior opportunity to cross-examine him or her. Two unresolved issues left by the recent decisions dealt with the scope of the "forfeiture by wrongdoing" doctrine and how to determine whether statements made by child sex abuse complainants are testimonial.

On first issue, Court here held that the purpose of the forfeiture-by-wrongdoing doctrine is not furthered when the doctrine is applied in circumstances where a D did not act with an intent to keep a witness from testifying. Present case involved a child molesting with the trial occurring before Crawford came down and the Tr. Ct. determined the child was unavailable due to the trauma she would undergo if required to testify. Court looked to Davis for its narrower interpretation of the forfeiture by wrongdoing doctrine. Court noted that Davis refers to Ds who "seek to undermine the judicial process by procuring or coercing silence from witnesses and victims" and to Ds' "duty to refrain from acting in ways that destroy the integrity of the criminal trial system." This language "strongly connotes a requirement of intent," Court stated. Two justices dissented from holding. Court also addressed questions as to whether statements made by the child to a nurse were testimonial in nature, with plurality of Court determining that when a statement is made outside of police questioning the statement's testimoniality should be determined by looking at the motive of the declarant. Plurality concluded that only a statement made by the child to her mother was non-testimonial and harmless error did not apply to admission of other testimonial statements.

See also*:* State v. Romero*,* 156 P.3d 694 (N.M. 2007) for similar holding on forfeiture by wrongdoing issue.

TITLE: Perry v. State

INDEX NO: J.9.

CITE: (08-22-11), 956 N.E.2d 41 (Ind. Ct. App. 2011)

SUBJECT: Admission of complaining witness's statement to nurse - no Confrontation Clause violation

HOLDING: In what is arguably dicta, Court held Tr. Ct. did not violate D's confrontation rights by admitting a medical report that contained C.W.'s identification of D as the perpetrator, where C.W. did not testify and the medical report was admitted through the testimony of the nurse.

Even though statements attributing fault or establishing a perpetrator's identity are normally inadmissible under the hearsay exception for medical diagnosis, see Rule of Evidence 803(4), Court has noted that in sexual assault and/or domestic violence cases, courts may exercise discretion to admit medical diagnosis statements that identify a perpetrator. See Nash v. State, 754 N.E.2d 1021, 1024-25 (Ind. Ct. App. 2001). Here, C.W.'s identification of D was relevant for: 1) potential treatment for STD's; 2) counseling, and 3) deciding how to discharge the patient.

The medical record containing C.W.'s statement, prepared by the nurse, was admissible under the hearsay exception for records or regularly recorded business activity, which includes diagnostic records, if kept in the course of regularly conducted business activity. Medical records are routinely held admissible under Rule 803(6). Even though hearsay rules exclude "investigative reports by police and other law enforcement personnel" when offered against Ds in criminal cases, "we do not read 'police and law enforcement personnel' to include treating doctors or nurses, even when such medical personnel may act in cooperation with law enforcement authorities."

Court also held, when viewed objectively under totality of circumstances, C.W.'s statement to nurse about alleged attack and identity of attacker was not testimonial, and, thus, admitting the statement did not violate D's Sixth Amendment right of confrontation. Even though the police drove C.W. to the hospital and even though the nurse's investigation of what happened to C.W. had an investigative component, the primary purpose of the nurse's exam and of C.W.'s statement to the nurse was to furnish and receive "emergency" medical and psychological care. See Michigan v. Bryant, 131 S. Ct. 1143, 1156 (2011); see also State v. Stahl, 855 N.E.2d 834 (Ohio 2006); State v. Slater, 939 A.2d 1105, 1118 (Conn. 2008); State v. Schaer, 757 N.W.2d (Iowa 2008); State v. Sandoval, 154 P.3d 271, 273 (Wash. Ct. App. 2007); Cf. State v. Mendez, 242 P.3d 328, 340-41 (N.M. 2010) "[Sexual Assault Nurse Examiners] may be more adept at collecting and preserving evidence, but any medical provider who treats sexual abuse victims is engaged to some extent in the collection of evidence, and most understand that the evidence they collect . . . could be used in a subsequent prosecution" but complaining witness's statement to nurse should not have been categorically excluded).

This reasoning is arguably dicta because even though Court affirmed Tr. Ct.'s decision to allow admission of the statement, Court reversed on other grounds and remanded for a new trial. Held, judgment affirmed in part and reversed in part on other grounds.

Note: Court also held that testifying nurse was the "technical 'declarant'" of the overall medical record and because she appeared for cross examination at trial, the Confrontation Clause "places no constraints at all" on the use of her prior statements, even if they were testimonial. Thus, the admission of the medical record and statements relayed therein did not violate D's Sixth Amendment rights.

RELATED CASES: Ward v. State, 50 N.E.3d 752 (Ind. 2016) (as in Perry, C.W.'s statement to paramedic and forensic nurse, identifying D as her attacker, were for the primary purpose of medical treatment,

and thus are non-testimonial.); McQuay, 10 N.E.3d 593 (Ind. Ct. App. 2014) (officer's testimony about victim's statements identifying D as perpetrator did not violate D's 6th amendment right to confront victim because victim's statements were non-testimonial as they addressed ongoing emergency created by fact that D was still at large and still posed a threat to victim and others).

TITLE: Proctor v. State
INDEX NO.: J.9.
CITE: (1st Dist., 10-03-07), Ind. App., 874 N.E.2d 1000
SUBJECT: Right to confrontation - Crawford; witness' memory loss
HOLDING: In robbery & burglary prosecution, admission of State witness' taped statement presented no violation of D's Sixth Amendment right to confrontation under Crawford v. Washington, 541 U.S. 36 (2004), because witness was present at trial, she testified, & she was subject to cross-examination. D argued that, in spite of witness' presence at trial, her lack of memory made her effectively unavailable for purposes of conducting a meaningful cross-examination. Even if a witness is determined to be "unavailable" under Indiana Rule of Evidence 804(a), that determination does not render the person unavailable for cross-examination for purposes of the Confrontation Clause. Fowler v. State, 829 N.E.2d 459 (Ind. 2005); U.S. v. Owens, 484 U.S. 554 (1988). Held, judgment affirmed.

TITLE: Rankins v. Commonwealth
INDEX NO.: J.9.
CITE: (237 S.W.3d 128 (Ky. 2007)
SUBJECT: Statements taken by officer responding to 911 domestic call were testimonial
HOLDING: Kentucky Supreme Court held a police officer who responded to a 911 call of an injured woman who described being beaten by her ex-boyfriend should not have been allowed to testify to the woman's statements after she declined to take the stand at the man's assault trial. Courts have significantly split in defining a "testimonial" statement in such situations since the U.S. Supreme Court issued Crawford v. Washington and Davis v. Washington, which significantly changed the direction of confrontation clause analysis pursuant to the Sixth Amendment. Even though in the past tense, several jurisdictions have allowed responses to officers' questions where the declarant is unavailable finding that the officers were assessing and addressing an ongoing emergency. Here, Court held that one of the lessons from Davis is that "where statements recount potentially criminal past events, the declarant is for Confrontation Clause purposes, acting as a witness against the accused."

"More simply, statements that tell 'what is happening' are nontestimonial, while statements that tell 'what happened' are testimonial." Court held the statements at issue in this case recounted "what happened," and they were therefore testimonial.

TITLE: Reed v. State
INDEX NO.: J.9.
CITE: (6-8-01), Ind., 748 N.E.2d 381
SUBJECT: Denial of confrontation/cross-examination - reversible error
HOLDING: In murder prosecution, D was denied his Sixth Amendment right of confrontation when Tr. Ct. refused to compel deposition of prosecution witness. Witness's credibility was critical & his testimony was cornerstone of prosecution's case against D. All other evidence & testimony against D was circumstantial. Record established that State's continued & vigorous opposition to D's efforts to depose witness & its refusal to grant use immunity until moments before witness took stand at trial constituted interference with D's case. Baxter v. State, 727 N.E.2d 429 (Ind. 2000); Bubb v. State, 434 N.E.2d 120 (Ind. Ct. App. 1982). Inability to depose witness left D with no opportunity to expose several inconsistencies in D's various accounts. At very least, D was entitled to access to D prior to trial to have opportunity to develop & pin down witness's testimony or at least have sworn testimony to impeach any variances.

Ct. also found reversible error in Tr. Ct.'s refusal to permit D to impeach witness with his videotaped interview with prosecutors. Tr. Ct.'s refusal to play tape interfered with D's right to cross-examine D & impeach his inconsistent testimony & therefore prejudiced him. Although D was able to cross-examine D on specific inconsistent statements, that impeachment was compromised by Tr. Cts.' refusal to play tape for jury. Held, conviction reversed & remanded for new trial.

RELATED CASES: Cain, 955 N.E.2d 714 (Ind. 2011) (where State waited until first day of trial to offer plea to co-D, Tr. Ct. did not abuse its discretion by refusing to exclude co-D's testimony; D was given opportunity to depose co-D before he testified).

TITLE: Richardson v. State
INDEX NO.: J.9.
CITE: (5th Dist., 11-20-06), Ind. App., 856 N.E.2d 1222
SUBJECT: Right to confrontation - business records are not testimonial evidence
HOLDING: In dealing in methamphetamine prosecution, Tr. Ct. did not abuse its discretion in admitting D's son's medical records. D argued that her Sixth Amendment right to confrontation was violated because medical records constitute testimonial evidence pursuant to Crawford v. Washington, 541 U.S. 36 (2004), & fails to otherwise fall within a recognized hearsay exception. Crawford drew a line between testimonial & non-testimonial hearsay without providing a definition of testimonial evidence, providing the States latitude for developing their hearsay laws in relation to non-testimonial hearsay. However, Crawford did comment on existing hearsay exceptions, stating, "[m]ost hearsay exceptions covered statements that by their nature were not testimonial-- for example, business records or statements in furtherance of a conspiracy." Crawford, 541 U.S. at 56.

Ct. found no persuasive reasoning posited by D to cause it to disagree with S. Ct.'s holding in Crawford that business records by their very nature are not testimonial. Thus, Tr. Ct. did not abuse its discretion in admitting medical records pursuant to Indiana Evidence Rule 803(6). Held, judgment affirmed in part, reversed in part on other grounds & remanded.

TITLE: Rogers v. State
INDEX NO.: J.9.
CITE: (4th Dist., 9-10-04), Ind. App. 814 N.E.2d 695
SUBJECT: Confrontation - hearsay; excited utterance exception
HOLDING: In battery & criminal recklessness prosecution, victim's hearsay statement to police following bar altercation fell under "excited utterance" hearsay exception & as "non- testimonial" statement to police, did not encroach on D's right to confront witnesses against him under Crawford v. Washington, 124 S. Ct. 1354 (2004). Ct. found that police officer's statement that victim was "'visibly shaking' & 'on the verge of tears' suggests he was still under the stress of the event" for excited utterance purposes. Ct. also found it "reasonable to infer" that police responded promptly to the dispatch, noting that amount of time passing between a startling event & the utterance is "relevant but not dispositive." Burdine v. State, 751 N.E.2d 260 (Ind. Ct. App.2001).

Ct. also analyzed the victim's statement under Crawford to determine if its admission violated D's right to confrontation. Noting Crawford's vagueness in defining what constitutes "testimonial" statements, Ct. relied on Hammon v. State, 809 N.E.2d 945 (Ind. Ct. App. 2004), which held that informal questioning by police at scene of incident was not testimonial & that by its very nature an excited utterance cannot be testimonial as it is not reflective or deliberate. Ct. concluded that "an unrehearsed statement made without time for reflection or deliberation, as required to be an 'excited utterance,' is not 'testimonial' in that such a statement, by definition, has not been made in contemplation of its use in a future trial." *Citing* Crawford at 1364. Held, judgment affirmed in part & reversed in part on other grounds.

RELATED CASES: McQuay, 10 N.E.3d 593 (Ind. Ct. App. 2014) (victim's spontaneous and hysterical statements made moments after D attacked her were excited utterances; thus, Tr. Ct. did not abuse its discretion in allowing officer who first attended to victim at scene of crime to testify about the victim's statements).

TITLE: Rollins v. State

INDEX NO.: J.9.

CITE: 392 Md. 455, 897 A.2d 821 (Md. Ct. App. 2006)

SUBJECT: Admissibility of Autopsy Reports under Crawford.

HOLDING: The Maryland Court of Appeals has held that autopsy reports which contain statements that can be characterized as "contested opinions or conclusions, or are central to the determination of a D's guilt, they are testimonial and trigger the protections of the Confrontation Clause, requiring both the unavailability of the witness and a prior opportunity for cross-examination." Reports that contain only findings about the physical condition of the decedent that can be characterized as "routine, descriptive, and non-analytical" are not testimonial and may be admitted without the testimony of the preparer.

TITLE: Shennett v. State
INDEX NO.: J.9.
CITE: 937 So.2d 287 (Fla. Dist. Ct. App. 2006)
SUBJECT: Officer's recorded surveillance observations "testimonial"
HOLDING: The Florida District Court of Appeals held an audiotape recording of a police officer's play-by-play description of events that took place in a parking lot that he had under surveillance was testimonial hearsay that was not admissible at trial under the confrontation clause as interpreted in Crawford v. Washington, 541 U.S. 36 (2004). D was accused of burglary of a conveyance after he was observed by a police officer breaking into a minivan in a playground parking lot. The officer radioed his observations to another officer, and a tape recording of the run was played at trial because the officer was unavailable to testify. Court determined a reasonable person in the declarant's position would believe that his statements would be used against a D in investigating and prosecuting the crime. Court noted that the police officer knew that he was in the midst of a surveillance operation and that his recorded observations would be used in a criminal prosecution as a contemporaneous record of the D's alleged criminal conduct.

TITLE: Speers v. State

INDEX NO.: J.9.

CITE: (12/19/2013), 999 N.E.2d 850 (Ind. 2013)

SUBJECT: Right to Confrontation - Lab technician involved in chain of custody of DNA evidence not required to testify at trial

HOLDING: Laboratory technician involved in the chain of custody of DNA evidence is not required to testify at trial in order to satisfy the demands of a D's Sixth Amendment right of confrontation. Here, a gun store was robbed and police found what appeared to be blood on two pieces of broken glass. Evidence technician put each piece in separate boxes, sealed them, and evidence was sent to the State Police lab for later testing. Lab technician transferred the blood drops from the glass and swabbed them onto a cloth for testing. Characterizing as a "crucial step" the transferring of blood from a piece of glass to a swab for testing, D argued his right of confrontation was violated because the technician who performed this function never testified nor was subject to cross examination. Another forensic DNA analyst for the ISP lab conducted the analysis of the swabs taken from the glass and testified at trial.

Court rejected D's claim that Williams v. Illinois, 132 S. Ct. 2221 (2012), controls because in his case, both DNA profiles were analyzed by a single analyst who prepared the laboratory reports that were introduced as exhibits and testified at trial. This is precisely the procedure dictated by Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011), which unlike instant case involved a lab analyst who did not testify at trial. Bullcoming makes clear that it does not suffice for Sixth Amendment purposes that the State may merely call as a witness a laboratory supervisor with direct involvement in the technical process.

The significance of any gap created by the absence of lab technician's testimony in this case was a matter for the jury to weigh. Lab technician was just one person involved in the chain of custody of the evidence. Thus, Tr. Ct. did not err by admitting the DNA evidence over D's Confrontation Clause objection. Held, transfer granted, Court of Appeals' opinion at 988 N.E.2d 1238 summarily affirmed in part and vacated on this issue, judgment affirmed.

RELATED CASES: Dycus, 90 N.E.3d 1215 (Ind. Ct. App. 2017) (In OWI prosecution, Tr. Ct. did not violate D's Confrontation Right by admitting chain of custody forms from the Indiana State Department of Toxicology; the forms were not created for the sole purpose of providing evidence against D, thus were not testimonial).

TITLE: State v. Birchfield
INDEX NO.: J.9.
CITE: 157 P.3d 216 (Ore. 2007)
SUBJECT: Confrontation - State must produce lab report author without subpoena
HOLDING: Oregon Supreme Court held that a D who wants to challenge the admissibility of a lab report prepared by a criminalist whom the State does not intend to call as a witness cannot, consistent with the Oregon Constitution's confrontation guarantee, be required to subpoena the criminalist to testify. An Oregon statute states that "in all prosecutions in which an analysis of a controlled substance or sample was conducted, a certified copy of the analytical report . . . shall be accepted as prima facie evidence of the results of the analytical findings." It also states that "the D may subpoena the analyst or forensic scientist to testify . . . at no cost to the D." In State v. Hancock, 854 P.2d 926 (Or. 1993), Court held that the statute did not violate Ds' state confrontation rights and interpreted it to require a D to notify the State that she wished to exercise the right to cross-examine the report's author. That decision also said, "If a D wants to cross-examine the criminalist, he or she must subpoena the criminalist." Court did not consider the distinction between requiring a D to give notice to the State that it should procure a witness for trial and obligating the D to subpoena the State's witness. However, in State v. Moore, 49 P.3d 785 (Or. 2002), Court declared that "before the state may introduce into evidence a witness's out-of-court declarations against a criminal D, the state must produce the witness at trial or demonstrate that the witness is unavailable to testify." In present case, Court resolved the conflict in its case law by saying that the state confrontation right requires the state to produce the author of a report that is admitted against the D or show that the witness is unavailable. Court noted that a subpoena requirement and the burden that it imposes differ both in kind and in degree from a typical notice requirement. When a subpoena is required, a D is not merely offered an opportunity to choose whether to stipulate to the admission of paper evidence; rather, the D is forced to identify and secure the attendance of the witness. Such a transfer of responsibility cannot withstand constitutional scrutiny.

TITLE: State v. Belvin; Johnson

INDEX NO.: J.9.

CITE: 986 So.2d 516 (Fla. 2008)

SUBJECT: Breath-test affidavits; lab reports are "testimonial" under Crawford

HOLDING: Florida Supreme Court resolved several issues left unanswered by the U.S. Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004), which limited the use of "testimonial" statements at trial. Court held that portions of a breath-test affidavit pertaining to the test operator's procedures and observations in administering the test are "testimonial," and that a state drug laboratory report is likewise "testimonial." Court held in Belvin, a drunken-driving case, that the admission of portions of a breath test affidavit involving the operator's procedures and observations in administering the test constitute testimonial evidence. In order to introduce breath test results as evidence in a drunken-driving prosecution, Florida law obligates the state to first present evidence that the test was performed by a person trained and qualified to conduct it and on an approved machine that has been tested and inspected. State law provides for the introduction of affidavits containing the necessary evidentiary foundation under the public-records exception to the hearsay rule. Court concluded the breath-test affidavit is testimonial for purposes of Crawford because it acts as a witness against the accused. Court noted that the technician who created the breath-test affidavit does so to prove a critical element in the prosecution. Quoting Davis v. Washington, a breath-test affidavit is created "to establish or prove past events potentially relevant to later criminal prosecution." Court further noted that the affidavit is not created during an ongoing emergency or contemporaneously with the crime and is created at the request of the police in anticipation of a prosecution.

In Johnson, Court decided that a state drug lab report is also testimonial, because it "is the functional equivalent of an affidavit submitted instead of testimony from a live witness. It was prepared for litigation and written to prove critical elements of the prosecution's case." Court distinguished state drug lab reports from reports prepared in hospitals, where testing is done almost exclusively for medical treatment. It noted that a police lab report is made with the intention that it will "bear witness against an accused."

TITLE: State v. Caulfield
INDEX NO.: J.9.
CITE: 722 N.W.2d 304 (Minn. 2006)
SUBJECT: Lab report on controlled substance, testimonial
HOLDING: The Minnesota Supreme Court held that a report from a police laboratory identifying a substance seized from a D is "testimonial", and its admission at trial without the testimony of the analyst violates the Sixth Amendment right of confrontation. Courts are divided as to whether lab reports are testimonial for purposes of requirements of the confrontation clause established in Crawford v. Washington, 541 U.S. 36 (2004). Courts in some states have held that hearsay that qualifies for admission under the "business and public records" exception to the hearsay rule is per se non-testimonial in nature. E.g., Commonwealth v. Verde, 827 N.E.2d 701 (Mass. 2005); State v. Forte, 619 S.E.2d 853 (N.C. 2006). The Minnesota Supreme Court, however, found a police lab's reports fit within "testimonial" statements as described in Crawford in that they are prepared with an eye toward litigation, which is the "critical determinative factor in assessing whether a statement is testimonial." The majority also rejected State's argument that D waived his confrontation rights by failing to comply with a state statute requiring a D, upon notice of a police lab report, to make a pretrial demand that the analyst appear at trial. Three members dissented on the waiver issue.

[Ed. **note:** In Crawford, Justice Scalia recognized that only one exception existed in the common law to admit testimonial statements against an accused - dying declarations. 541 U.S. 36, 56 fn.6 (2004). He did make reference to fact that most of hearsay exceptions covered statements that by their nature were not testimonial such as business records or statements in furtherance of a conspiracy, but that statement in itself concludes that if statements in a business record meet the criteria of "testimonial" then they are inadmissible.]

TITLE: State v. Davis
INDEX NO.: J.9.
CITE: 158 P.3d 317 (Kan. 2006)
SUBJECT: Non-testimonial statements may still violate confrontation
HOLDING: Kansas Supreme Court held that evidence of hearsay statements that are not testimonial in nature, and thus not subject to the strictures of Crawford v. Washington, 541 U.S. 36 (2004), must still satisfy other admissibility requirements erected by the Sixth Amendment's Confrontation Clause.

In Ohio v. Roberts, 448 U.S. 56 (1980), the U.S. Supreme Court approved an interpretation of the Confrontation Clause that permitted the admission of evidence of non-testifying declarants' out-of-court statements so long as the evidence bore "particularized guarantees of trustworthiness." In Crawford, however, the Supreme Court criticized Roberts's reliability-based test and adopted a new constitutional standard for hearsay that is testimonial in nature. That standard requires a D to have an opportunity to cross-examine the maker of hearsay statements. Later, in Davis v. Washington, 126 S. Ct. 2266 (2006), the Supreme Court explained that Crawford's testimonial requirement is based on the text of the Sixth Amendment and delineates not only the "core" protection of the constitutional provision but also its "perimeter."

Some courts and commentators read Crawford and Davis as establishing that evidence that is not testimonial in nature is not regulated by the Sixth Amendment. E.g. United States v. Feliz, 467 F.3d 227 (2d Cir. 2006). The Seventh Circuit, however, held that the Roberts test still applies to non-testimonial hearsay. United States v. Thomas, 453 F.3d 838 (7th Cir. 2006). The Kansas Supreme Court held in a similar fashion. The evidence at issue was a statement in which the declarant identified the Declarant to his lover as the person who had just telephoned him. Without discussing Davis, the Court held that, although the evidence was clearly not testimonial in nature, it still had to satisfy Roberts's reliability standard before it could be deemed admissible.

TITLE: State v. Decoteau
INDEX NO.: J.9.
CITE: 2007 Vt. 94, 940 A.2d 661 (Vt. 2007)
SUBJECT: Hearsay improperly allowed in probation revocation hearing
HOLDING: Vermont Supreme Court held the admission at a probation revocation proceeding of a conclusory discharge summary provided by the probationer's treatment program as well as hearsay allegations made by program staffers violated the probationer's right to due process. State evidence rules do not categorically bar hearsay in probation revocation proceedings, but the Fourteenth Amendment's due process guarantee gives Ds facing probation revocation a right to confront adverse witnesses. Court has previously made it clear that reliability is a key factor in determining the admissibility of hearsay at a probation revocation proceeding. In present case, Court found that the discharge-summary report and the PO's testimony did not bear sufficient indicia of reliability to be admissible. First, there was no evidence to corroborate the hearsay allegations regarding D's misbehavior. The PO testified about what he had heard from D's caseworker, but no non-hearsay testimony supported the accounts of D's behavior or the measures that the staff took to address it. Furthermore, Court noted the evidence consisted of judgments and conclusions, not objective facts. It added that a treatment report is subjective and less inherently reliable than other kinds of reports, such as lab reports. Also, the allegations contained in the hearsay statements were general, not factually detailed.

Compare to*:* Reyes v. State, 868 N.E.2d 438 (Ind. 2007)

TITLE: State v. Henderson
INDEX NO.: J.9.
CITE: 60 P.3d 776 (Kan. 2007)
SUBJECT: Confrontation clause; Child's hearsay statements qualified as testimonial
HOLDING: Kansas Supreme Court held that young children's inability to understand that their statements may be used in later criminal prosecutions is just one factor that trial judges should consider when determining whether a child's hearsay statements qualify as "testimonial" for purposes of the Sixth Amendment's right to confrontation. Courts have split across the country regarding the admissibility of children's hearsay accusations of abuse. Court decided that the "forfeiture by wrong-doing" doctrine did not apply in a case involving a D who was found guilty of sexually abusing a child.

Appearing as amicus curiae, the American Prosecutors Research Institute urged the Court to adopt an objective "age-equivalent standard" for determining whether a child's statement is testimonial, citing studies that statements by a 3-year-old are not testimonial because a child of that age would not have a reasonable expectation her statements would later be used at a trial. The Minnesota Supreme Court relied on similar reasons to uphold a statement in State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006). Court here, however, observed that this approach heavily relies upon the language in Crawford v. Washington that describes testimonial statements as those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Court agreed with a law review article that the Supreme Court's description of testimonial statements in Davis v. Washington, 126 S. Ct. 2266 (2006) represented a "fundamental shift in the guidance provided by Crawford . . ." Whereas Crawford focused on whether the declarant made the statement in question with the understanding that it was to be used in a later prosecution, the Davis court focused on officers' primary purpose in eliciting the statements. Court also noted that under the APRI's approach, "the prosecution is allowed to have its cake and eat it too: The victim is too young to be competent to testify . . . but not too young to have her statement placed in evidence by the State with no attendant defense right to confront and cross-examine." Court, following other jurisdictions, adopted a totality-of-the-circumstances approach in determining the testimoniality of a child's hearsay accusation.

TITLE: State v. Kirby
INDEX NO.: J.9.
CITE: 908 A.2d 506 (Conn. 2006)
SUBJECT: Abductee's phone call to police testimonial
HOLDING: The Connecticut Supreme Court held that hearsay evidence of an abduction victim's statements in a telephone call to a police dispatcher immediately following her escape from her abductor qualified as "testimonial," and its admission in a criminal trial violated the Sixth Amendment's Confrontation Clause. The court interpreted the U.S. Supreme Court's recent decision in Davis v. Washington, 126 S. Ct. 2266 (U.S. 2006), and concluded that the primary purpose of the declarant's statements was to report a past crime, not to resolve an emergency. After escaping and returning to her home, the complaining witness's husband called police and the complaining witness then described what had occurred while abducted, declined an offer for an ambulance and, in response to questions by the dispatcher, provided a description of the perpetrator's appearance and location. Before trial, the victim died in a fall down some stairs. Court held that the primary purpose of the dispatcher's and officer's conversations with the complaining witness, like that of later questioning in Davis, "was to investigate and apprehend a suspect from a prior crime, rather than to solve an ongoing emergency or crime in progress at the time of the call." It noted that, at the time of the call, "the emergency had been averted and the complainant no longer was under any threat from the D because she already had escaped and had left him stranded on the side of the road." Although the complainant may have needed emergency aid at the time of her call, the bulk of the conversation consisted of an account of the crime that happened in the recent past "rather than one that was happening to her *at the time of the call.*"

TITLE: State v. Lewis
INDEX NO.: J.9.
CITE: 648 S.E.2d 824 (N.C. 2007)
SUBJECT: Victim statements to "first responder" violated confrontation clause
HOLDING: North Carolina Supreme Court, on remand from the U.S. Supreme Court, held that it erred in an earlier decision in holding that a victim's statements to a "first responder" police officer following her assault were not testimonial for purposes of the Sixth Amendment confrontation rule established in Crawford v. Washington, 541 U.S. 36 (2004). Crawford placed rigorous limits on the admissibility of "testimonial" out-of-court statements by declarants who do not testify. In Davis v. Washington, 126 S. Ct. 2266 (2006), Supreme Court clarified Crawford by noting that statements made during the course of police questioning are non-testimonial only if "the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency and. . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

Prior to Davis providing guidance, Court held in 2005 that an officer's role in interrogating the declarant and the declarant's expectations as to how her statements would be used are the critical factors for determining the admissibility of those statements. It ruled that the then-deceased declarant's statements were admissible through the testimony of the first responding police officer because his questioning was aimed at gathering preliminary information, rather than investigating the crime, and because the victim had no expectation that her remarks would be used against D at trial.

Court, on remand, held that Davis made clear that its earlier analysis was incorrect, and it held that the victim's statements were testimonial in nature because there was "no emergency in progress" when the police officer arrived. The victim's statements, it said, related to past criminal conduct - the officer, through his questioning, was seeking to determine "'what happened' rather than 'what is happening.'" When she made the statements, the victim "faced no immediate threat to her person" and was simply recounting earlier events.

TITLE: State v. Lopez
INDEX NO.: J.9.
CITE: 974 So.2d 340 (Fla. 2008)
SUBJECT: Deposition testimony not enough for confrontation under Crawford; split with Indiana
HOLDING: Florida Supreme Court held that defense counsel's ability to cross-examine a complainant during a discovery deposition does not provide the opportunity for confrontation required by the Sixth Amendment to render testimonial hearsay admissible at a criminal trial. Court also ruled that statements the complaining witness, who was unavailable at trial, made to police about being abducted in his car by D with a gun were testimonial in nature and subject to the Sixth Amendment's restrictions on admissibility on hearsay. Prosecutors only proceeded with a gun charge against D but were able to present evidence of the complaining witness's deposition statement that the handgun found in his car was placed there by D. Analyzing case under Crawford v. Washington, 541 U.S. 36 (2004) and Davis v. Washington, 126 S. Ct. 2266 (2006), Court determined that the cross-examination contemplated by the Crawford rule is questioning that serves the same purposes as cross-examination at trial. In other words, the questioning must not only permit the cross-examiner "'to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness,'" Court noted, quoting Davis v. Alaska, 415 U.S. 308 (1974). A defense attorney cannot be expected to be prepared to cross-examine a witness about matters that the attorney is learning about for the first time at the deposition.

But see: Howard v. State, 853 N.E.2d 461 (Ind. 2006) finding that discovery deposition of prosecution witness provides opportunity for cross-examination sufficient to satisfy requirements of confrontation clause. Issue should continue to be preserved as clear split between jurisdictions makes it more likely U.S. Supreme Court will accept certiorari; Morgan, 903 N.E.2d 1010 (Ind. Ct. App. 2009) (D's motive to cross State's witness in his deposition was substantially similar to the motive to cross witness at trial, and thus, the admission of the missing State's witness did not violate Indiana Rule of Evidence 804 and the Sixth Amendment); Thomas, 966 N.E.2d 1267 (Ind. Ct. App. 2012) (although defense attorney claimed on the record and prior to questioning that deposition is for discovery purposes only and that D does not waive his right to confront, Tr. Ct. did not abuse its direction by admitting the deposition into evidence when the witness refused to testify at trial; D had the opportunity to cross-examine at the deposition and his unexplained failure to do so does not change anything).

TITLE: State v. Miller

INDEX NO.: J.9.

CITE: 144 P.3d 1052 (Ore. Ct. App. 2006)

SUBJECT: Urine analysis by state lab is testimonial, not common law business record

HOLDING: The Oregon Court of Appeals held that a report of the results of a urine analysis conducted by a police laboratory was "testimonial" for purposes of the Confrontation Clause's limits on the admission of hearsay evidence. D was charged with possession of methamphetamine and the trial judge denied prosecutors' in limine motion seeking permission to introduce lab reports from the state police lab indicating that the drug was present in a sample of D's urine. The Court said that the court in Crawford v. Washington did not have urinalysis reports in mind when it spoke of business records being nontestimonial in nature. The dictum in Crawford was part of the court's assessment of what evidence the framers of the Confrontation Clause meant to exclude, and the modern business records exception has evolved beyond the scope of the common law "shop book rule" "We conclude that a lab report that is prepared by staff at a state crime laboratory at the request of police for use in a criminal prosecution of a specific D would not fall within the shop book rule exception as the framers of the U.S. Constitution would have understood it." As in Davis v. Washington, the statements made in the lab reports were clearly intended to be used in a criminal prosecution "to prove past events potentially relevant to a later criminal prosecution."

TITLE: State v. Moore
INDEX NO.: J.9.
CITE: 926 A.2d 1058 (Conn. Ct. App. 2007)
SUBJECT: Confrontation violated when witness invoked 5th during redirect
HOLDING: Connecticut Court of Appeals held that Tr. Ct.'s refusal to strike redirect testimony of State's witness after the witness invoked Fifth Amendment deprived D of his right to cross-examine the witness. Witness, a co-D, testified on direct of D's involvement in a robbery, but changed his story on cross stating that D was with a group involved in the robbery but was dropped off at a club and picked up later. On redirect, State brought out details of the witness's plea proceedings but prior to concluding he invoked his Fifth Amendment rights precluding the defense from recross. Tr. Ct. denied D's motion to strike witness's redirect testimony. "When material new matters are brought out on redirect examination, the Confrontation Clause of the Sixth Amendment mandates that the opposing party be given the right to recross-examination on those new matters." U.S. v. Riggi, 951 F.2d 1368, 1375 (3rd Cir. 1991). Since new issues were raised in redirect, Court found no difference between if D were precluded from cross-examination. Court also concluded that matters addressed in redirect were not collateral and thus substantial danger of prejudice existed due to the deprivation of the right to cross-examination.

TITLE: State v. Renshaw

INDEX NO.: J.9.

CITE: 390 N.J. Super. 456, 915 A.2d 1081 (N.J. Sup. Ct. 2007)

SUBJECT: Medical form for blood draw found to be testimonial

HOLDING: The New Jersey Superior Court held that a certification by a nurse attesting to the fact that she followed medically accepted procedures when taking a blood sample from a suspected drunken driver is testimonial for purposes of the Sixth Amendment's confrontation clause and hence may not be admitted at trial over the accused's objection unless she testifies.

The nurse who took a blood sample from D provided the arresting officer with a "Uniform Certification for Bodily Specimens Taken in a Medically Acceptable Manner" pursuant to a state statute. Based on Crawford v. Washington, 541 U.S. 36 (2004), the Court found the form to be testimonial in nature.

TITLE: State v. Siler
INDEX NO.: J.9.
CITE: (10/25/2007), Ohio, 2007-OHIO-5637
SUBJECT: Officer's 'primary purpose', not child's age main factor under Crawford
HOLDING: Ohio Supreme Court held whether a child's statements to a law enforcement officer about a crime are testimonial for purposes of the Sixth Amendment confrontation rule established in Crawford v. Washington, 541 U.S. 36 (2004), turns solely on the primary purpose behind the officer's questions, without regard to the child's ability to comprehend the prosecutorial use to be made of his statements. Court held that a 3-year-old's statements to plainclothes police officer at the scene of his mother's murder, hours after her assailant had left, were testimonial. Court held that the statements of the child in the case met the definition of testimonial enunciated in Davis v. Washington, 126 S. Ct. 2266 (2006). The correct test to apply when the statement is made to someone other than a law enforcement officer or an agent of law enforcement is the "primary-purpose test set forth in Davis." Court emphasized that "the age of the declarant is not determinative of whether or not a testimonial statement has been made during a police interrogation." Court distinguished from its precedent that found a statement made by a rape victim to an examining nurse to be non-testimonial because the complainant "could have reasonably believed that although the examination . . . would result in scientific evidence being extracted for prosecution purposes, the statement would be used primarily for health-care purposes." This sort of objective-witness approach does not apply in cases in which a child's statements were made to a law enforcement officer. Court further noted that because the primary-purpose test focuses on the objective circumstances of the statement and not the expectations of the declarant, it does not matter whether the declarant is too young to understand that his statements might be used in a future prosecution.

TITLE: State v. Tiernan
INDEX NO.: J.9.
CITE: 941 a.2d 129 (R.I. 2008)
SUBJECT: Limiting cross about pending civil suit improper under Sixth Amendment
HOLDING: Rhode Island Supreme Court held that an assault D who sought to attack the complainant's credibility at trial by cross-examining him closely about the extent of injuries he claimed to have suffered and about his plans to file a civil lawsuit should not have been limited to a single question as to whether the complainant planned to seek monetary damages from D. Court stated the trial judge gave defense counsel essentially no latitude to explore possible bias relating to the planned lawsuit, noting that it was clearly in the complainant's interest to maximize his harm and D's fault. Defense counsel should have had a chance to explore that by asking questions not only about the complainant's retention of counsel and the extent of his injuries but also as to whether the victim believed a conviction of D might help his civil action. Limiting defense counsel to a single general question about a lawsuit amounted to a "virtually total" preclusion of the cross-examination guaranteed by the Sixth Amendment and its state counterpart.

TITLE: Thomas v. United States
INDEX NO.: J.9.
CITE: 914 a.2d 1 (D.C. 2006)
SUBJECT: Police lab report is testimonial, confrontation applies
HOLDING: The District of Columbia Court of Appeals held that a report from a police laboratory identifying a substance seized from a D is testimonial in nature; therefore, its admission at trial without the testimony of the chemist is ordinarily prohibited by the Sixth Amendment's confrontation clause. Courts are divided on the question of whether lab reports are testimonial for purposes of Crawford v. Washington, 541 U.S. 36 (2004), with other courts finding that hearsay that qualifies for admission under the "business and public records" exception to the hearsay rule is per se non-testimonial in nature, including the Indiana Court of Appeals. See Richardson v. State, 856 N.E.2d 1222 (Ind. Ct. App. 2006). However, the District of Columbia's highest court interpreted Crawford and Davis v. Washington, 126 S. Ct. 2266 (2006), as calling for "functional" rather than a categorical assessment a particular record and the purpose for which it was made. The Court noted that while it is true that most statements that fall within the business records exception to the hearsay rule will not be testimonial, the reason is that most are created for a business purpose unrelated to criminal law enforcement. This is not true, however, of lab reports prepared by the DEA for use in criminal trials.

[Ed. **Note:** See similar holding by Oregon Court of Appeals State v. Miller, 144 P.3d 1052 (Ore. Ct. App. 2006)]

TITLE: Torres v. State
INDEX NO.: J.9.
CITE: (6/18/2014), 12 N.E.3d 272 (Ind. Ct. App. 2014)
SUBJECT: Right to confrontation - failure to object to surrogate testimony waived claim on appeal
HOLDING: In murder prosecution, Tr. Ct. did not violate D's right to confrontation when it permitted chief forensic pathologist to testify about the results of victim's autopsy even though she did not perform the autopsy. In Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011), Court held that with respect to autopsy reports, D's right is to be confronted with the analyst who makes the certification and that surrogate testimony does not satisfy the constitutional requirement. Here, however, D waived this claim as to pathologist's testimony because he did not object at trial. Court did not find fundamental error in admission of this testimony because there was no reference made to exactly what was included in the autopsy nor was there any specific reference made to examining pathologist's report. Any error in admitting pathologist's testimony regarding the number of gunshot wounds the victim sustained and D's claim of self-defense was harmless. Other witnesses who were subject to D's cross-examination testified about the number and location of bullets recovered from the scene, and about the number of gunshots they heard. Held, judgment affirmed; Kirsch, J., dissenting on basis of Bullcoming, does not believe any error was harmless beyond a reasonable doubt and would remand for a new trial.

TITLE: Vasquez v. People
INDEX NO.: J.9.
CITE: 173 P.3d 1099 (Colo. 2007)
SUBJECT: Despite "forfeiture by wrongdoing", evidence rules may still exclude hearsay
HOLDING: Colorado Supreme Court held a D whose Sixth Amendment confrontation clause challenge to the admission of hearsay statements is thwarted by the "forfeiture by wrongdoing" doctrine can still rely on state evidence rules to have the hearsay excluded. Court also elaborated on the showing that prosecutors must make to establish the intent element of the constitutional forfeiture-by-wrongdoing doctrine.

In People v. Moreno, 160 P.3d 242 (Colo. 2007), the Court declared: "To deprive a criminal D of the protection of the Confrontation Clause, his wrongful conduct must also be designed, at least in part, to subvert the criminal justice system by depriving that system of the evidence upon which it depends." However, the Court had not established the showing that prosecutors must make to satisfy the doctrine's intent requirement. D argued that he cannot be deemed to have forfeited his right to confront a witness unless the State can prove that he procured the unavailability of that witness with the intention of preventing testimony in the particular case at hand, in this case charges of violating a protective order and bail condition. D contended that because the charges in this case were not filed until months after he killed his wife, the homicide could not have been motivated by an intention to silence her regarding the present case. Court noted knowing of no state jurisdiction that had addressed a situation in which a D had the requisite intent to work a forfeiture in one proceeding, then subsequently benefited from the witness's unavailability in additional proceedings. Colorado's evidence rules governing the admission of hearsay do not contain a forfeiture-by-wrongdoing provision.

Court found that under both the state and federal constitutions the State must only prove that (1) the witness is unavailable; (2) the D was involved in, or responsible for, procuring the unavailability of the witness; and (3) the D acted with the intent to deprive the criminal justice system of evidence. If this is found, then the D forfeits his right to confront that witness at any proceeding in which the witness's statements are otherwise admissible. However, Court also decided that even though the D forfeited his constitutional rights, he could still challenge the admissibility of his wife's statements to police officers under the hearsay rules. While the confrontation clause and the state hearsay rules are designed to protect similar values, Court found that, in light of the absence of a forfeiture-by-wrongdoing provision in the state hearsay rules, the "prudent course" is to require that the hearsay rules be satisfied separately from the confrontation clause.

TITLE: United States v. Hearn
INDEX NO.: J.9.
CITE: 500 F.3d 479 (6th Cir. 2007)
SUBJECT: Admission of hearsay evidence violated confrontation right
HOLDING: The Sixth Circuit Court of Appeals held the admission at a drug-trafficking trial of extensive testimony by police officers concerning confidential informers' statements about D's intent to distribute large quantities of drugs, ostensibly to illustrate why the police had D under surveillance in the first place, violated D's Sixth Amendment right to confront witnesses. District court allowed government to use statements to show why authorities had their eye on D at the time and why they stopped his car. Officers testified, however, testified as to the large amounts of several different drugs that the informant said D had moved from his residence into his car in order to sell them at a rave party. The officers' testimony went far beyond explaining the reason D was under surveillance and enabled the government to establish that informers had told police that he intended to sell the drugs and personally moved the drugs from his residence to his car. Court said it would have sufficed to apprise the jury that officers followed D pulled him over because of "some illegal activity." Court also found that the error was not harmless as no other evidence so directly demonstrated D's possession of the drugs with intent to distribute.

TITLE: United States v. Jimenez
INDEX NO.: J.9.
CITE: 464 F.3d 555 (5th Cir. 2006)
SUBJECT: Limit on cross of officer violated Confrontation
HOLDING: The U.S. Court of Appeals for the Fifth Circuit held that D's Sixth Amendment right to confront and cross-examine witnesses was violated by the refusal to allow her counsel to ask a key government witness, a narcotics officer, where specifically he was located when he allegedly observed D selling drugs on her front porch. On review, the court vacated the convictions after finding that the constitutional error was not harmless. The jury was not given an opportunity to form a thorough opinion regarding the officer's motive or credibility. The case turned wholly on reasonable doubt generated through witness credibility and specifically on the testimony of the officer. Officer was the only person that observed D selling drugs, and there was no corroborative evidence through photographs, later arrests, or direct fingerprint evidence. The officer's testimony was not just the government's "smoking gun," it was the government's only gun. Therefore, D should have had the opportunity to create reasonable doubt regarding the officer's credibility. D's constitutional right to put on an effective defense and to confront those who testified against her outweighed any government interest.

TITLE: United States v. Perez
INDEX NO.: J.9.
CITE: 526 F.3d 543 (9th Cir. 2008)
SUBJECT: D had right to cross lab tech at revocation hearing
HOLDING: Ninth Circuit Court of Appeals held an offender on supervised release had a right to cross-examine a laboratory technician who tested a urine sample admitted at a revocation hearing, in a case in which the test report stated that the sample had been combined with another liquid at some point before or during the testing, the evidence showed that D had no opportunity to adulterate the sample, and the result of the urinalysis was critical to support a finding that D had used illegal drugs. Court held that the D had a due process right under the Fifth Amendment to cross-examine the technician who handled and tested the sample. Because such cross-examination was not allowed, the urinalysis should not have been admitted, and the revocation had to be reversed. Court stressed that its holding was tied to the unique facts in this case, in which the illegal drug found in the tested sample could have come only from D's urine, an added substance, or another liquid, and because the validity of the urinalysis was the critical issue in determining whether release would be revoked. It made clear that it was not holding that a person on supervised release always has a right to cross-examine the technician who tested a urine sample. This is not a case where additional evidence was offered in support of revocation, or where multiple urine samples each tested positive. Further, the report itself showed the sample had been adulterated. Given that fact, Court declared the test results to be "ineluctably unreliable."

TITLE: Ward v. State

INDEX NO.: J.9.

CITE: (2/19/2016), 50 N.E.3d 752 (Ind. 2016)

SUBJECT: Confrontation - statements made to emergency medical personnel not testimonial hearsay

HOLDING: In battery prosecution, trial court did not abuse its discretion in admitting complaining witness's (C.W.'s) statements to treating parametic and forensic nurse identifying D as her attacker. The State was unable to locate C.W. for trial, so it relied on the testimony of these witnesses, who spoke to C.W. when she was taken to the hospital. The paramedic testified C.W. said that her boyfriend "Dee" [Defendant] had caused her injuries. The forensic nurse testified C.W. said she had been "struck repeatedly with a belt" and that "it was her boyfriend Dee Ward" who hit her. Court concluded that the "primary purpose" of C.W.'s statements was for appropriate medical and psychological treatment. It was important for forensic nurse to identify C.W.'s attacker in order to initiate a safety plan and assess her psychological and emotional state. Thus, the statements were not testimonial hearsay and therefore did not violate the Sixth Amendment Confrontation Clause. See Ohio v. Clark, 135 S. Ct. 2173 (2015) and Perry v. State, 956 N.E.2d 41 (Ind. Ct. App. 2011). Held, transfer granted, Court of Appeals' opinion on this issue at 15 N.E.3d 114 vacated, judgment affirmed. Rucker, J., joined by Dickson, J., dissenting as to the statements made to the forensic nurse. They believed the evidence showed the forensic nurse was serving in a dual capacity of obtaining information for medical treatment and gathering evidence for possible criminal prosecution, thus her statements were testimonial. There was little evidence that the information about the attacker's identity was actually used for physical, emotional, or psychological treatment of C.W. Further, C.W. was presented with a general information sheet which told her the forensic nurse would be gathering evidence for trial.

TITLE: Wilson v. State

INDEX NO.: J.9.

CITE: 950 A.2d 634 (Del. 2008)

SUBJECT: Confrontation allows cross of witness regarding sentence avoided even if informs of D's sentence

HOLDING: Delaware Supreme Court held the Sixth Amendment's confrontation clause guarantees an accused the right to cross-examine a witness about the sentence he or she avoided by cooperating with authorities, even when doing so would inform the jurors of the sentence the accused will face if they return a guilty verdict. Federal appellate courts are divided on the question. For instance, Brown v. Powell, 975 F.2d 1 (1st Cir. 1992) determined the confrontation clause was satisfied by permitting Ds to inquire whether a prosecution witness received some type of benefit for their testimony while precluding jurors from actually learning the number of years the witness may have faced absent their cooperation. In contrast, U.S. v. Chandler, 326 F.3d 210 (3rd Cir. 2003) held that an accused must be allowed to cross-examine a cooperating witness regarding the magnitude of the sentence reduction the witness learned through testifying. Court, here, noted, "The magnitude of a witness' sentence reduction could significantly impact a jury's impression of the witness' credibility."

TITLE: Young v. State
INDEX NO.: J.9.
CITE: (12/11/2012), 980 N.E. 2d 412 (Ind. Ct. App. 2012)
SUBJECT: Non-testimonial statement made to firefighters, but not to police detective
HOLDING: In domestic battery and strangulation prosecution, victim's statements to firefighters after she went to fire station across street from her aparment were admissible, but statement to detective who came to station to investigate 45 minutes later was not. Victim did not testify and could not be found for trial, so firefighters and detective testified regarding victim's prior statements. Court held that victim's statements to firefighters were excited utterances elicited by inquiries to assess the situation and, thus, nontestimonial and not violative of D's confrontation rights under the Sixth Amendment. See State v. Martin, 885 N.E.2d 18 (Ind. Ct. App. 2008).

However, victims' subsequent statement to detective were not under the stress of the battery, were not focused on treating her injuries and thus not admissible as excited utterances. It had been nearly an hour before detective spoke to victim after the alleged battery, she was antsy to leave, and had stopped crying at some point. Error in admitting officer's hearsay testimony was not harmless because officer's testimony at trial was the only testimony that supported State's strangulation charge. Court also held that State presented insufficient evidence to show that the battery happened in front of the children. Held, strangulation and Class D battery convictions reversed, Class A misdemeanor domestic battery affirmed.

RELATED CASES: King, 985 N.E.2d 755 (Ind. Ct. App. 2013) (police officer's testimony of what battery victim said to police officer at the scene was not testimonial based on C.W.'s visibly shaken demeanor, the proximity in time to the infliction of her injuries and the immediate possibility of danger to her child).

J. CONSTITUTIONAL LAW

J.9. Confrontation/ cross-examination (6th Amend; Ind.Const. Art 1, 13)

J.9.a. In general (see, also O.5.e)

TITLE: Borders v. State
INDEX NO.: J.9.a.
CITE: (11-18-97), Ind., 688 N.E.2d 874
SUBJECT: Right to confrontation - use of Co-D's guilty plea hearing testimony
HOLDING: State's use of Co-D's guilty plea hearing testimony did not constitute violation of D's Sixth Amendment right to confront witnesses against him because: 1) Co-D did not refuse to testify, but rather testified & was available for cross-examination; & 2) statements which were admitted were cumulative of D's statements. Mere fact that D did not take advantage of opportunity to cross-examine does not mean that his right was violated. In fact, refusal to cross- examine may have been trial strategy to avoid possibility that Co-D would offer evidence damaging to D. Co-D's guilty plea evidence was properly admitted for purposes of impeachment & not substantive evidence. Held, judgment affirmed.

TITLE: Carr v. State

INDEX NO.: J.9.a.

CITE: (7/23/2018), 106 N.E.3d 546 (Ind. Ct. App. 2018)

SUBJECT: D's wrongdoing made statement of unavailable declarant admissible under 6th Amendment and Indiana Rules of Evidence

HOLDING: D forfeited his 6th Amendment right to confront his victim at trial because his wrongdoing procured her absence from trial. That same wrongdoing made her statement also admissible under the Indiana Rules of Evidence. D stabbed S.G., his former girlfriend, in the eye with a steak knife. At the hospital, S.G. told Detective Tobi Cobain that D was the perpetrator. The State charged D with, inter alia, battery resulting in serious bodily injury, a Level 5 felony, and criminal confinement while armed with a deadly weapon, a Level 3 felony. The trial court entered a no-contact order. Over the next several months, D violated the order by writing letters of apology to S.G. and attempting 384 phone calls to her, 46 of which were completed. In these communications, D asked S.G. to change her story and to not appear at trial. He promised her $20,000, and also said his parents would support her financially if she was "loyal." In November of 2017, the State personally served S.G. with a subpoena to appear at trial. However, the State soon lost contact with her, so in the six weeks leading up to trial, the State called her several times, contacted her parents, and visited her last known address, all to no avail. S.G. did not appear at trial. At trial, S.G.'s statement to Detective Cobain were admitted. D forfeited his right to confront S.G., and thus her statements to Detective Cobain were admissible, because of his wrongdoing. See Crawford v. Washington, 541 U.S. 36, 62 (2004) (relying on Reynolds v. United States, 98 U.S. 145, 158-59 (1878)). He tried to influence her testimony through letters of apology and promises of financial support. The same behavior allowed admission of the statement through Indiana Rule of Evidence 804(b)(5), which provides that a statement from an unavailable witness is admissible if the party against whom it is offered "intended to, and did, procure the unavailability of the declarant as a witness for the purpose of preventing the declarant from attending or testifying." Held, judgment affirmed.

RELATED CASES: Galloway, 188 N.E.3d 493 (Ind. Ct. App. 2022) (D's wrongdoing forfeited his right to confrontation); Smoots, 172 N.E.3d 1279 (Ind. Ct. App. 2021) (D forfeited Sixth Amendment right to confrontation in light of his wrongdoing of threatening witness to prevent him from testifying); Scott, 139 N.E.3d 1148 (Ind. Ct. App. 2020) (State proved by a preponderance of evidence that D's conduct in repeatedly urging C.W. to change her story and not appear for depositions or trial was designed, at least in part, to keep her from testifying against him; D's wrongdoing forfeited his right to confront C.W.'s statements to the police and his Sixth Amendment right to confrontation was not violated by their admission).

TITLE: Coleman v. State
INDEX NO.: J.9.a.
CITE: (11/29/89), Ind., 546 N.E.2d 827
SUBJECT: Confrontation - videotaped deposition; unavailability
HOLDING: State's use of rape victim's videotaped deposition did not violate D's right to confront witnesses. Before trial, victim voluntarily entered drug rehabilitation program in Wisconsin. State petitioned to take videotaped deposition of victim because she would not be available for trial testimony. Tr. Ct. granted state's petition & granted D's counsel public funds to attend deposition. D did not attend, although he was not in jail at time, & there was no objection to proceeding in his absence. D was convicted of rape, & on appeal argues that use of videotaped deposition violated his confrontation right because there was no showing that victim was unavailable for trial testimony. D further argues that victim's parents placed her in rehab program merely to keep her from testifying. At beginning of deposition, victim indicated that her date of discharge from center would be 9 days after trial was scheduled to start. Victim also stated that she was in program because of "drug problems." D points to cross-examination of victim during which she was reluctant to say that she had drug problem. However, it is apparent from reading transcript that while victim did not believe she had drug problem, her parents did & that is why she was placed in rehab center. Record sufficiently establishes that victim was unavailable to testify at trial, & further that D was not prevented from attending deposition & confronting victim in that setting. DeBruler, J., DISSENTS, arguing that record does not establish that victim was unavailable for purpose of overriding D's confrontation rights.

TITLE: Coy v. Iowa
INDEX NO.: J.9.a.
CITE: 487 U.S. 1012, 108 S. Ct. 2798, 101 L.Ed.2d 857 (1988)
SUBJECT: Face-to-face confrontation
HOLDING: Confrontation Clause guarantees D face-to-face meeting with witnesses appearing before trier of fact. Right to face-to-face confrontation serves to ensure integrity of the fact-finding process. Benefits of exposing false allegations exceed costs of upsetting truthful complainant. Here, screen was placed between testifying 13-year-old complainants & D in child molest case. D was able to dimly see witnesses, but they could not see him. Court finds "[i]t is difficult to imagine a more obvious or damaging violation of D's right to a face-to-face encounter." Any exceptions to general rule will be allowed only when necessary to further important public policy. If exception is not "firmly rooted in our jurisprudence," something more than generalized findings is required. Exception urged here was created by State legislature & is not "firmly rooted." Nor were there specific findings that these particular witnesses needed special protection. Nor is Court willing to hold error harmless beyond a reasonable doubt. Assessment of harmlessness cannot include consideration of whether witness' testimony would have been unchanged or the jury's assessment unaltered, had there been confrontation. Held, D's confrontation rights violated; remanded to State court for determination whether error was harmless. Kennedy, not participating; O'Connor, joined by White, CONCURS; Blackmun, joined by Rehnquist, DISSENTS.

TITLE: Delaware v. Fensterer
INDEX NO.: J.9.a.
CITE: 474 U.S. 15, 106 S. Ct. 292, 88 L.Ed.2d 15 (1985)
SUBJECT: Cross-exam - inability to recall basis of expert opinion
HOLDING: Per curiam. Confrontation Clause is not violated where expert witness was permitted to testify concerning his opinion but was unable to recall theory upon which his opinion was based. Main purpose of confrontation is to secure opponent's opportunity of cross-examination. Davis v. AK (1974), 415 U.S. at 315-16, 94 S. Ct. at 1109-10, 39 L.Ed.2d 347. Confrontation Clause does not guarantee cross-examination that is effective in whatever way & to whatever extent defense might wish. Here, D's counsel cross-examined expert & exposed his inability to recall basis for his opinion. Further, D presented defense expert who testified as to theory relied upon by state's expert & testified it was baseless. Held, no 6th Amend. violation. Marshall DISSENTS; Blackmun would grant certiorari & plenary consideration; Stevens CONCURS IN JUDGMENT.

TITLE: Delaware v. VanArsdall
INDEX NO.: J.9.a.
CITE: 475 U.S. 673, 106 S. Ct. 1431, 89 L.Ed.2d 674 (1986)
SUBJECT: Denial of cross-examination (CX) concerning bias
HOLDING: Main purpose of confrontation is to secure for opponent opportunity for CX. Davis v. AK (1974), 415 U.S. 308, 94 S. Ct. 1105, 39 L.Ed.2d 347. Exposure of witness' motivation in testifying is proper & important function of constitutionally-protected right of CX. Id. Violation of Confrontation Clause is shown where opponent is prohibited from engaging in otherwise appropriate CX designed to show bias on part of witness/expose to jury facts from which they could appropriately draw inferences relating to reliability of witness. Whereas some constitutional claims by their very nature require a showing of prejudice with respect to trial as a whole (e.g., ineffective assistance of counsel claims), focus of Confrontation Clause is instead on individual witnesses. Here, Tr. Ct. prohibited all inquiry into state's witness' possible bias resulting from state's dismissal of charges against him. By cutting off questioning about an event which jury might reasonably have found furnished witness a motive for favoring prosecution in his testimony, court's ruling violated D's rights secured by Confrontation Clause. D has met his burden of proving prejudice because reasonable jury might have received significantly different impression of witness' credibility had D been permitted to pursue his proposed line of questioning. White CONCURS IN THE JUDGMENT; Marshall & Stevens DISSENT WITH SEPARATE OPINIONS.

TITLE: Driver v. State
INDEX NO.: J.9.a.
CITE: (1st Dist. 06/24/92), App., 594 N.E.2d 488
SUBJECT: Face-to-face confrontation - Use of testimony from first trial held in absentia
HOLDING: Where D did not knowingly & voluntarily absent himself from first trial, use of deceased witness' testimony from that trial at second trial was erroneous, because it denied D right to face-to-face confrontation guaranteed under Ind. Const. D's first trial was held in his absence, but when it was determined that he did not knowingly, intelligently & voluntarily waive his right to be present, he was granted second trial. Before second trial, officer who previously testified that D had admitted to giving informant some Percodan in D's possession died, & his previous testimony was admitted at second trial. Because D was not present at first trial, he could not consult with counsel & aid in officer's cross-examination. Art. I, 13 of Ind. Const. provides right to face-to-face confrontation, Brady (1991), Ind., 575 N.E.2d 981, & this right is not subsumed by right to cross-examination. Admission of testimony was not harmless error, largely because informant had motivation to lie, & buy was not rigidly controlled.

TITLE: Haley v. State
INDEX NO.: J.9.a.
CITE: (3rd Dist., 10-17-00), Ind. App., 736 N.E.2d 1250
SUBJECT: Taking judicial notice of school - no denial of right to confrontation
HOLDING: In prosecution for dealing controlled substance within 1,000 feet of school property, Tr. Ct. did not deny D his right to confrontation under Indiana Constitution when it took judicial notice that Howe Military Institution in LaGrange County is school. At close of evidence, Tr. Ct. instructed jury that it had taken judicial notice that Howe is school within meaning of statute, but jury was not required to accept fact as conclusive. Indiana Evidence Rule 201(a) provides: "[a] judicially-noticed fact must be one not subject to reasonable dispute in that it is either: (1) generally known within territorial jurisdiction of Tr. Ct., or (2) capable of accurate & ready determination by resort to sources whose accuracy cannot reasonably be questioned." When Ct. takes judicial notice, a party is entitled, upon timely request, to opportunity to be heard as to propriety of taking judicial notice. Ind. Evidence Rule 201(e).

Certain firmly established evidence rules are not consistent with constitutional right to meet witnesses face to face. Although judicially-noticed facts are contradictory to right of confrontation, they are admissible so long as requirements of Indiana Rule of Evidence 201 are met. By satisfying requirements of this evidence rule, reliability of judicially noticed facts is safeguarded, & thus, their admission does not violate constitutional right of confrontation. Here, D did not argue that requirements of Rule 201 were not met. Fact that Howe is private school is generally known within LaGrange County. Before taking judicial notice of this fact, Tr. Ct. held hearing to provide D with opportunity to be heard on matter. D could have offered evidence at hearing or at trial to contest that Howe is school within meaning of law. Since evidence was admissible under I.R.E. 201, it was sufficiently reliable & therefore, D's constitutional right of confrontation was not violated. Held, judgment affirmed.

TITLE: Jackson v. State
INDEX NO.: J.9.a.
CITE: (10/11/89), Ind., 544 N.E.2d 853
SUBJECT: Cross-examination - witness protected in federal witness protection program
HOLDING: Tr. Ct. erred in preventing D from questioning state's witness, whose former identity was protected under federal witness protection program, regarding prior convictions for Ashton offenses. At trial, when D's counsel asked witness, Sean Hughes, re prior convictions, witness replied simply that Sean Hughes had no prior convictions. After bench conference, at which witness indicated that he was involved in federal witness protection program & did not wish to answer any questions which might reveal former identity, Tr. Ct. ruled that witness did not have to answer any such questions, including those about prior convictions. It is well settled that D may cross-examine witness as to prior Ashton offenses. While Tr. Ct. has discretion as to scope of cross-examination, 6th Amend. is violated when D is completely prohibited from cross-examining crucial witness on area concerning credibility. See Crull, 540 N.E.2d 1195 (card at J.9.c); Delaware v. VanArsdall (1986), 475 U.S. 673, 106 S. Ct. 1431, 89 L.Ed.2d 674 (card at J.9.a). Here, witness testified as accomplice N.E.2d eyewitness, & testimony was clearly crucial. Although state knew that witness had 5 prior Ashton convictions under former identity, witness had testified before jury that he had no prior convictions. D was unable to counter this testimony in any way. While Tr. Ct. acted within its discretion in preventing D from revealing witness' former identity, specific questions re prior Ashton convictions would not have done so. Held, reversed & remanded for new trial.

TITLE: Kentucky v. Stincer

INDEX NO.: J.9.a.

CITE: 482 U.S. 730, 107 S. Ct. 2658, 96 L.Ed.2d 631 (1987)

SUBJECT: D's presence at hearing to determine competency of witnesses - confrontation rights

HOLDING: Primary interest secured by Confrontation Clause is right of cross-exam (CX). Douglas v. AL (1965), 380 U.S. 415, 418, 85 S. Ct. 1074, 13 L.Ed.2d 934. Confrontation Clause guarantees only opportunity for effective CX, not CX that is effective in whatever way, & to whatever extent, defense might wish. DE v. Fensterer, (1985), 4 74 U.S. 15, 20, 106 S. Ct. 292, 88 L.Ed.2d 15. Limitation is consistent with concept that right to confrontation is functional one for purpose of promoting reliability. Here, court conducted in-chambers hearing to determine if 2 young girls were competent to testify. D, but not his counsel, was excluded from hearing. Issue at competency hearing is whether child is capable of observing/recollecting/narrating facts & whether child has moral sense of obligation to tell truth. Questions at competency hearing usually are limited to matters unrelated to basic issues of trial. Determination of competency is responsibility of judge & responsibility continues throughout trial. Questions asked during competency hearing were repeated during trial testimony for which D was present. At close of testimony D could have moved court to reconsider competency ruling based upon trial testimony. Held, since D had opportunity for full & effective CX & because of nature of competency hearing in this case D's confrontation rights were not violated. Marshall, joined by Brennan, & Stevens, DISSENTS.

TITLE: Pennsylvania v. Ritchie

INDEX NO.: J.9.a.

CITE: 480 U.S. 39, 107 S. Ct. 989, 94 L.Ed.2d 40 (1987)

SUBJECT: Confrontation - pretrial access to confidential files re complainant

HOLDING: Confrontation Clause provides 2 types of protection for criminal D: right to face physically those who testify against D, & right to conduct cross-examination (CX). DE v. Fensterer (1985), 106 S. Ct. 292, 88 L.Ed.2d 15. Here, D argues that right to conduct CX was violated when Tr. Ct. denied him access to records maintained by Children & Youth Services (CYS) re investigation of alleged sexual assaults against D's daughter for which he was charged. D contends he could not effectively question daughter because, without CYS material, he did not know which types of questions would best expose her weaknesses. CYS records may have enabled D to show prior inconsistent statement or that she acted with an improper motive. Right of confrontation is a trial right designed to prevent improper restrictions on types of questions that defense counsel may ask during CX. Ability to question adverse witnesses does not include power to require pretrial disclosure of all information that might be useful in contradicting unfavorable testimony. Normally, right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses. DE v. Fensterer, *supra*. Confrontation Clause only guarantees "an opportunity for effective CX, not CX that is effective in whatever way, & to whatever extent the defense may wish." Id. Held, Confrontation Clause was not violated by withholding CYS file; it only would have been impermissible for the judge to have prevented D's lawyer from CXing daughter. Blackmun CONCURS IN PART & IN JUDGMENT; Stevens, joined by Brennan, Marshall & Scalia, DISSENTS.

TITLE: Stanger v. State
INDEX NO.: J.9.a.
CITE: (1st Dist. 11/6/89), Ind. App., 545 N.E.2d 1105
SUBJECT: Confrontation - child witness; placement of chair
HOLDING: D's right to confront witnesses was not denied when Tr. Ct. allowed child witness to sit with chair turned slightly toward jury & away from D. Both US & Ind. constitutions require face-to-face confrontation. See Coy v. Iowa (1988), 487 U.S. 1012, 108 S. Ct. 2798, 101 L.Ed.2d 857. However, this cannot be taken too literally. [Citations omitted.] Particular vice which gave impetus to confrontation clause was practice of trying Ds solely on basis of ex parte affidavits or depositions, thereby denying D opportunity to challenge his accusers in face-to-face encounter in front of trier of fact. [Citations omitted.] Confrontation clause is fully satisfied when fact-finder can observe witness' demeanor under cross-examination & testifying under oath & in presence of accused. Delaware v. Fensterer (1985), 474 U.S. 15, 106 S. Ct. 292, 88 L.Ed.2d 15. Placement of chair here was reasonable limitation on D's interest in physical confrontation. As U.S. S. Ct. noted with respect to cross-examination, confrontation does not mean in whatever way & to whatever extent D might wish. See Pennsylvania v. Ritchie (1987), 480 U.S. 39, 107 S. Ct. 989, 94 L.Ed.2d 40. Indiana courts have treated confrontation clause in Ind. constitution similarly, as neither fully literal nor absolute. Held, positioning of child witness facing slightly toward jury & away from D did not deny D's right to confront witnesses. Conviction affirmed.

TITLE: Thorton v. State
INDEX NO.: J.9.a.
CITE: (6-9-99), Ind., 712 N.E.2d 960
SUBJECT: Right to confront witness - limitation on cross
HOLDING: Tr. Ct.'s refusal to allow D to cross-examine his step-daughter on child she & D had together did not violate D's constitutional right to confront witnesses against him. Confrontation Clause does not prevent trial judge from imposing limits on defense counsel's inquiry into potential bias of prosecution witness. On contrary, trial judges retain wide latitude insofar as Confrontation Clause is concerned to impose reasonable limits on such cross- examination based on concerns about, among other things, harassment, prejudice, confusion of issues, witness' safety, or interrogation that is repetitive or only marginally relevant. Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). Here, Tr. Ct. permitted D to cross-examine his fourteen- year-old step-daughter at length to establish her resentment & bias toward him, but did not allow D to cross step-daughter about child she had with D. However, another witness testified as to ongoing sexual relationship between D & his fourteen-year-old step-daughter. Because of witness' age, nature of inquiry, fact that similar evidence came in from another witness, & that case was tried to bench, Tr. Ct. did not abuse its discretion in excluding evidence of witness' child with D. Held, conviction affirmed.

TITLE: United States v. Owens
INDEX NO.: J.9.a.
CITE: 484 U.S. 554, 108 S. Ct. 838, 98 L.Ed.2d 951 (1988)
SUBJECT: Confrontation - witness' memory loss
HOLDING: Confrontation Clause gives D right "to be confronted with the witnesses against him." Here, following attack, witness described attack, named D as attacker, & identified D from photographs. At trial, witness testified he recalled identifying D. On cross-examination he admitted he could not remember seeing assailant nor most of his hospital visitors, nor whether any visitor suggested that D was assailant. Confrontation Clause guarantees only "an opportunity for cross-examination, not cross-examination that is effective in whatever way, & to whatever extent, the defense might wish." DE v. Fernsterer, (1985), 474 U.S. 15, 22, 106 S. Ct. 292, 88 L.Ed.2d 15. That opportunity is not denied when witness testifies re current belief but is unable to recollect reason for that belief. Fernsterer, supra (no Confrontation Clause violation where expert testifies re opinion but cannot recall basis for opinion). Confrontation Clause is satisfied provided D has opportunity to bring out matters such as witness' bias, lack of care/attentiveness, poor eyesight, & bad memory. Held, no Confrontation Clause violation. Kennedy, not participating; Brennan, joined by Marshall, DISSENTS.

TITLE: White v. State
INDEX NO.: J.9.a.
CITE: (11/21/2012), 978 N.E. 2d 475 (Ind. Ct. App. 2013)
SUBJECT: Murder victim's statements admissible under "forfeiture by wrongdoing" exception
HOLDING: In issue of first impression regarding Evidence Rule 804(b)(5), trial court properly admitted hearsay statements of Defendant's wife ("Wife"), whom Defendant murdered, about his abusive behavior because the State proved by preponderance of evidence that Defendant murdered Wife, in part, to prevent her from testifying at a provisional custody hearing regarding their child. See id. Excluding the statements would have rewarded Defendant for making Wife unavailable to testify. Thus, the trial court properly ruled that the statements were admissible under the "forfeiture by wrongdoing" exception to the general rule against admission of hearsay. See id. Further, admission of the statements did not violate Defendant's confrontation rights under the 6th Amendment.

Here, after Defendant and Wife separated, he verbally and physically abused her, often when they argued about parenting time. Wife told others about Defendant's behavior, including incidents where he 1) hit and shoved her; 2) called her a "f***ing whore"; 3) told her she was "going to get what she deserved,"; and 4) put his hand in the shape of a gun and pointing it at her as if to shoot her. The day before the provisional hearing, Wife went to Defendant's house to pick up their child. Defendant asked Wife if he could keep the child another 30 minutes. Wife denied the request. They argued and Defendant shot Wife twice in the abdomen. She and her unborn child died.

Evidence Rule 804(b)(5) establishes the "forfeiture by wrongdoing" exception. It permits admission of a "statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." The State need only show that a defendant was "motivated in part by a desire to silent a witness." U.S. v. Dhinsa, 243 F.3d 635, 653-34 (2nd Cir. 2001) (quoting U.S. v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996)). Under these circumstances, a defendant "waives his right to object on confrontation grounds to the admission of the declarant's out-of-court statements." Dhinsa, 243 F.3d at 653-54 (quoting Houlihan, 92 F.3d at 1280). To prevent admission of facially unreliable hearsay, a court should balance the probative value of the evidence against its prejudicial effect. U.S. v. Miller, 116 F.3d 641, 668 (2nd Cir. 1997).

The State's evidence showed by a preponderance of evidence that Defendant shot Wife, in part, to make her unavailable at the provisional custody hearing. Thus, her statements were admissible under the "forfeiture by wrongdoing" exception. See Evid. R. 804(b)(5). Further, the statements' probative value outweighed their potential prejudicial effect. Held, judgment affirmed.

RELATED CASES: Carr v. State, 106 N.E.3d 546 (Ind. Ct. App. 2018) (D's wrongdoing forfeited 6th amendment right to confront declarant, who was unavailable; same wrongdoing made hearsay statement admissible under Indiana Evidence Rule 804(b)(5); see full review at J.9a, this section).

J. CONSTITUTIONAL LAW

J.9. Confrontation/ cross-examination (6th Amend; Ind.Const. Art 1, 13)

J.9.b. Co-D statements (Bruton v US; Ind. Code 35-34-1-11) (severance, see D.6.a; co-conspirator statements, see O.9.c.15)

TITLE: Cruz v. New York

INDEX NO.: J.9.b.

CITE: 481 U.S. 186, 107 S. Ct. 1714, 95 L.Ed.2d 162 (1987)

SUBJECT: Co-Ds' interlocking confessions

HOLDING: Confrontation Clause (CC) guarantees D right "to be confronted with the witnesses against him." Right includes right to cross-examine [CX] witnesses. D is deprived of rights under CC when co-D's incriminating confession is introduced at joint trial, even if jury is instructed to consider confession only against co-D. Bruton v. U.S., (1968), 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476. In Parker v. Randolph, (1979), 442 U.S. 62, 99 S. Ct. 2132, 60 L.Ed.2d 713, a plurality determined no 6th Amend. violation where each jointly-tried D had himself confessed, D's own confession was introduced against him, & his confession recited essentially the same facts as confessions of non-testifying co-Ds. Court now rejects Parker plurality opinion that Bruton, supra, is inapplicable to cases involving interlocking confessions. Court finds co-D's confession will be relatively harmless if incriminating story it tells is different from D's, but enormously damaging if it confirms, in all essential respects, D's alleged confession. Held, where non-testifying co-D's confession incriminating D is not directly admissible against D, CC bars its admission at their joint trial, even if jury is instructed not to consider it against D, & even if D's own confession is admitted against him. However, D's confession may be considered at trial to assess whether co-D's statements are supported by sufficient "indicia of reliability" to be directly admissible against him (assuming unavailability of co-D), despite lack of opportunity for CX. D's confession may also be considered on appeal to assess whether any CC violation was harmless. White, joined by Rehnquist, Powell, & O'Connor, DISSENTS.

TITLE: Ex parte Sneed
INDEX NO.: J.9.b.
CITE: 783 So.2d 863 (Ala. 2000)
SUBJECT: Bruton Statement -- Editing Unduly Prejucial to Declarant
HOLDING: Editing of statement of non-testifying co-D to render it admissible under Bruton altered it to such an extent as to render make it unduly prejudicial to declarant in capital murder trial. In statement, declarant admitted participation in robbery, but claimed he did not intend for anyone to get hurt, that co-D drove car, brought weapon, chose robbery target, provided masks, and did the shooting. Statement was edited so that all references to coD were removed, and word "we" was changed to "I." D's theory of defense mirrored his original statement. Viewed in that light, majority finds that admission of edited confession was so prejudicial as to constitute abuse of Tr. Ct.'s discretion. From the edited version, it appeared that declarant drove the car, obtained the weapon, selected the target, devised the masks, and induced his co-D to carry the weapon into the store. Other evidence, including a videotape showing the declarant opening the convenience store door and co- D immediately shooting clerk, did not overcome the "distorted statement's" contradiction of declarant's claim of lack of intent to kill. Majority holds that redaction violates rule of completeness where it distorts statement's meaning or excludes substantially exculpatory information. Majority further concludes that admission of the edited statement violated the declarant's 5th Amendment privilege against compelled self-incrimination. Although the declarant's statement was voluntary, the significant alteration effectively compelled his testimony as to matters to which he did not agree when he gave the statement. Declarant's rights cannot be sacrificed merely to serve state's interest in joint trial. Held: Murder conviction and death sentence reversed.

TITLE: Garland v. State

INDEX NO.: J.9.b.

CITE: (11-19-99), Ind., 719 N.E.2d 1184

SUBJECT: Ineffective assistance of counsel (IAC) found - failure to object to admission of Co-D's statement

HOLDING: Trial counsel's failure to object to admission of Co-D's videotaped statement at joint trial constituted IAC & rendered result of proceeding unreliable & unfair. D & her son were each charged with murder, conspiracy to commit murder & assisting criminal in joint trial at which Co-D did not testify. When State & Co-D moved to admit videotaped statement, D failed to assert violation of Confrontation Clause pursuant to Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476 (1968). Bruton clearly established that, in joint trial, statements of one Co-D that facially incriminate another Co-D may not be introduced against other Co-D, when Co-D providing statement does not testify at trial or is not otherwise subject to cross-examination. Id. Holding that defense counsel's performance fell below standard of reasonableness, Ct. rejected State's argument that failure to make proper Bruton objection was based on reasonable trial strategy. Because statement contained facts & opinion testimony that substantially implicated D & was not subject to cross-examination, there was reasonable probability that, because of counsel's error, result of proceeding was unreliable or unfair. Held, conviction reversed & remanded for new trial; Shepard, C.J., concurring with separate opinion.

RELATED CASES: Grinstead, 845 N.E.2d 1027 (distinguishing Garland, Ct. noted counsel explained in the PCR hearing that he stipulated to the statements because he thought the co-D would be more credible on the stand than D; moreover, counsel did challenge the co-D's credibility on several occasions through other acts by the co-D & physical evidence). Latta, 743 N.E.2d 1121 (where D was tried jointly with husband & represented by same counsel, trial counsel's failure to object to unredacted transcript including objections & unanswered questions from husband's pre-arrest interview was compelling evidence of IAC).

TITLE: Gray v. Maryland
INDEX NO.: J.9.b.
CITE: 523 U.S. 185, 118 S. Ct. 1151 (1998)
SUBJECT: Confrontation -- Bruton; Redacted Statements
HOLDING: Use, at joint trial, of non-testifying co-D's confession that has been redacted so as to replace D's name with a space or the word "deleted," violates the 6th Amendment right to confrontation. In Bruton v. U.S., 391 U.S. 123 (1968), Court held that use of statements of non-testifying co-D which implicate the D by name violate confrontation clause. In Richardson v. Marsh, 481 U.S. 200 (1987), the Court held that a confession so edited as to omit any reference to the D was not prohibited by Bruton, even though it could be read, in light of other evidence, to incriminate D. Unlike confession here, confessions in Richardson, did not refer directly to the D, and required evidentiary linkage for their incriminating effect. Here, confession referred directly to D, and merely replacing his name with a blank, or the word deleted, was not likely to fool anyone. Further, such obvious deletion may well have called jurors' attention to the missing name and enhance its importance. Majority suggested that confessions of this sort could in fact be used, and that they may be edited rather freely in order to cure the Bruton problem. For example, the statement "me, deleted, deleted, and a few other guys," could be edited to read "me and a few other guys." Scalia, Rehnquist, Kennedy, and Thomas, JJ., DISSENT, arguing that this case is more like Richardson than like Bruton. Scalia, JJ., expressed concern about editing words out of confessions without indicating the fact of deletion.

RELATED CASES: Greene, 132 S. Ct. 38 (U.S. 2011) (since Pennsylvania Supreme Court's decision dismissing D's appeal predated U.S. Supreme Court's decision in Gray v. Maryland by three months, Gray was not "clearly established Federal law" that would allow the federal court to grant D's application for a writ of habeas corpus).

TITLE: Hammers v. State
INDEX NO.: J.9.b.
CITE: (1/29/87), Ind., 502 N.E.2d 1339
SUBJECT: Right to confrontation - waiver
HOLDING: D waived his right to confront witness, unavailable at trial, by calling him at bail hearing. Here, D contends calling witness (brother of murder victim) as witness at bail hearing did not satisfy his right to cross-exam witness. D argues his questioning of witness did not amount to cross-examination since nature of testimony elicited was different than that which would be elicited during standard cross-examination at trial. Court finds state sufficiently demonstrated that witness was unavailable at trial & that statement used had sufficient "indicia of reliability" [i.e., D had opportunity to cross-examine witness]. Iseton, App., 472 N.E.2d 643. Testimony at bail hearing was under oath & recorded. Both D & his attorney were present & D had opportunity to question witness extensively. Court sees no reason to distinguish this case from one in which admission of deposition is sought, *citing* Gallagher, App., 466 N.E.2d 1382. Held, no error.

TITLE: Lee v. Illinois
INDEX NO.: J.9.b.
CITE: 476 U.S. 530, 106 S. Ct. 2056, 90 L.Ed.2d 538 (1986)
SUBJECT: Admissibility of co-D's confession
HOLDING: Where certain hearsay evidence does not fall within a "firmly rooted hearsay exception," it is presumptively unreliable & inadmissible for Confrontation Clause purposes. OH v. Roberts, (1980), 448 U.S. 56, 100 S. Ct. 2531, 65 L.Ed.2d 597. Nonetheless, such evidence may meet Confrontation Clause reliability standards if supported by a "showing of particularized guarantees of trustworthiness." Id. Here, co-D's statement was admitted into evidence at bench trial at which neither D nor co-D testified. Circumstances surrounding co-D's confession do not rebut presumption of unreliability: co-D's unsworn statement was elicited only after co-D was advised that D had implicated him; it was given in response to questions of police who knew what they were looking for; statement was not tested in any manner by contemporaneous cross-examination by counsel, or its equivalent; co-D may have been motivated to overstate D's involvement in murders in retaliation for her having implicated him; & co-D contemplated becoming witness for state against D. Obviously, when co-D's confessions are identical in all material respects, likelihood that they are accurate is significantly increased. However, when discrepancies between statements are significant, co-D's confession may not be admitted. Here, Court finds significant overlap, but clear divergence with respect to D's participation in planning of one murder, her facilitation of second murder & certain factual circumstances relevant to premeditation. Held, co-D's confession inculpating D is inherently unreliable; evidence presented is insufficient to rebut that presumption. Blackmun, joined by Burger, Powell & Rehnquist, DISSENTS.

TITLE: Norton v. State
INDEX NO.: J.9.b.
CITE: (8-12-02), Ind. App., 772 N.E.2d 1028
SUBJECT: Decision to assert or waive Bruton protection belongs to D
HOLDING: D may voluntarily waive his Bruton protection & thereby cause an entire statement of co-D to be entered into evidence. Here, only part of co-D's recanted statement was admitted into evidence because Tr. Ct. invoked protections provided to D from incriminating admission by co-D under Bruton v. United States, 391 U.S. 123 (1968), despite fact that D & co- D made it clear they wished to have statement admitted. Law is clear that D may waive right to cross-examine witnesses, both voluntarily & through error. Timberlake v. State, 690 N.E.2d 243 (Ind. 1997). Therefore, it is only logical that Bruton claim may also be voluntarily waived by D against whom incriminating statement of co-D may potentially be used.

Where, as here, D agreed with co-D who made statement that entire statement should be entered into evidence, Tr. Ct. must look to doctrine of completeness to determine whether admissibility is proper. State argued that evidence which is highly prejudicial to D cannot be admitted under doctrine of completeness. It does not serve interests of justice for State to be permitted to admit portions of statement which are inculpatory against individual, but to prevent that same individual from entering remaining portions of statement which are relevant while being both inculpatory & exculpatory under guise that judicial system is protecting that individual from prejudicial information being brought before jury. Ct. also noted that no D may use waiver of Bruton rights to coerce admission of statement made by co-D when co-D does not request that entire statement be entered unless there is hearsay exception which will allow D to enter statement. Lastly, it was obvious that waiver was knowing & voluntary in this case because D understood that co-D would not testify & he could not cross-examine him, that entire statement would implicate him in crime, & that he had right to prevent jury from hearing any prejudicial portions of statement. Held, conviction reversed & remanded for new trial.

TITLE: Richardson v. Marsh
INDEX NO.: J.9.b.
CITE: 481 U.S. 200, 107 S. Ct. 1702, 95 L.Ed.2d 176 (1987)
SUBJECT: Co-D statements – redaction
HOLDING: Confrontation Clause guarantees right of D "to be confronted with the witnesses against him." Right of confrontation includes right to cross-examine witnesses. [Citation omitted.] Generally, witness whose testimony is introduced at joint trial is not considered to be witness "against" D if jury is instructed to consider that testimony only against co-D. Law assumes jurors follow instructions. [Citation omitted.] Exception to general rule applies when facially incriminating confession of nontestifying co-D is introduced at joint trial. Bruton v. U.S., (1968), 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476. In such a case, D is denied right to confrontation even if jury is instructed to consider confession only against co-D. Id. Here, Marsh & Williams were jointly tried. Williams' redacted confession was admitted at trial. As admitted, confession made no reference to Marsh. Confession, in part, concerned conversation between Williams & 3d accomplice. Williams did not testify. Judge admonished jury to consider confessions against Williams only. Marsh testified she was present during conversation but did not hear it. This confession is distinguishable from that in Bruton. Confession in Bruton directly implicated D. Here, confession was not incriminating on its face & became so only when linked with evidence introduced at trial (D's own testimony). Evidence requiring "linkage" is not so overwhelming that jury will be presumed to disregard instruction to consider confession solely against co-D. Held, Confrontation Clause not violated by admission of nontestifying co-D's confession with proper limiting instruction when confession is redacted to eliminate not only D's name, but any reference to her existence. Stevens, joined by Brennan & Marshall, DISSENTS.

TITLE: Shackelford v. State
INDEX NO.: J.9.b.
CITE: (10/9/86), Ind., 498 N.E.2d 382
SUBJECT: Co-D statements - admissible through third party under exceptions to hearsay
HOLDING: Tr. Ct. did not err in denying D's motion for severance; D was not prejudiced by witness' testimony of statements, made by co-D implicating D in commission of crime. Here, D & co-D described each of their roles in committing murder. Witness was allowed to testify to this conversation. D contends witness' testimony re co-D's statements were improper because co-D did not testify; therefore, D was denied right to confront witnesses, *citing* Bruton v. US, (1968), 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476. Court finds Bruton inapplicable. Statements were admissible against D under 2 exceptions: (1) admissions against interest (Cooper 461 N.E.2d 1119) & (2) adoptive admission (Harris 425 N.E.2d 154 & Robinson 365 N.E.2d 1218). Court finds D's involvement in conversation goes further than holdings in Harris & Robinson which referred to situation where accusation against D is made & D maintains silence without denial. D in this case did not remain silent but joined in conversation agreeing with what co-D said & adding his own commentary. Witness' testimony was admissible against D & co-D equally & it would have been so had D been tried separately or jointly (as was the case). Court also notes D did not object to witness' testimony on grounds now presented on appeal. Held, no error.

TITLE: Taggart v. State
INDEX NO.: J.9.b.
CITE: (07/10/92), Ind., 595 N.E.2d 256
SUBJECT: Admission of non-testifying co-D's (Co-D) redacted confession reversible error if no limiting instruction
HOLDING: Tr. Ct. committed reversible error in admitting non-testifying Co-D's redacted confession without limiting instruction, because other evidence presented at trial linked D to confession. Admission of confession was found not erroneous in other Ds' appeal which was decided in 1979, Gutierrez 395 N.E.2d 218. Since that decision, however, law in this area has been changed. In Richardson v. Marsh, 481 U.S. 200, 107 S. Ct. 1702, 95 L.Ed.2d 176 (1987)), S. Ct. held that while confrontation clause doesn't totally bar admission of redacted confession which incriminates Co-D only through linkage by other evidence (as it does if confession makes specific reference to Co-D, Bruton v. US, 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476 (1968)), it does bar admission of such redacted, but linked, confession, if there is no limiting instruction advising jury that confession is limited in applicability to confessor. Rule of Richardson should be applied retroactively, and Tr. Ct.'s error in admitting redacted confession without limiting instruction was not harmless because D's conviction rested largely on testimony of witnesses who sought benefit from State or to shift their culpability onto D, making their credibility a crucial issue. D did not confess or testify and therefore there was reasonable possibility that erroneously admitted confession contributed to his conviction, Givan & Krahulik, JJ., dissenting.

RELATED CASES: Harbert v. State**,** 51 N.E.3d 267 (Ind. Ct. App. 2016) (it was not fundamental error to admit Co-D's statement that his wallet was stolen a few weeks before the robbery around the time he had spent time with D and several other people; the statement did not facially incriminate D in the robbery).

TITLE: United States v. Gonzalez
INDEX NO.: J.9.b.
CITE: 183 F.3d 1315 (11th Cir. 1999)
SUBJECT: Bruton -- Redacted Confession Indicating Number of Confederates
HOLDING: Presentation of non-testifying co-D's out of court confession redacted so as to still indicate number of people involved in crime violated 6th Amendment Confrontation Clause of jointly tried Ds because the confession clearly referred to them. Reference to three other non-named people, where there were three co-Ds on trial, was no different than simply replacing references to co-Ds with blank spaces or the word "deleted." The latter was found to be a 6th Amendment in Gray v. Maryland, 523 U.S. 185 (1998).

TITLE: Zachary v. State
INDEX NO.: J.9.b.
CITE: (10/23/84), Ind., 469 N.E.2d 744
SUBJECT: Bruton violation harmless where co-D's confession is redacted
HOLDING: Tr. Ct. did not err in admitting co-D's confession into evidence. Here, D's own confession was admitted. Victim's testimony clearly established D's guilt. Introduction of non-testifying co-D's confession, inculpatory of D, violates D's 6th Amend right to confrontation. Bruton v. US, (1968), 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476; Sims 358 N.E.2d 746. However, it is harmless error where D's own confession has been admitted & does not differ substantially from coD's. Gutierrez 388 N.E.2d 520; Burnett 377 N.E.2d 1340; Stone 377 N.E.2d 1372; Jefferson, App., 399 N.E.2d 816. Held, harmless error.

RELATED CASES: Carrington, App., 678 N.E.2d 1143; Townsend, 533 N.E.2d 1215 (harmless error conclusion strengthened when there exists corroborating testimony & evidence of D's guilt in addition to similar confessions); Wardlaw, 483 N.E.2d 454 (no error in denial of motion for mistrial where police referred to "reduced statement" of co-D); Smith, 474 N.E.2d 973 (where co-Ds' admissions were not admitted at trial, Ind. Code 35-3.1-1-11 [repealed] is not applicable); Johnson, 472 N.E.2d 892 (statement of co-D (who did not testify) was sufficiently redacted to shield other non-testifying Ds from incrimination, thus, Ct. finds no Bruton violation, citing Jenkins 409 N.E.2d 591, Gutierrez, 379 N.E.2d 449 & Williams, 379 N.E.2d 449).

J. CONSTITUTIONAL LAW

J.9. Confrontation/ cross-examination (6th Amend; Ind.Const. Art 1, 13)

J.9.c. Informants

TITLE: Crull v. State
INDEX NO.: J.9.c.
CITE: (7/7/89), Ind., 540 N.E.2d 1195
SUBJECT: Confrontation - re residence & employment
HOLDING: Tr. Ct. erred in denying D right to cross-examine (C-X) civilian informant, state's key witness, as to current residence, employment, & other personal matters that would allow jury to judge his credibility in light of his environment. D was charged with dealing in cocaine, & informant's testimony made up state's entire case. At trial, informant refused to answer questions on C-X re residence, employment, & other personal matters, stating that he was afraid of possible connections D & his family might have. State objected to questions on relevancy grounds, & Tr. Ct. sustained, stating that it was difficult to imagine what relevancy this information might have. Tr. Ct. stated that it did not have slightest idea whether informant's fears were well-founded & rejected D's request to conduct hearing into matter. U.S.S. Ct. decided same issue 60 years ago in Alford v. US, (1931), 282 U.S.687, 51 S. Ct. 218, 75 L. Ed. 624. Alford Court found it permissible purpose of C-X that witness be identified with his community in effort to elicit independent testimony as to reputation for truthfulness in community; to allow jury to place informant's testimony in context of his environment; & to allow D to probe for evidence of bias. Counsel need not show that C-X would necessarily bring out facts tending to discredit testimony but should be allowed reasonable latitude. Again, in Smith v. IL, (1968), 390 U.S. 129, 88 S. Ct. 748, 19 L.Ed.2d 956, U.S.S. Ct. found denial of such C-X to be error which cannot be harm-less. Where informant claims that divulging such information would endanger him, Tr. Ct. must conduct in camera hearing into matter. Palermo v. US, (CA7 1969), 410 F.2d 468. See also Johnson, 518 N.E.2d 1073. Held, reversed & remanded.

TITLE: Robinson v. State
INDEX NO.: J.9.c.
CITE: (4th Dist., 06-15-94), Ind. App., 634 N.E.2d 1367
SUBJECT: Limitation of cross-examination (CX) of informant
HOLDING: Invocation of 5th Amend. privilege against self-incrimination by informant, at both deposition & trial, did not impermissibly restrict D's right to CX & confrontation. Information at issue involved details of informant's drug transactions unrelated to transactions with D. Ct. rejected D's claim of prejudice due to limitation of his ability to inquire into instant transaction & into extent of informant's knowledge of drugs. Evidence of informant's arrest on drug offenses, agreement to set up 20-30 other dealers in exchange for dismissal of his charges, his assistance in 22 drug investigations, & fact he avoided possible 100 year+ sentence by his actions, was presented to jury. Therefore Ct. found jury was under no illusion as to why informant was testifying, or as to his character. Ct. also noted in footnote that informant's testimony was devoted almost exclusively to charge for which D was acquitted. It was additionally found that D was not prejudiced by inability to inquire into informant's knowledge of drugs, as this was irrelevant to testimony about events of day, & drugs were identified by others.

J. CONSTITUTIONAL LAW

J.9. Confrontation/ cross-examination (6th Amend; Ind.Const. Art 1, 13)

J.9.e. Hearsay

TITLE: Boyd v. State
INDEX NO.: J.9.e.
CITE: (1st Dist., 05-25-07), Ind. App., 866 N.E.2d 855
SUBJECT: Right to confrontation - forfeited by wrongdoing
HOLDING: The D's wrongdoing, i.e., murdering his wife, forfeited his right to confront her at trial as provided by the Sixth Amendment & the Indiana Rules of Evidence. "The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." Crawford v. Washington, 541 U.S. 36, 62 (2004). Although Indiana Rule of Evidence 802 states that "[h]earsay is not admissible except as provided by law or by these rules," Federal Rule of Evidence 804(b)(6) provides that the hearsay rule does not exclude "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, & did, procure the unavailability of the declarant as a witness." Although the Indiana Rules of Evidence do not contain a similar provision, there is no reason why the doctrine of forfeiture by wrongdoing may not be applied as a matter of common law. Here, between the time D's wife made statements that he battered her & trial, D murdered, & was convicted of murdering, his wife. Thus, D forfeited his right to confront her at trial under both the Sixth Amendment & the Indiana Rules of Evidence. Held, judgment affirmed.

RELATED CASES: Carr v. State, 106 N.E.3d 546 (Ind. Ct. Appt. 2018), (D's wrongdoing forfeited 6th amendment right to confront declarant, who was unavailable; same wrongdoing made hearsay statement admissible under Indiana Evidence Rule 804(b)(5); see full review at J.9a, this section). Giles v. California, 128 S. Ct. 2678 (2008) (for Confrontation Clause claims, forfeiture by wrongdoing doctrine only applies when D procured the witness's unavailability by conduct designed to prevent a witness from testifying.; see full review at J.9); Roberts, App, 894 N.E.2d 1018 (D forfeited his right to confront murder victim about non-testimonial statements when he killed her; see full review, this section).

But see: Giles v. California, 128 S. Ct. 2678 (2008) (forfeiture doctrine only applies when D procured the witness's unavailability by conduct designed to prevent witness from testifying).

TITLE: Frye v. State
INDEX NO.: J.9.e.
CITE: (2nd Dist.; 07-18-06), Ind. App., 850 N.E.2d 951
SUBJECT: Confrontation clause- statements made to police were non-testimonial
HOLDING: Admission of witness' hearsay statement to the police that D had two handguns on him did not violate confrontation clause of the Sixth Amendment. The admission of certain hearsay evidence, if testimonial, violates the confrontation clause of the Sixth Amendment. Crawford v. Washington, 541 U.S. 16 (2004). "Preliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an interrogation." Hammon v. State, 829 N.E.2d 444, 456 (Ind. 2005) (*quoting* Hammon v. State, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004)), *rev'd by*, Hammon v. Indiana & Davis v. Washington, 126 S. Ct. 2266 (2006). Here, police officers were dispatched because of a "distraught female." When officers arrived at the location of the distraught female, she told them the D had two guns on him & was at the victim's house. This statement was non-testimonial & was admissible into evidence, despite the fact that the declarant was unavailable to testify at trial &, thus, could not be cross-examined. Held, judgment affirmed.

NOTE: Although the ct. recognized in a footnote that cert. was granted in Hammon, 829 N.E.2d 444 (Ind. 2005), the ct. cites & relies on the Indiana S. Ct. decision in Hammon, *supra*, for the proposition that statements made to police immediately after a crime are informal, & thus, non-testimonial. This holding conflicts with the U.S. S. Ct. decision in Hammon v. Indiana & Davis v. Washington, 126 S. Ct. 2266 (2006).

RELATED CASES: Mack, 23 N.E.3d 742 (Ind. Ct. App. 2014) (informant's statement to police about what D told him constituted testimonial hearsay, and its admission into evidence violate the right to confrontation; harmless error).

TITLE: Lilly v. Virginia

INDEX NO.: J.9.e.

CITE: 527 U.S. 116, 119 S. Ct. 1887, 144 L.Ed.2d 117 (1999)

SUBJECT: Hearsay, confrontation clause, co-D's statements

HOLDING: In this case, D's brother, an accomplice in several robberies & a murder, gave the police a statement that was arguably self-incriminating, but which primarily shifted the blame for the murder to his accomplices. At trial, the D's brother invoked his privilege against self- incrimination & refused to testify. The Tr. Ct. admitted the tape recordings & transcripts of the brother's statements into evidence in their entirety. D was found guilty of murder & sentenced to death.

The Virginia Supreme Court found that the statements were declarations against interest, that their reliability was established by other evidence, & that the statements therefore fell within an exception to Virginia's hearsay rule. The Virginia court also held that the statements had "sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule," & therefore the Confrontation Clause was satisfied. Held, the admission of the accomplice's out-of-court statement inculpating the petitioner violated the Confrontation Clause. Accomplices' out-of-court confessions that inculpate a D are not within a "firmly rooted" hearsay exception. To satisfy the residual "trustworthiness" test (that the declarant's truthfulness is so clear that cross-examination would be of marginal utility), hearsay evidence used to convict a D must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. Case remanded to the Virginia Supreme Court for application of harmless error analysis.

Note: This case is consistent with Indiana Rule of Evidence 804(b)(3).

TITLE: Ohio v. Clark
INDEX NO.: J.9.e.
CITE: (6/18/2015), 135 S. Ct. 2173 (U.S. 2015)
SUBJECT: Child's statement identifying D was non-testimonial
HOLDING: Tr. Ct. did not violate D's Sixth Amendment Right of Confrontation by denying his motion to suppress a three-year-old child's out-of-court statement that D abused him; the statement was non-testimonial, meaning its primary purpose was not to collect evidence but to defuse an on-going emergency. See Crawford v. Washington, 541 U.S. 36 (2004); Michigan v. Bryant, 562 U.S. 344 (2011).

D sent his girlfriend to Washington D.C. to work as a prostitute while he watched her son, L.P, and her eighteen-month-old daughter, A.T. L.P.'s teachers discovered marks on the boy, and he identified D as his abuser. At trial, the State introduced L.P.'s statements, but L.P. did not testify. D was convicted of multiple counts of abusing both children.

Several factors show that L.P.'s statement's primary purpose was non-testimonial. His teachers asked questions to identify and end the threat to both children, not to collect evidence. They did not tell L.P. his statements would be used to arrest or punish D, and L.P. did not hint or suggest he intended his statement to be used in D's prosecution. Also, his statement was spontaneous and informal. His age further confirms his statement was not testimonial. Finally, although statements to people other than law enforcement officials, such as teachers, are not categorically admissible, such statements are much less likely to be testimonial. Held, cert. granted, opinion of the Ohio Supreme Court at 999 N.E.2d 592 reversed and remanded. Alito, J., joined by Roberts, C.J., and Kennedy, Breyer, Sotomayor, and Kagan, JJ; Scalia, J., concurring in judgment, joined by Ginsburg, J.; Thomas, J., concurring in judgment.

TITLE: Ohio v. Clark
INDEX NO.: J.9.e.
CITE: (6/18/2015), 135 S. Ct. 2173 (U.S. 2015)
SUBJECT: Child's statement to teacher was non-testimonial
HOLDING: Tr. Ct. did not violate D's Sixth Amendment Right of Confrontation by denying his motion to suppress a three-year-old child's out-of-court statement to a teacher; the statement was non-testimonial because it was made to someone other than a law enforcement officer. See Crawford v. Washington, 541 U.S. 36 (2004); Michigan v. Bryant, 562 U.S. 344, 369 (2011); Giles v. California, 554 U.S. 353, 376 (2008).

D sent his girlfriend to Washington D.C. to work as a prostitute while he watched her son, L.P, and her eighteen-month-old daughter, A.T. L.P.'s teachers discovered marks on the boy, and he identified D as his abuser. At trial, the State introduced L.P.'s statements, but L.P. did not testify. D was convicted of multiple counts of abusing both children.

L.P.'s statement was made to his teacher, not a law enforcement officer. Although statements to people other than law enforcement officials are not categorically admissible, such statements are much less likely to be testimonial. Alito, J., joined by Roberts, C.J., and Kennedy, Breyer, Sotomayor, and Kagan, JJ; Scalia, J., concurring in judgment, joined by Ginsburg, J.; Thomas, J., concurring in judgment.

TITLE: Roberts v. State
INDEX NO.: J.9.e.
CITE: (1st Dist., 10-15-08), Ind. App., 894 N.E.2d 1018
SUBJECT: Admissibility of non-testimonial hearsay evidence - forfeiture by wrongdoing
HOLDING: In murder prosecution, Tr. Ct. did not abuse its discretion in admitting victim's statements to her friends and co-workers that D had threatened to kill her. D argued that evidence was inadmissible because it violated Sixth Amendment right to confront witnesses and because it was inadmissible hearsay under Indiana Rules of Evidence. In Giles v. California, 128 S. Ct. 2678 (2008), a Confrontation Clause case, Court held the common-law doctrine of forfeiture by wrongdoing only applies when the D procured the witness's unavailability by conduct designed to prevent a witness from testifying. Giles and Crawford are inapplicable to this case because statements were not testimonial, but "casual remarks" not made in anticipation of a criminal prosecution. Thus, statements did not implicate the Sixth Amendment.

Assuming that victim's statements to her friends were inadmissible hearsay, Court concluded that any objection to the admissibility of statements was forfeited. Analysis in Giles was limited to a D's Sixth Amendment right to confrontation, and states may adopt their own rules regarding non-testimonial statements. Court held that a broader view of forfeiture applies to challenged non-testimonial statements. "A party, who has rendered a witness unavailable for cross-examination through a criminal act, including homicide, may not object to the introduction of hearsay statements by the witness as being inadmissible under the Indiana Rules of Evidence." See also Boyd v. State, 866 N.E.2d 855 (Ind. Ct. App. 2007). Moreover, concern of circular proof is not at issue in this case because D admitted killing victim. Held, judgment affirmed.

NOTE: This holding conflicts with the amendment to Ind. R. Evid. 804, effective Jan. 1, 2009, which allows hearsay offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness for the purposes of preventing the declarant from attending or testifying.

RELATED CASES: Carr v. State, 106 N.E.3d 546 (Ind. Ct. App. 2018), (D's wrongdoing forfeited 6th amendment right to confront declarant, who was unavailable; same wrongdoing made hearsay statement admissible under Indiana Evidence Rule 804(b)(5); see full review at J.9a, this section).

TITLE: White v. State
INDEX NO.: J.9.a.
CITE: (11/21/2012), 978 N.E. 2d 475 (Ind. Ct. App. 2013)
SUBJECT: Murder victim's statements admissible under "forfeiture by wrongdoing" exception
HOLDING: In issue of first impression regarding Evidence Rule 804(b)(5), trial court properly admitted hearsay statements of Defendant's wife ("Wife"), whom Defendant murdered, about his abusive behavior because the State proved by preponderance of evidence that Defendant murdered Wife, in part, to prevent her from testifying at a provisional custody hearing regarding their child. See id. Excluding the statements would have rewarded Defendant for making Wife unavailable to testify. Thus, the trial court properly ruled that the statements were admissible under the "forfeiture by wrongdoing" exception to the general rule against admission of hearsay. See id. Further, admission of the statements did not violate Defendant's confrontation rights under the 6th Amendment.

Here, after Defendant and Wife separated, he verbally and physically abused her, often when they argued about parenting time. Wife told others about Defendant's behavior, including incidents where he 1) hit and shoved her; 2) called her a "f***ing whore"; 3) told her she was "going to get what she deserved,"; and 4) put his hand in the shape of a gun and pointing it at her as if to shoot her. The day before the provisional hearing, Wife went to Defendant's house to pick up their child. Defendant asked Wife if he could keep the child another 30 minutes. Wife denied the request. They argued and Defendant shot Wife twice in the abdomen. She and her unborn child died.

Evidence Rule 804(b)(5) establishes the "forfeiture by wrongdoing" exception. It permits admission of a "statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." The State need only show that a defendant was "motivated in part by a desire to silent a witness." U.S. v. Dhinsa, 243 F.3d 635, 653-34 (2nd Cir. 2001) (quoting U.S. v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996)). Under these circumstances, a defendant "waives his right to object on confrontation grounds to the admission of the declarant's out-of-court statements." Dhinsa, 243 F.3d at 653-54 (quoting Houlihan, 92 F.3d at 1280). To prevent admission of facially unreliable hearsay, a court should balance the probative value of the evidence against its prejudicial effect. U.S. v. Miller, 116 F.3d 641, 668 (2nd Cir. 1997).

The State's evidence showed by a preponderance of evidence that Defendant shot Wife, in part, to make her unavailable at the provisional custody hearing. Thus, her statements were admissible under the "forfeiture by wrongdoing" exception. See Evid. R. 804(b)(5). Further, the statements' probative value outweighed their potential prejudicial effect. Held, judgment affirmed.

RELATED CASES: Carr, App. 106 N.E.3d 546, (D's wrongdoing forfeited 6th amendment right to confront declarant, who was unavailable; same wrongdoing made hearsay statement admissible under Indiana Evidence Rule 804(b)(5); see full review at J.9a, this section).

J. CONSTITUTIONAL LAW

J.9. Confrontation/ cross-examination (6th Amend; Ind.Const. Art 1, 13)

J.9.g. Child victim - alternative testimony (see O.9.c.17)

TITLE: White v. Illinois
INDEX NO.: J.9.g.
CITE: 502 U.S. 346 (1992)
SUBJECT: Right to confrontation -- child victim
HOLDING: D was convicted of aggravated criminal sexual assault, residential burglary, & unlawful restraint. At trial, other witnesses testified to what four-year old victim had told them about D's attack. D filed motion for mistrial based on victim's presence & failure to testify. Ct. held that where proffered hearsay has sufficient guarantees of reliability to come within firmly rooted exception to hearsay rule, Confrontation Clause is satisfied. Out-of-court statements admitted had substantial probative value, value that could not be duplicated simply by declarant later testifying in Ct. To exclude such probative statements under strictures of Confrontation Clause would be height of wrongheadedness, given that Confrontation Clause has as basic purpose promotion of integrity of factfinding process. Coy, 487 U.S. 1012.

RELATED CASES: Wright, 497 U.S. 805 (admission of two & one-half year-old's statements violated D's Confrontation Clause rights because child's statements lacked particularized guarantees of trustworthiness in that doctor had conducted interview without procedural safeguards; doctor failed to videotape interview, asked leading questions, & had preconceived idea of what child should be disclosing).

J. CONSTITUTIONAL LAW

J.9. Confrontation/ cross-examination (6th Amend; Ind.Const. Art 1, 13)

J.9.h. Compulsory Process

TITLE: Commonwealth v. Barroso
INDEX NO.: J.9.h.
CITE: 122 S.W.3d 554 (Ky. 2003)
SUBJECT: Compulsory Process Trumps Patient Privilege for Exculpatory Evidence
HOLDING: The 6th Amendment Compulsory Process clause grants Ds right to obtain evidence in possession of third party that would otherwise be subject to psychotherapist-patient privilege. Under Kentucky law, psychotherapist-patient privilege is an absolute privilege. However, where privileged material includes exculpatory evidence, compulsory process rights trump absolute privilege.

TITLE: Combs v. Commonwealth
INDEX NO.: J.9.h.
CITE: 74 S.W.3d 738 (Ky. 2002)
SUBJECT: Defense Witness Who Selectively Invoked 5th Amendment
HOLDING: Kentucky S. Ct. holds that defense witness who, during preliminary questioning, selectively invoked 5th amend. privilege, should have been allowed to testify, as she invoked privilege only with regard to tangential matters. D, charged with selling drugs to undercover officer asserted alibi defense, alleging that at time of sale, she and witness were being detained for shoplifting at K-Mart. During "dry run" of questioning of witness outside presence of jury, she testified that she had driven D to K-Mart on day in question, and that D had been detained for shoplifting, but invoked 5th Amend. privilege when questioned about her own involvement in shoplifting. Tr. Ct. barred witness from testifying. Kentucky S. Ct. reverses, holding that witness' testimony was important for its tendency to place D at a location away from drug sale, that her own involvement in shoplifting was only tangentially related to "essence" of her testimony, and that invocation of privilege did not prevent government from inquiring into matters central to her testimony, such as what time they arrived at K-Mart, how long D was detained, etc. Government's inability to cross-examine on tangential matters should not have prevented D from calling a material witness.

TITLE: Gray v. State
INDEX NO.: J.9.h.
CITE: 368 Md. 529, 796 A.2d 697 (Md. Ct. App. 2002)
SUBJECT: Defense Calling Witness Who Will Invoke 5th Amendment
HOLDING: Where defense argues a third party committed crime, and person accused by defense will invoke 5th Amend. if called to testify, Tr. Ct. has discretion to allow defense to call witness for that purpose. In exercising this discretion, Tr. Ct. should determine on record whether there is sufficient credible evidence that third party, and extent of prejudice to D if not allowed to call potentially exculpatory witness. If Tr. Ct. refuses to allow D to call third party accused by defense, it should instruct jury that this individual has invoked 5th Amend. privilege and is not available to D.

J. CONSTITUTIONAL LAW

J.10. Double jeopardy (5th Amend; IndConst Art 1, 14) (see, also L.7.d)

J.10.a. In general

TITLE: Abney v. U.S.
INDEX NO.: J.10.a.
CITE: 431 U.S. 651 (1977)
SUBJECT: Double jeopardy -- pretrial denial appealable
HOLDING: Pretrial order denying motion to dismiss indictment on double jeopardy grounds lacks finality traditionally considered indispensable to appellate review. However, such order falls within small class of cases that Cohen, 337 U.S. 541, has placed beyond confines of final judgment rule, & such order thus constitutes final decision which is immediately appealable since it constitutes complete, formal & final rejection of accused's double jeopardy claim. Rights conferred by double jeopardy clause would be significantly undermined if appellate review of such claims were postponed until after conviction & sentence. Here, D was charged with conspiracy & attempt to obstruct interstate commerce by means of extortion. Subsequent guilty verdict was reversed but D was not acquitted. Ct. held that retrial on conspiracy charge not barred on facts because Ct. satisfied jury did not acquit on conspiracy charge. Held, affirmed in part, reversed in part, & remanded.

TITLE: Baker v. State
INDEX NO.: J.10.a.
CITE: (4th Dist. 10/8/85), Ind. App., 483 N.E.2d 772
SUBJECT: Double jeopardy (DJ) - can be waived
HOLDING: Where D failed to cite authority for argument that public intoxication is lesser included offense of DWI (D convicted of both), D waived any error. AR 8.3(A)(7). Although alleged error might infringe on D's constitutional right against DJ, such infringement does not constitute fundamental error & may be waived. Jeffers v. US, (1977), 432 U.S. 137, 97 S. Ct. 2207, 53 L.Ed.2d 168; Strode, 400 N.E.2d 183; Pivak, (1931), 202 Ind. 417. Held, convictions affirmed. Miller CONCURS IN RESULT. Young DISSENTS without opinion.

RELATED CASES: State v. Mercer, App., 500 N.E.2d 1278 (court rejects state's contention that D waived DJ claim; court distinguishes case from Manns, infra, here, state could have objected to verdict, which found D guilty of criminal recklessness, but hung on battery count); Manns, App., 459 N.E.2d 435 (Crim L 204; D waived DJ by failing to object to jury's discharge, following entry of defective verdict, *citing* Moyer, App., 379 N.E.2d 1036.

TITLE: Currier v. Virginia
INDEX NO.: J.10.a.
CITE: (6/22/2018), (U.S. 2018)
SUBJECT: Second trial of severed charge after acquittal in first trial did not violate double jeopardy
HOLDING: Because D agreed to sever one charge from two others, and where his first trial resulted in an acquittal, his second trial and resulting conviction did not violate the double jeopardy prohibition, because by agreeing to the severance of charges, D waived his double jeopardy claim.

D was indicted for burglary, grand larceny, and unlawful possession of a firearm by a convicted felon. Because the prosecution could introduce evidence of his prior burglary and larceny convictions to prove the felon-in-possession charge, and because he worried that evidence might prejudice the jury's consideration of the other charges, he agreed to sever the burglary and larceny charges, which would be tried in the first trial, from the felon-in-possession charge, which would be tried in the second. D was acquitted in the first trial, so he tried to stop the second, arguing it would amount to double jeopardy. Alternatively, he asked the court to prohibit the State from re-litigating at the second trial any issue resolved in his favor at the first. The Tr. Ct. denied his requests, and D was convicted on the felon-in-possession charge. The Virginia appellate courts affirmed.

In arguing that the second trial was a re-litigation of the first, D relied on Ashe v. Swenson, 397 U. S. 436 (1970), where the Court held the Double Jeopardy Clause barred a D's prosecution for robbing a poker player because the D's acquittal in a previous trial for robbing a different poker player from the same game established that he "was not one of the robbers," id., at 446. However, the Ashe test is a demanding one; it forbids a second trial only if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the D's favor in the first trial.

However, even if D's second trial qualified as retrial of the same offense under Ashe, D consented to the second trial, and thus waived his double jeopardy claim. In Jeffers v. United States, 432 U. S. 137 (1977), where the issue was a trial on a greater offense after acquittal on a lesser-included offense, the Court held that the Double Jeopardy Clause is not violated when the D "elects to have the . . . offenses tried separately and persuades the Tr. Ct. to honor his election." Id., at 152. If consent can overcome a traditional double jeopardy complaint about a second trial for a greater offense, it must also be enough to overcome a double jeopardy complaint under Ashe.

D is incorrect that he had no choice but to request two trials because evidence of his prior convictions would have tainted the jury's consideration of the burglary and larceny charges. D was not required to surrender one constitutional right to secure another. Instead, he faced a difficult but lawful choice between two courses of action, each bearing potential costs and benefits. Difficult strategic choices are "not the same as no choice," United States v. Martinez-Salazar, 528 U. S. 304, 315 (2000), and the Constitution "does not . . . forbid requiring" a litigant to make them, McGautha v. California, 402 U. S. 183, 213 (1971).

In Part III of the Court's decision, four justices declared that civil issue preclusion cannot be imported into criminal law through the Double Jeopardy Clause to prevent parties from retrying any issue or introducing any evidence about a previously tried issue.

In dissent, Justice Ginsburg identified two separate concerns: 1) the protection against multiple trials and 2) the protection for the finality of acquittals. She also argued that D took no action inconsistent with assertion of an issue-preclusion argument, and that because the Court "indulge[s] every reasonable presumption against waiver of fundamental constitutional rights," the waiver of D's issue-preclusion claim cannot be implied from his agreement to separate trials. GORSUCH, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined, and an opinion with respect to Part III, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined. KENNEDY, J., filed an opinion

concurring in part. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

TITLE: Dowling v. United States
INDEX NO.: J.10.a.
CITE: 493 U.S. 342, 110 S. Ct. 668, 107 L.Ed.2d 708 (1990)
SUBJECT: Double jeopardy - admission of testimony re: prior criminal act for which D acquitted
HOLDING: Double jeopardy clause not violated by admission of testimony re criminal act for which D acquitted. Here, at D's federal bank robbery trial testimony was elicited from witness that 2 weeks after bank robbery D & another man entered her home wearing mask & carrying gun similar to that used in bank robbery. D was acquitted of offenses arising from residential burglary. D argues here that admission of residential burglary testimony violated due process. Collateral estoppel doctrine of double jeopardy clause provides that "when an issue of ultimate fact has once been determined by a valid & final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, (1970), 397 U.S. 436, 443, 90 S. Ct. 1189, 1194, 25 L.Ed.2d 469. However, prior acquittal did not determine ultimate issue in present case. Acquittal in criminal case does not preclude government from re-litigating issue in subsequent action with lower standard of proof. Furthermore, evidence was admissible because D did not demonstrate that he was not one of men who entered witness' home. Burden is on D to show issue whose re-litigation he seeks to foreclose was actually decided in first case. There is nothing in record that persuasively indicates identity was at issue in first case & decided in D's favor. Held, conviction affirmed. Brennan, joined by Marshall & Stevens, DISSENTING.

TITLE: Drake v. State
INDEX NO.: J.10.a.
CITE: (8/31/84), Ind., 467 N.E.2d 686
SUBJECT: Double jeopardy (DJ) - continuance is not a discharge of jury
HOLDING: Dismissal of jurors from 5/17 until 5/24 (upon state's motion to continue for absent witness) was not discharge of one impaneled jury & impaneling of new jury; thus, D's DJ rights were not violated. Here, D *cites* Corley 455 N.E.2d 945. In Corley, prosecutor moved to continue after trial commenced. Because of congested calendar, Tr. Ct. advised prosecutor that jurors would have to be discharged & a new panel selected for rescheduled trial. Ind. S. Ct. held in Corley that jeopardy attached at swearing of first panel; DJ prevented second panel from hearing case. Court finds jury was simply allowed to recess in D's case. Held, no error.

TITLE: Golden v. State
INDEX NO.: J.10.a.
CITE: (1st Dist. 5/7/90), Ind. App., 553 N.E.2d 1219
SUBJECT: Double jeopardy (DJ) - correction of illegal sentence after commencement
HOLDING: Remand to Tr. Ct. to attach 30-year habitual offender (HO) sentence to one of 2 concurrent forgery sentences as enhancement does not violate DJ, even though D has completely served 5-year forgery sentence. Court of Appeals affirms denial of D's PCR petition to have separate HO sentence set aside, but remands with instructions to impose it as enhancement. D argues that re-sentencing would violate DJ, since he has already served 5-year forgery sentence. However, separate HO sentence was illegal, & there is no DJ prohibition against correcting illegal sentence even if it results in increased penalty. See also Niece, App., 456 N.E.2d 1081; Bozza v. US, (1947), 330 U.S. 160, 67 S. Ct. 645, 91 L.Ed.2d 818; Stuckey v. Stynchcombe, (CTA 5 1980), 614 F.2d 75; Thompson v. US, (CTA 1 1974), 495 F.2d 1304. Held, remanded for resentencing.

TITLE: Jackson v. State
INDEX NO.: J.10.a.
CITE: (4/6/88), Ind., 521 N.E.2d 339
SUBJECT: Double jeopardy - after sentence commenced
HOLDING: Double jeopardy does not bar retrying D on habitual offender count & enhancing sentence once D has begun serving it. D was tried & convicted of robbery & confinement. Jury was unable to reach verdict on habitual offender question, & mistrial was declared. Before D was retried on habitual count, he began serving sentence on underlying offenses. D contends that commencement of service of sentence restricted Tr. Ct.'s power to correct or amend sentence. Sentence should have finality, & is tantamount to acquittal on possibility of greater punishment. US v. Turner, (7th Cir. 1975), 518 F.2d 14; US v. Sacco, (2d Cir. 1966), 367 F.2d 368. However, in US v. DiFrancesco, (1980), 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 328, U.S. S. Ct. rejected argument that criminal sentence, once imposed, should always be accorded finality of acquittal. Double jeopardy clause protects only legitimate expectations of finality. Here, D did not object at time of sentencing, retrial, or resentencing, D clearly understood that should habitual offender determination be made at retrial, sentence would be enhanced.

TITLE: Justice v. State
INDEX NO.: J.10.a.
CITE: (1st Dist. 2/28/90), Ind. App., 550 N.E.2d 809
SUBJECT: Probation revocation based on charges resulting in acquittal
HOLDING: Double jeopardy (DJ) does not bar continued execution of sentence for probation violation based on charges ultimately resulting in acquittal. D was on probation at time he was charged with numerous offenses, & Tr. Ct. revoked his probation for violation of good behavior condition. All charges other than attempted burglary were either dismissed by state or discharged pursuant to CR 4. D was convicted of attempted burglary, but Supreme Court reversed due to insufficient evidence. Justice 530 N.E.2d 295. Following this reversal, Tr. Ct. held hearing to determine whether to set aside probation revocation, & decided not to. D appealed, arguing that because evidence was found insufficient to support conviction for burglary, it is insufficient to support probation revocation, & that in any case DJ bars its use to revoke probation. D's probation was revoked because he violated condition that he remain on good behavior. To support this revocation, state must prove by preponderance of evidence that D has engaged in unlawful activity. Brown, App., 458 N.E.2d 245. Charges dismissed or discharged pursuant to CR 4 may be considered despite statute of limitations, since revocation proceedings is not prosecution. Similarly, DJ does not bar consideration of charge resulting in acquittal, since revocation proceeding does not go to guilt or innocence on offense charged.

TITLE: Livingston v. State
INDEX NO.: J.10.a.
CITE: (10/18/89), Ind., 544 N.E.2d 1364
SUBJECT: Double jeopardy - when jeopardy attaches
HOLDING: Jeopardy has not yet attached when 12-member jury is sworn but alternates have not been selected & sworn. It is well-settled that jeopardy attaches when jury selected to try D is sworn. [Citations omitted.] In Godfrey, App., 380 N.E.2d 621, Court of Appeals found that jeopardy had not attached when 2 of 12 juror remained silent during oath & were excused. Here, record shows that immediately after selection of 12th juror, 12-member panel was sworn. Then, before alternates were selected, 12th juror informed court that he vaguely knew one D's witness. After questioning by court & counsel, juror was removed over D's objection. On appeal, D argues that jeopardy had attached when 12-member jury was sworn, so that he could not be tried after removal & replacement of 12th juror. State argues that "jury" was not sworn until alternates were impaneled & sworn pursuant to TR 47(b). Issue is one of 1st impression. California & Pennsylvania have similar rules providing for use of alternate jurors, & their courts have held that jeopardy attaches only after full jury, including alternates, is sworn. [Citations omitted.] Alternates sit with regular panel & may very well serve as member of it. Very purpose of having alternates is to keep jury intact & continue with trial when regular juror cannot serve. D's constitutional protection against double jeopardy is not impinged in these circumstances. Held, conviction affirmed.

RELATED CASES: Martinez, 134 S. Ct. 2070 (2014) (jeopardy attaches once jury sworn even when State fails to present evidence; see full review, this section).

TITLE: Lyons v. State
INDEX NO.: J.10.a.
CITE: (3d Dist. 3/28/85), Ind. App., 475 N.E.2d 719
SUBJECT: Double jeopardy (DJ) - criminal & administrative conviction & punishment
HOLDING: Criminal & administrative conviction & punishment for same act does not constitute DJ. Anderson (Ga. 1983), 300 S.E.2d 163. [Other citations omitted.] Here, D contends administrative punishment by Institutional Conduct Adjustment Board for his attempted escape bars subsequent criminal prosecution on DJ grounds. Court finds Board is authorized to punish acts done within prison walls by imposing disciplinary sanctions to ensure peace & order but may not lengthen convict's term. The state is required to ensure safety/well-being of society & is authorized to punish those who attempt to escape by extending their term. Held, no error.

RELATED CASES: Brown, 172 N.E.3d 1273 (Ind. Ct. App. 2021) (administrative sanctions by DOC do not preclude subsequent prosecution for the same actions); Mullins, App., 647 N.E.2d 676 (Because DOC did not lengthen fixed term of D's sentence when it deprived her of good time credit, there was no impingement upon fundamental liberty interest triggering double jeopardy concerns; Tr. Ct. erred in granting D's motion to dismiss); Williams, 493 N.E.2d 431 (same holding; Dickson & DeBruler DISSENT without opinion).

TITLE: Martinez v. Illinois
INDEX NO.: J.10.a.
CITE: (5/27/2014), 134 S. Ct. 2070 (2014)
SUBJECT: Jeopardy attached once jury empanelled
HOLDING: The Illinois Supreme Court "manifestly erred" by ruling that jeopardy had not attached, where a jury was empaneled but the State presented no evidence at trial. The Illinois court also erred in ruling that the State could retry D.

The State charged D with aggravated battery and mob activity. After many delays, the Tr. Ct. set the matter for trial and denied the State's eleventh-hour motion to continue the trial. A jury was empaneled. When the Tr. Ct. asked the State to call its first witness, it declined to do so and presented no evidence throughout the trial. The trial judge granted D's motion for directed not-guilty verdict and dismissed the charges. The Illinois Supreme Court later ruled that jeopardy did not attach, reasoning that because the State did not put on a case, D "was never at risk for conviction." The Illinois court ruled that the State could retry D because the entry of a not guilty directed verdict was not a "true acquittal."

In reversing the Illinois court, the Court affirmed long-standing precedent. "There are few if any rules of criminal procedure clearer than the rule that jeopardy attaches when the jury is empaneled and sworn." Crist v. Bretz, 437 U.S. 28, 35 (1978); Downum v. United States, 372 U.S. 734 (1963). Further, the Double Jeopardy Clause bars retrial because the trial ended with an acquittal, not a "dismissal" despite the Tr. Ct.'s use of the latter term. "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed . . . without putting [a D] twice in jeopardy, and thereby violating the Constitution.'" U.S. v. Martin Linen Supply Co., 430 U. S. 564, 571 (1977). Held, cert. granted, Illinois Supreme Court decision at 990 N.E.2d 215 vacated, and judgment affirmed. Per Curiam.

TITLE: Morris v. Mathews

INDEX NO.: J.10.a.

CITE: 475 U.S. 237, 106 S. Ct. 1032, 89 L.Ed.2d 187 (1986)

SUBJECT: Remedy for double jeopardy violation

HOLDING: Where jeopardy-barred conviction is reduced to conviction for lesser included offense which is not jeopardy-barred (as opposed to granting new trial), burden shifts to D to demonstrate reasonable probability that he would not have been convicted of non-jeopardy-barred offense absent presence of jeopardy-barred offense. "Reasonable probability" is a probability sufficient to undermine confidence in outcome. D must show that, but for improper inclusion of jeopardy-barred charge, result of proceeding probably would have been different. Here, D was convicted of aggravated murder after he had pled guilty to aggravated robbery. Because aggravated robbery was lesser included offense of aggravated murder, aggravated murder conviction was jeopardy-barred. State appellate court set aside D's conviction for aggravated murder & entered judgment of conviction for murder which was not jeopardy-barred. Held, remanded to habeas court for a determination as to whether D made a showing that but for the improper inclusion of aggravated murder charge D would not have been convicted of murder. Blackmun, joined by Powell, CONCURS IN JUDGMENT; Brennan & Marshall DISSENT WITH SEPARATE OPINIONS.

TITLE: Montana v. Hall
INDEX NO.: J.10.a.
CITE: 481 U.S. 400, 107 S. Ct. 1825, 95 L.Ed.2d 354 (1987)
SUBJECT: Re-prosecution following successful appeal
HOLDING: Per curiam. Re-prosecution following successful appeal by D does not violate Double Jeopardy Clause where reversal is not occasioned by insufficient evidence. U.S. v. Scott (1978), 437 U.S. 82, 98 S. Ct. 2187, 57 L.Ed.2d 65. Here, D was originally convicted of incest against stepdaughter. State Supreme Court reversed conviction because at time of offense, statute did not apply to sexual assaults against step-children. Statute was amended 3 months after alleged offense, but could not be applied against D without violating ex post facto prohibition of state constitution. Held, Double Jeopardy Clause does not bar D's retrial under appropriate charge. "[T]he Constitution permits retrial after a conviction is reversed because of a defect in the charging instrument." [Citation omitted.] Brennan would deny cert.; Marshall & Stevens DISSENT with separate opinions.

TITLE: Puerto Rico v. Sanchez Valle
INDEX NO.: J.10.a.
CITE: (6/9/2016), 136 S. Ct. 1863 (U.S. 2016)
SUBJECT: DJ exception for dual sovereignty doesn't apply to Puerto Rico
HOLDING: The federal double jeopardy clause bars Puerto Rico from prosecuting D for illegally selling firearms after he pled guilty in federal court for the same transactions under an analogous federal statute; the dual sovereignty exception to the double jeopardy prohibition does not apply here because the source of Puerto Rico's authority to impose punishment for criminal offenses is Congress, not a source of law independent of Congress. The test for whether the dual sovereignty exception applies is not whether the entity exercises self-governance or possesses the ability to enact and enforce its own laws – as Puerto Rico plainly does – but whether the ultimate source of power supporting the respective prosecutions comes from independent sources. United States v. Wheeler, 435 U.S. 313, 320 (1978). Because Puerto Rico's ultimate source of authority comes from Congress, it may not prosecute D. Held, cert granted; judgment affirmed. Kagan, J., joined by Roberts, C.J., Kennedy, Ginsburg, Alito, JJ; Ginsburg, concurring, joined by Thomas, J.; Thomas, J., concurring in part and concurring in judgment; Breyer, J., dissenting, Joined by Sotomayor, J.

TITLE: Smith v. Massachusetts
INDEX NO.: J.10.a.
CITE: 543 U.S. 462 (2005)
SUBJECT: Double Jeopardy, Judgment on the Evidence
HOLDING: The 5th Amendment Double Jeopardy clause prohibits a trial judge, who has dismissed a count against a D on grounds of evidentiary insufficiency, from later changing her ruling and allowing the charge to go to the jury.

Midway through a jury trial, during a sidebar conference, Smith's counsel moved for acquittal on one of the three charged counts on grounds that no evidence supported an element of the crime. The judge acquitted Smith of that count, and the trial proceeded. The prosecution rested its case and the defense presented evidence in defense of the remaining counts. During the recess before closing arguments, the prosecutor drew the judge's attention to state precedent in which similar evidence had been held sufficient to establish the element in question, and the judge reversed her earlier ruling. The U.S. Supreme Court held 5-4 that the judge's finding of insufficient evidence and the dismissal of the count terminated jeopardy and submitting the count to the jury later was a violation of the Double Jeopardy clause.

TITLE: State v. Boze
INDEX NO.: J.10.a.
CITE: (3d Dist. 8/27/85), Ind. App., 482 N.E.2d 276
SUBJECT: Double jeopardy (DJ) - effect of guilty plea on remaining counts
HOLDING: Tr. Ct. erred in dismissing charge of attempted murder on DJ grounds after D pled guilty to battery. Court examines 2 U.S. S. Ct. cases on
SUBJECT: OH v. Johnson (1984), U.S., 104 S. Ct. 2536, 81 L.Ed.2d 425 (D pled guilty to manslaughter & grand theft & Tr. Ct. dismissed murder & aggravated battery charges on DJ grounds; held, no DJ violation to try D on latter charges) & Jeffers v. US (1977), 432 U.S. 137, 97 S. Ct. 2207, 53 L.Ed.2d 168 (D won severance of 2 indictments & after conviction on one, moved for dismissal of other, arguing DJ; held, D waived 5th Amend right against DJ). State has power to charge more than one count & pursue all counts in single trial. D may plead guilty to one count, but such plea over state's objection does not insulate him/her from prosecution on remaining counts. DJ prohibits multiple punishments for same offense, not multiple prosecutions. Held, dismissal reversed; remanded for proceedings on attempted murder charge.

NOTE: Following D's conviction on attempted murder charge, Ind. S. Ct. remanded to vacate battery conviction on DJ grounds. Boze 514 N.E.2d 275.

RELATED CASES: Beeks, App., 839 N.E.2d 1271 (Tr. Ct. did not err in refusing to accept D's guilty plea to conversion prior to trial & conviction for theft).

TITLE: State v. Keith
INDEX NO.: J.10.a.
CITE: (2d Dist. 9/11/85), Ind. App., 482 N.E.2d 751
SUBJECT: Double jeopardy - prosecution for felony following guilty plea to misdemeanor
HOLDING: Tr. Ct. did not err in dismissing felony charges against D based upon double jeopardy. Here, D was charged with disorderly conduct, criminal recklessness & DWI, all misdemeanor charges. State moved to dismiss misdemeanor charges. Under Ind. Code 35-34-1-13, motion should have been granted, but state took no action to enforce statute. Tr. Ct. accepted D's guilty plea to misdemeanor charges. State charged D with felony offense of criminal recklessness. Tr. Ct. granted state's second motion to dismiss misdemeanor proceedings. D was charged with felony offense of DWI. Tr. Ct. granted D's motion to dismiss felony proceeding. State appeals. Court finds jeopardy attached when Tr. Ct. accepted D's guilty plea. Stowers, 363 N.E.2d 978; Boswell, (1887), 111 Ind. 47. See generally 5th Amend.; IN Const., Art. 1, Section 14; Ind. Code 35-41-4-3. Court finds misdemeanor offenses to which D pled guilty constitute lesser included offenses of felony charges filed after D's guilty plea was accepted. Court distinguishes OH v. Johnson, (1984), 467 U.S. 493, 104 S. Ct. 2536, 81 L.Ed.2d 425. In Johnson, over state's objection, D pled guilty to 2 of 4 charges, which were lesser included offenses of remaining charges. Tr. Ct. granted D's motion, over state's objection, to have remaining charges dismissed. U.S. S. Ct. held double jeopardy did not prohibit state from prosecuting D for multiple offenses in single prosecution. Court finds parties in present case are not similarly situated. State filed felony charges after D had pled guilty to misdemeanor charges & that plea had been accepted. Held, dismissal affirmed. Sullivan CONCURS IN RESULT without opinion. On rehearing State v. Keith, App., 507 N.E.2d 245 (dismissal affirmed).

TITLE: State v. Proctor
INDEX NO.: J.10.a.
CITE: (1st Dist. 12/4/84), Ind. App., 471 N.E.2d 707
SUBJECT: Double jeopardy (DJ) - when attaches; bench trial
HOLDING: Once taking of evidence in a non-jury case commences, jeopardy attaches. Serfass v. US, (1975), 420 U.S. 377, 95 S. Ct. 1055, 43 L.Ed.2d 265. Here, parties at pretrial conference stipulated judge was to view videotape of D (taken at time of arrest) prior to bench trial, which judge did. State then dismissed charges & refiled them in another court. Tr. Ct. granted D's motion for dismissal on DJ grounds. Held, dismissal affirmed. **NOTE:** Transfer denied.

J. CONSTITUTIONAL LAW

J.10. Double jeopardy (5th Amend; IndConst Art 1, 14) (see, also L.7.d)

J.10.b. Reprosecution following mistrial

TITLE: Bauder v. State

INDEX NO.: J.10.b.

CITE: 921 S.W.2d 696 (Tex. Crim. App. 1996), reversed in part by ex Parte Masonheimer, 220 S.W.2d 494

SUBJECT: Mistrial - Double Jeopardy

HOLDING: Texas court rules that D may not be retried after mistrial if prosecutor was aware of, but consciously disregarded, risk that objectionable event for which prosecution was responsible would require mistrial at D's request. Texas court goes beyond federal standard set out in Oregon v. Kennedy, 456 U.S. 667 (1982), which would bar retrial only if prosecutor has deliberately induced D to seek mistrial. Court here reasons that prosecutor's specific intent is irrelevant. When prosecutor has tainted trial, state should bear responsibility for denying D's state constitutional right to be tried in single proceeding by jury first selected.

TITLE: Blueford v. Arkansas

INDEX NO.: J.10.b.

CITE: (05-24-12), 132 S. Ct. 2044 (Sup. Ct. 2012)

SUBJECT: Retrial not barred where jury told court it was unanimous against serious charged but then continued deliberations

HOLDING: The Double Jeopardy Clause did not bar retrial of Blueford on capital murder and lesser included charges where after a few hours of deliberation, the jury foreperson advised the Tr. Ct. that it was unanimous against guilty on capital murder and first-degree murder, was deadlocked on manslaughter, and had yet to vote on negligent homicide. After being so advised, the Tr. Ct. directed the jury to resume deliberations, which it did. The jury still could not reach a verdict, so the Tr. Ct. declared a mistrial. The State re-filed the charges, and Blueford moved to dismiss the capital and first-degree murder charge, claiming retrial would violate the Double Jeopardy Clause because the jury foreperson's report to the Tr. Ct. that the jury was unanimous against guilt in those charges was a final resolution of some or all of the elements of the offenses. However, the jury's report was not a final resolution. Indeed, the jury resumed deliberations. Thus, the report lacked the finality needed to constitute an acquittal of the offenses. Cf. Green v. United States, 355 U.S. 184 (1957) and Price v. Georgia, 398 U.S. 323 (1970).

The declaration of mistrial was not improper. The Tr. Ct.'s reason for declaring a mistrial - the jury was unable to reach a verdict - is a "classic basis" for establishing necessity for a mistrial. See Arizona v. Washington, 434 U.S. 497, 509, 98 S. Ct. 824, 832 (1978). Roberts, C.J., Kennedy, Scalia, Breyer, Thomas, Alito, J.J., concurring; Sotomayor, J., dissenting, joined by Ginsburg, Kagan, J.J. Certiorari granted; Supreme Court of Arkansas affirmed.

TITLE: Brock v. State

INDEX NO.: J.10.b.

CITE: (10-18-11), 955 N.E.2d 195 (Ind. 2011)

SUBJECT: Retrial - mistrial necessity caused by defense counsel's improper argument so no double jeopardy violation.

HOLDING: Tr. Ct. neither abused its discretion by denying D's Motion to Dismiss retrial, where the retrial was prompted by granting State's motion for mistrial, nor violate D's rights against double jeopardy by allowing the retrial. A mistrial granted over a D's objection, and in the absence of manifest necessity acts, as an acquittal and bars re-prosecution for the same offense. Ordinarily, a D must raise a timely objection when the government moves for a mistrial or when Tr. Ct. declares a mistrial sua sponte. However, when circumstances surrounding a Tr. Ct.'s declaration of a mistrial do not allow a D to object to a mistrial, failure to object will not be deemed consent unless the totality of the circumstances otherwise shows that D consented to the mistrial.

Here, D did not object to State's Motion for Mistrial, but Tr. Ct. did not give him a chance to object. The State had moved for mistrial because during closing argument, D counsel ignored Tr. Ct.'s admonitions by repeatedly misrepresenting the law by arguing that the notice requirement of Ind. Code. 9-30-10-16, operating as a HTV as a Class D felony, applied to Ind. Code. 9-30-10-17, Operating after a lifetime suspension. D counsel also misled jury during closing argument by suggesting that the material redacted from D's driving record was beneficial to D when in fact it was prejudicial to D. The trial court initially denied the Motion for Mistrial but recessed the case for a few minutes to allow counsel to prepare for submission of additional evidence. However, after returning from the recess, Tr. Ct. abruptly and unexpectedly granted the State's Motion for Mistrial without allowing D to object. Thus, D did not consent to the mistrial.

However, there was a manifest necessity for a mistrial because of D counsel's repeated improper comments to the jury about both the law and the facts. Held, transfer granted, Court of Appeals' opinion at 936 N.E.2d 266 vacated, judgment affirmed.

RELATED CASES: Cleary, (retrial of greater offense not barred even though CCS entries erroneously indicated that judgment of conviction was entered on lesser offenses and Tr. Ct. clarified shortly thereafter that it had not actually entered judgment of conviction).

TITLE: Cleary v. State

INDEX NO.: J.10.b.

CITE: (1/15/2015), 23 N.E.3d 664 (Ind. 2015)

SUBJECT: No double jeopardy where jury hung on greater charges, judge withheld judgment on lesser convictions & ordered retrial

HOLDING: D's double jeopardy rights were not violated by retrial when Tr. Ct. refused to enter previous jury conviction on lesser included offenses into judgment. Jury in first trial was deadlocked on felony charges of driving while intoxicated causing death, but found D guilty of misdemeanor charges. Implied acquittal provision, Ind. Code § 35-41-4-3(a), does not apply when the jury returns a guilty verdict on a lesser-included offense but deadlocks on the greater charge. Because jury affirmatively deadlocked on the greater offense in first trial rather than remaining silent on those counts, Ind. Code § 35-38-1 did not require judgment of conviction to be entered on the lesser offenses and implied acquittal provision was not implicated. See Haddix v. State, 827 N.E.2d 1160 (Ind. Ct. App. 2005).

Despite Garrett v. State, 992 N.E.2d 710 (Ind. 2013), which broadened the application of Indiana's double jeopardy prohibitions, Court rejected D's argument that Indiana's double jeopardy clause barred retrial after the guilty verdict on the lesser misdemeanor offenses. D's second trial on the greater offenses that deadlocked the first jury was "simply a continuation of the jeopardy." Held, transfer granted, Court of Appeals' opinion at 2 N.E.3d 765 vacated, judgment affirmed.

RELATED CASES: Bullock, 106 N.E.3d 531 (Ind. Ct. App. 2018) (retrial of greater offense not barred even though CCS entries erroneously indicated that judgment of conviction was entered on lesser offenses and Tr. Ct. clarified shortly thereafter that it had not actually entered judgment of conviction).

TITLE: Commonwealth v. Martorano
INDEX NO.: J.10.b.
CITE: 741 A.2d 1221 (Pa. 1999)
SUBJECT: Double Jeopardy -- Following Mistrial Due to Prosecutorial Misconduct
HOLDING: The Pennsylvania Supreme Court has reaffirmed that its state constitution provides greater double jeopardy protections than the federal constitution following a mistrial due to prosecutorial misconduct. In Oregon v. Kennedy, 456 U.S. 667 (1982), the U.S. Supreme Court held that the federal constitution's double jeopardy clause bars retrial following a mistrial caused by prosecutorial misconduct only if the misconduct was intended to provoke the D to move for a mistrial. The Pennsylvania Court holds that its state double jeopardy clause bars retrial not only in this situation, "but also when the conduct of the prosecutor is intentionally undertaken to prejudice the D to the point of the denial of a fair trial." Here, the prosecutor "acted in bad faith throughout the trial, consistently making reference to evidence that the Tr. Ct. had ruled inadmissible, continually defying the Tr. Ct.'s rulings on objections, and, in a tactic that can only be described as Machiavellian, repeatedly insisting that there was fingerprint evidence linking Appellees to the crime when the prosecutor knew for a fact that no such evidence existed."

TITLE: Commonwealth v. States
INDEX NO.: J.10.b.
CITE: 595 Pa. 453 (Pa. 2007)
SUBJECT: Collateral estoppel; double jeopardy - judge's factual ruling precluded retrial
HOLDING: Pennsylvania Supreme Court held a trial judge's declaration of a mistrial on some charges after the jury hung, coupled with the judge's simultaneous acquittal of D on a related charge on a factual ground on which the remaining counts hinged, erected a double jeopardy bar to a retrial on the unresolved charges. Court explained that a retrial would require re-litigation of an issue that was resolved by the acquittal in the joint jury/bench trial. D obtained severance of a charge of causing a fatal accident while not properly licensed, arguing that the jury would be prejudiced by the fact that he lacked a valid driver's license. That charge was tried to the bench, whereas charges of vehicular homicide while driving under the influence of alcohol and other charges were simultaneously tried to a jury. After the jury reported being deadlocked, Tr. Ct. declared a mistrial on charges before them, but acquitted D on the charge before it, saying that it was not convinced beyond a reasonable doubt that D was driving the vehicle. Court held that in light of the Tr. Ct.'s definitive finding that the State failed to prove that D was the driver of the car, the Fifth Amendment barred the State from attempting to convince a second jury otherwise in a retrial on the remaining charges. Further, the fact that a retrial would require the State to present evidence on who was driving the vehicle and urge a second jury to reach a result contrary to the result previously reached by another fact finder made the case a classic collateral estoppel situation.

TITLE: Corley v. State
INDEX NO.: J.10.b.
CITE: (11/23/83), Ind., 455 N.E.2d 945
SUBJECT: Manifest necessity for mistrial
HOLDING: Where no manifest necessity existed for granting motion of prosecutor to take deposition of surprise witness & discharging jury, subsequent trial of D on same charges violates double jeopardy. Here, during D's trial on drug charges, state trooper testified she had no physical involvement with any drug arrestee. Bom, attorney for Allison, told D's attorney that Allison could testify that trooper lied about physical involvements. Allison's name was given to prosecutor as potential witness. Prosecutor & D's attorney met with Bom & Allison. Prosecutor filed motion in limine re evidence of sexual activity. Out of jury's presence, defense called Bom. Prosecutor claimed surprise & was allowed to question Bom (for 26 transcript pages). Tr. Ct. excluded testimony of Bom & Allison re trooper or prosecutor's conduct ("threats" to Allison, who had recently accepted plea bargain). Prosecutor asked to depose Bom & consented to discharge of jury. Trial was rescheduled. D's motion to dismiss charge was denied. D took interlocutory appeal. Court rejects state's contention D waived double jeopardy issue. Court holds there was no manifest necessity for discontinuing trial after jeopardy attached. IL v. Somerville, (1973), 410 U.S. 458, 93 S. Ct. 1066, 35 L.Ed.2d 425; US v. Perez, (1824), 9 Wheat. 579, 6 L. Ed. 165. Held, reversed & remanded, Tr. Ct. to grant D's motion to dismiss & to discharge D.

RELATED CASES: Bridwell, App., 507 N.E.2d 645 (Tr. Ct. properly granted mistrial over D's objection where D told jury he had passed polygraph; DJ does not bar retrial).

TITLE: Domangue v. State
INDEX NO.: J.10.b.
CITE: (2nd Dist., 7-19-95), Ind. App., 654 N.E.2d 1
SUBJECT: No manifest necessity for mistrial
HOLDING: Where manifest necessity did not exist to warrant mistrial & discharge of jury, D could not be retried for same offense. D was charged with OVWI resulting in serious bodily injury. Before trial, State offered motion in limine requesting that any pending litigation arising out of instant case not be referred to in presence of jury without Tr. Ct.'s permission. Tr. Ct. warned D against mentioning lawsuit during voir dire but did not issue order for trial. On direct examination, State asked witness if he intended to file civil suit against D, & witness replied that he did not. On cross-examination, D questioned witness about his intent to file suit against taverns who sold men alcohol. State objected & moved for mistrial. Unsure how to proceed, judge allowed D to pursue this line of questioning. After witness admitted his intent to file suit against tavern owners, State again objected & moved for mistrial, which Tr. Ct. granted over D's objection.

Ct. noted that in criminal case, mistrial is extreme remedy which should be granted only when nothing else can rectify situation. Underwood, 644 N.E.2d 108. Manifest necessity, which precludes D from successfully raising double jeopardy challenge to retrial, contemplates sudden & overwhelming emergency beyond control of Ct., & cannot be created by judicial or prosecutorial error. Ried, App., 610 N.E.2d 275, *aff'd*, Ind., 615 N.E.2d 893. Here, Tr. Ct. abused discretion because D did not violate motion in limine. Tr. Ct. did not issue order saying that D could not ask about other litigation arising from accident. Even assuming evidence was improper & precluded by motion in limine, error could have been cured by admonishing jury. Underwood, supra. Jeopardy attached when jury was sworn, thus Tr. Ct.'s action in discharging jury without D's consent served as acquittal & exempted D from retrial. Held, reversed.

RELATED CASES: Glasscock, App., 759 N.E.2d 1170 (there was no manifest necessity for mistrial because if State really wanted to proceed with direct examination of witness, who claimed 5th Amendment privilege, it could have done so by grant of immunity); Hall, App., 722 N.E.2d 1280 (where no manifest necessity existed to warrant mistrial, double jeopardy barred retrial of D on same charge).

TITLE: Emmons v. State
INDEX NO.: J.10.b.
CITE: (2nd Dist., 05-26-06), Ind. App.847 N.E.2d 1035
SUBJECT: Double jeopardy - re-prosecution after witness sworn
HOLDING: D argued that jeopardy attached after all witnesses were sworn in but before they testified in a bench trial. In the first proceeding, D moved for dismissal because the charging documents had not been file stamped as required by Ind. Code 35-34-1-1. Tr. Ct. granted this motion, although in a footnote the Ct. noted the "better course of action" would be a nunc pro tunc entry to show the filing of the information. State refiled the charges & D moved to dismiss, which was denied & an interlocutory appeal was granted. Ct. found that jeopardy did not attach so as to bar subsequent prosecution after the first proceeding. Jeopardy did attach under Ind. Code 35-41-4-3(a)(2) due to the witnesses being sworn, but this "begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." Illinois v. Somerville, 410 U.S. 458 (1973). If a D moves for or consents to the termination of proceedings after jeopardy attaches, he forfeits his right to raise double jeopardy later unless government conduct necessitated the motion, which conduct was intended to provoke the D into seeking to terminate the proceedings. U.S. v. Jorn, 400 U.S. 470 (1971); Whitehead v. State, 444 N.E.2d 1253 (Ind. Ct. App. 1983); Ind. Code 35-41-4-3(a)(2)(i), & 3(b).

Here, Ct. held that failure to properly file-stamp charging information was clerical error & not prosecutorial error. I.C 35-34-1-1(c)(1) notes that it is the clerk's responsibility to "mark the date of filing on the instrument." Further, the Tr. Ct. lacked proper jurisdiction over D due to the filing error & any judgment would have been void for lack of jurisdiction. Slack v. Grigsby, Ind., 97 N.E.2d 145 (1951). Held, judgment affirmed.

TITLE: Ex parte Masonheimer
INDEX NO.: J.10.b.
CITE: 220 S.W.3d 494 (Tex. Crim. App. 2007)
SUBJECT: Mistrial prompted to avoid acquittal also bars retrial
HOLDING: Texas Court of Criminal Appeals held that prosecutorial misconduct that prompts a mistrial at D's request erects a double-jeopardy bar against a retrial not only if the misconduct was intended to provoke the defense to seek a mistrial, but also if it was meant simply to avert an acquittal. Courts across country, and members of Court here, have disagreed as to whether the U.S. Supreme Court's decision in Oregon v. Kennedy, 456 U.S. 667 (1982), should be read that broadly.

Ordinarily, double jeopardy principles do not bar the retrial of a D who requested and was granted a mistrial. However, in Kennedy, the Supreme Court held that a retrial after a defense-requested mistrial is jeopardy-barred when prosecutors engaged in misconduct that "was intended to provoke [or goad] the D into moving for a mistrial." Although the Kennedy court stated its conclusion very narrowly, it relied on several opinions that discussed double jeopardy principles in the context of prosecutorial misconduct designed to avoid an acquittal. In U.S. v. Tateo, 377 U.S. 463 (1964), the high court suggested in a footnote that jeopardy might attach when misconduct justifying a mistrial is the result of prosecutors' fears that a jury is likely to acquit. In U.S. v. Dinitz, 424 U.S. 600 (1976), the court stated that retrial following a defense-requested mistrial is not barred where the prosecutorial actions that prompted the D's motion were not intended to prejudice his prospects for acquittal.

Analyzing that precedent, Court here reasoned that Kennedy should be applied to the circumstances presented by this murder case. Record here supported "a finding that [the D's] mistrial motions were necessitated primarily by the State's 'intentional' failure to disclose exculpatory evidence that was available prior to [his] first trial with the specific intent to avoid the possibility of an acquittal" and that this deliberate misconduct, together with a specific mens rea, barred retrial. Court was "persuaded that, in a case like this, a D suffers the same harm as when the State intentionally 'goads' or provokes the D into moving for a mistrial," and therefore the logic of Kennedy bars another trial. A concurrence and dissent, joined by the concurring judge, was entered.

TITLE: Haddix v. State
INDEX NO.: J.10.b.
CITE: (4th Dist., 05-23-05), Ind. App., 827 N.E.2d 1160
SUBJECT: No double jeopardy where judge withheld judgment on lesser conviction
HOLDING: D's double jeopardy rights were not violated by retrial when Tr. Ct. refused to enter previous jury conviction on lesser included offense into judgment. In first trial, jury found D guilty of misdemeanor OWI but hung on C felony charges related to OWI resulting in death. The foreperson noted the jury could not reach agreement & the jury was polled. Over objection, Tr. Ct. discharged the jury, declared a mistrial, & refused to enter judgment on the misdemeanor convictions. D brought mandamus action to compel the trial judge to enter judgment, but Indiana S. Ct. rejected it. In the second trial, D was again found guilty of the lesser charges but this time acquitted of the more serious ones. Ct. looked at Fifth Amendment & Ind. Code 35-41-4-3(a) for guidance. The Ct. distinguished from U.S. S. Ct. cases finding "implied" acquittals on more serious charges when convictions for lesser offenses occur. See Green v. U.S., 355 U.S. 184 (1957); Price v. Georgia, 398 U.S. 323 (1970), noting that unlike in those cases the jury here expressly told the Tr. Ct. it was deadlocked. In Price, although the D was only convicted of the lesser charge in the second trial, retrial was ordered because double jeopardy "is cast in terms of the risk or hazard of trial & conviction, not of the ultimate legal consequences of the verdict." The U.S. S. Ct. has not addressed whether the reasoning of those cases extend to a situation where the jury explicitly states it has hung. However, the Ct. adopted the reasoning of U.S. v. Bordeaux, 121 F.3d 1187 (8th Cir. 1997), which stated "[t]he jury's express statement . . . obviously precludes the inference that there was an implied acquittal." Ind. Code 35-41-4-3(a) has essentially codified the doctrine of "implied" acquittal & provides that a conviction for a lesser included offense absolutely bars subsequent prosecution for the greater offense. A "conviction" generally is not regarded as equivalent to a guilty verdict. See Carter v. State, 750 N.E.2d 778 (Ind.2001).

Ct. then considered whether Tr. Ct. had authority to refuse to enter judgments of conviction for the lesser offenses. While Tr. Ct's. may not withhold judgment nor indefinitely postpone sentencing, a party cannot directly appeal failure to enter a judgment & the only available remedy is a writ of mandamus. Chissell v. State, 705 N.E.2d 501 (Ind. Ct. App.1999). In the present case, the denial of mandate by the Indiana S. Ct. is the determinative factor, although the Ct. did not explain its ruling. To conclude that the Tr. Ct. was required to enter judgment would "fly in the face" of the S. Ct.'s denial. Pursuant to Original Action Rule 3(A), Ct. concluded the most likely reason for denial by the S. Ct. was a determination the Tr. Ct. did not have an absolute duty to enter judgment on the verdicts. The remedy otherwise would be for a third trial although only on the lesser included offenses & "surely our S. Ct." would not have allowed expenditure of limited judicial resources if it believed Tr. Ct. must enter judgment on the first trial jury verdicts. Held, judgment affirmed.

ED **NOTE:** Ct. also raised questions as to validity of analysis in Davenport, 734 N.E.2d 622 (Ind. Ct. App.2000) & State v. Klinger, 698 N.E.2d 1199 (Ind. Ct. App.1998), which allowed retrials after acquittals on lesser offenses because these cases do not mention "most pertinent authorities on the issue" of Price, Green, or Ind. Code 35-41-4-3(a).

RELATED CASES: Blueford, 132 S. Ct. 2044 (2012) (double jeopardy clause did not bar retrial on capital murder and lesser included charges where jury advised Tr. Ct. that it was unanimous against guilt on capital murder and first-degree murder but was deadlocked on other charges; jury's report was not a final resolution of case; see full review, this section); Kocielko, 938 N.E.2d 243 (Ind. Ct. App. 2010)

(allegations of sexual conduct with a single victim in a single encounter does not necessarily involve only "included" offenses for double jeopardy purposes such that an acquittal on any count precludes retrial on all others; here, D was properly retried for Class B and C felony sexual misconduct with a minor counts after jury in first trial hung on first two counts and acquitted him of a third Class C felony count).

TITLE: Harbert v. State
INDEX NO.: J.10.b.
CITE: (2/4/2016), 51 N.E.3d 267 (Ind. Ct. App. 2016)
SUBJECT: Double Jeopardy - D's motion for mistrial; no deliberate provocation
HOLDING: Trial court did not err by denying Co-D's motion to dismiss charges after mistrial. Retrial following a D's successful mistrial motion is only barred where the government's conduct is responsible for the D's mistrial motion. Butler v. State, 724 N.E.2d 600 (Ind. 2000). The essential inquiry is whether the prosecutor acted with the intent to provoke or goad the D into moving for a mistrial.

Here, while testifying, police officer mentioned he had previously arrested one of the Co-Ds on another case. Trial court immediately granted a mistrial, as any reference to Ds' criminal history was barred from trial. But double jeopary did not bar retrial because there was no evidence the prosecutor intended to cause a mistrial, that the prosecutor colluded with the officer or that the officer knew that his comments would cause a mistrial.

Court affirmed robbery convictions, noting the evidence of the Ds' identities was sufficient. There was a "wealth of circumstantial evidence" from which the jury could have inferred the Ds were the people who committed the robbery. It was not fundamental error to admit the Co-D's statement that his wallet was stolen a few weeks before the robbery around the time he had spent time with D and several other people. The statement did not facially incriminate D in the robbery. Held, judgment affirmed.

TITLE: Hoover v. State

INDEX NO.: J.10.b.

CITE: (5th Dist.,12-31-09), 918 N.E.2d 724 (Ind. App. 2009)

SUBJECT: Retrial of greater offense after hung jury is barred by conviction on lesser included offense

HOLDING: The State is barred from retying D on a greater charge on which the jury deadlocked when D was convicted of the lesser charge. "A prosecution is barred if there was a former prosecution of the D based on the same facts and for commission of the same offense and if . . . the former prosecution resulted in an acquittal or a conviction of the D (A conviction of an included offense constitutes an acquittal of the greater offense, even if the conviction is subsequently set aside.) . . . ." Ind. Code § 35-41-4-3(a).

Here, D was charged with murder, robbery as a Class A felony, and felony murder with robbery as the predicate. The jury acquitted D of murder convicted D of robbery and was unable to reach a decision on felony murder. Federal double jeopardy principles do not bar retrial of a greater, mistried offense when the D was convicted of a lesser offense. However, although Ind. Code § 35-41-4-3(a) is silent with respect to the hung-count situation presented here, by its plain language, the statute bars any retrial on a greater offense when the D has been convicted of the lesser-included, even where a first jury considered but deadlocked on the greater charge. The conviction on the lesser-included robbery offense constitutes an acquittal on the greater felony-murder charge, notwithstanding the jury's express deadlock. The State is therefore barred from retrying D for felony murder. Held, judgment affirmed, but remanded to Tr. Ct. with instructions to dismiss the felony-murder count with prejudice.

TITLE: Jackson v. State
INDEX NO.: J.10.b.
CITE: (04-27-10), 925 N.E.2d 369 (Ind. 2010)
SUBJECT: Double jeopardy - mistrial for publicity was within court's discretion
HOLDING: Tr. Ct.'s ruling ordering a new trial was not an abuse of discretion. Once jeopardy has attached, Tr. Ct. may not grant a mistrial over a D's objection unless it finds a manifest necessity for the mistrial. Absent this finding, a mistrial operates as an acquittal to bar further prosecution. Brown v. State, 703 N.E.2d 101 (Ind. 1998). A reviewing court must accord the highest degree of respect to the trial judge's evaluation to the likelihood that the impartiality of one or more jurors may have been affected by the improper comment.

Here, the same day the jury was sworn in D's trial for aggravated battery, the local newspaper ran an article quoting a letter D wrote to the prosecutor which stated: 'I know my life to you doesn't mean anything, just another poor black man the state can clean-up the book on. I can understand you feeling that way, but at least give Buddy Roberts' family peace by telling the truth. They deserve that. The next day, the State requested a mistrial. Five jurors had been exposed to the article, but all agreed that the article would not affect their decision in the case. Regardless, the judge granted a mistrial. Although all jurors claimed they were not influenced by the article, Tr. Ct. was in the best position to evaluate their testimony. Moreover, Tr. Ct. was not required to admonish the jury or attempt other curative measures before declaring a mistrial. Thus, Tr. Ct.'s decision was not an abuse of discretion and retrial was not barred by double jeopardy. Held, transfer granted, Court of appeals' opinion at 903 N.E.2d 942 vacated, judgment affirmed.

TITLE: McWhorter v. State
INDEX NO.: J.10.b.
CITE: (12/28/2018), 117 N.E.3d 614 (Ind. Ct. App. 2018)
SUBJECT: Retrial on voluntary manslaughter charge did not violate double jeopardy
HOLDING: D charged with murder and convicted of voluntary manslaughter can be retried for voluntary manslaughter after successful PCR vacating voluntary manslaughter conviction without violating principles of double jeopardy or collateral estoppel. Bailey, J., dissents stating that voluntary manslaughter is not a lesser offense of murder pursuant to Brantley v. State, 91 N.E.3d 566 (Ind. 2018) and that at first trial D was required to defend against the elements of murder and was acquitted and then in second trial he was again required to defend against the same elements which is a double jeopardy violation. Dissent would remand with instructions to enter judgment on criminal recklessness and conduct a new sentencing hearing.

TITLE: Mears v. State
INDEX NO.: J.10.b.
CITE: (1/31/89), Ind., 533 N.E.2d 140
SUBJECT: Double Jeopardy - D's motion for mistrial; no deliberate provocation
HOLDING: Prosecutor's intern's statement in final argument, which justified D's motion for mistrial was innocent mistake, and thus declaration of mistrial did not bar retrial for same offense. Double jeopardy bars retrial following declaration of mistrial, where prosecutorial misconduct which provoked D's motion for mistrial was deliberate and designed to gain new trial. OR v. Kennedy (1982), 465 U.S. 667, 102 S. Ct. 2083, 72 L.Ed.2d 416; Woods, 484 N.E.2d 3; Crim., App., 294 N.E.2d 822. Nothing in record here indicates State was having difficulty in prosecuting appellant. Remark that D had not done anything to rebut State's proof of his guilt [an impermissible comment on D's choice not to testify under 5th Amend., see Griffin v. CA (1965), 380 U.S. 698, 85 S. Ct. 1229, 14 L.Ed.2d 106; Harper 474 N.E.2d 508] was poor choice of words, not deliberate provocation. Conviction on re-trial affirmed.

RELATED CASES: Etter, 56 N.E.3d 53 (Ind. Ct. App. 2016) (Tr. Ct.'s "intemperate" comments were not intended to goad D into seeking mistrial so retrial did not violate DJ prohibition; in heated exchange with defense counsel, trial court loudly proclaimed, "Have it your way," and "it's Burger King day"); Green, App., 875 N.E.2d 473 (because prosecutor did not intentionally withhold phone records from D and question concerning phone records arose from jury, prosecutor did not intentionally cause mistrial); Noble, App., 734 N.E.2d 1119 (prosecutor did not try to goad D into mistrial when he elicited testimony concerning lab report he did not disclose); Wilson, 697 N.E.2d 466 (record supported finding that mistrial was not caused by deliberate conduct by prosecution).

TITLE: Renico v. Lett

INDEX NO.: J.10.b.

CITE: 130 S. Ct. 1855 (05-03-10)

SUBJECT: Double Jeopardy - Judge's cursory inquiry before declaring hung-jury mistrial; no habeas relief

HOLDING: A trial judge's three-minute inquiry before determining that jurors in a murder trial were deadlocked after four hours of deliberations was not so cursory as to justify federal habeas corpus relief under AEDPA's deferential standard of review (28 U.S.C. ' 2254). In addition to standard imposed by Antiterrorism and Effective Death Penalty Act, Court emphasized trial judge's superior position to assess juror's ability to overcome impasses in particular cases.

During approximately four hours of deliberations, the jury sent Tr. Ct. seven notes, including one asking what would happen if the jury could not agree. The judge called the jury and attorneys into courtroom and questioned the foreperson, who seemed to say that the jury was unable to reach a unanimous verdict. Judge then declared a mistrial, dismissed the jury, and scheduled a new trial, without further clarification. After his conviction at a second trial, D argued that the original mistrial was declared without manifest necessity and his second trial was prohibited by double jeopardy. Double jeopardy principles allow a retrial following a hung jury if trial judge exercised "sound discretion" in concluding that there was a "manifest necessity" for declaring the mistrial. In this case, Court recognized that the trial judge "could have been more thorough before declaring a mistrial" by asking the foreperson additional questions, or allowing further deliberations, or consulting with the prosecution and defense counsel. However, the Supreme Court's Double Jeopardy precedent provides no "rigid formula" for when to declare a mistrial due to jury deadlock. Without conceding that trial judge in this case erred when she accepted, without question, a foreperson's assertion that the jurors were deadlocked, Supreme Court held the state court's decision to allow a retrial was clearly not "unreasonable" for purposes of the AEDPA standard. Held, Sixth Circuit Court of Appeals' opinion at 316 Fed.Appx. 421 reversed, grant of habeas corpus reversed. Stevens, J., joined by Sotomayor, J., and Breyer, J. (in part), DISSENTING, said trial judge's cursory inquiry in this case is out of step with prevailing standards, and reiterated the court's prior recognition that declarations of mistrials prejudice Ds by giving prosecutors the benefit of a dress rehearsal and by extending the anxiety and stigma flowing from the pendency of criminal charges.

TITLE: Sivels v. State
INDEX NO.: J.10.b.
CITE: (1-29-01), Ind., 741 N.E.2d 1197
SUBJECT: Due process - reprosecution after hung juries
HOLDING: Tr.Cts. have inherent authority to dismiss information with prejudice following mistrials attributable to repeated jury deadlocks, where necessary to uphold guarantees of fundamental fairness & substantial justice. In determining whether fundamental fairness compels dismissal, Tr. Ct. must balance D's right to fair trial & State's right to seek verdict on validly prosecuted charges. When striking this balance, Tr. Ct. should weigh following factors: 1) seriousness & circumstances of charged offense; 2) extent of harm resulting from offense; 3) evidence of guilt & its admissibility at trial; 4) likelihood of new or additional evidence at trial or retrial; 5) D's history, character, & condition; 6) length of any pretrial incarceration or any incarceration for related or similar offenses; 7) purpose & effect of imposing sentence authorized by offense; 8) impact of dismissal on public confidence in judicial system or on safety & welfare of community in event D is guilty; 9) existence of any misconduct by law enforcement personnel in investigation, arrest, or prosecution of D; 10) existence of any prejudice to D as result of passage of time; 11) attitude of complainant or victim with respect to dismissal of case; & 12) any other relevant fact indicating that judgment of conviction would serve no useful purpose. State v. Sauve, 666 A.2d 1164 (Vt. 1995). Further relevant considerations include: 1) number of prior mistrials & outcome of jury deliberations, as known; & 2) Tr. Ct.'s own evaluation of relative strength of each party's case. State v. Abbatti, 493 A.2d 513 (N.J. 1985).

Here, Tr. Ct. did not abuse its discretion by allowing State to retry murder case after two mistrials. D remained incarcerated without bond for two & a half years before his final trial. During that time, he was acquitted on felony murder & robbery charges. At last retrial, which resulted in murder conviction, State had newly available eyewitness testimony by accomplice that D murdered victim. Ct. held that balance between D's right to fundamental fairness & State's right to seek verdict on validly prosecuted charges swings in favor of State. Held, judgment affirmed.

TITLE: State v. Breit
INDEX NO.: J.10.b.
CITE: 122 N.M. 655; 930 P.2d 792 (N.M. 1996)
SUBJECT: Mistrial -- Double Jeopardy; Prosecutor's "Willful Disregard"
HOLDING: New Mexico joins states that extend double-jeopardy protection following mistrial based on prosecutorial misconduct beyond situation where prosecutor intended to goad the defense into requesting mistrial. New Mexico Supreme Court finds "intended to goad" standard, set out by U.S. Supreme Court in Oregon v. Kennedy, 456 U.S. 667 (1982), too narrow, and announces following standard under state constitution: double jeopardy bars retrial where misconduct is so unfairly prejudicial to the D that it cannot be cured by means short of mistrial or new trial, prosecutor knew (or should have known) of improper nature of conduct, and prosecutor either intended to provoke mistrial or acts in willful disregard of resulting mistrial, retrial, or reversal. Other states have adopted similar standards. See, e.g.,State v. Kennedy, 666 P.2d 1316 (Ore. S. Ct. 1983); Pool v. Superior Court, 677 P.2d 261 (Ariz. S. Ct. 1984); State v. White, 354 S.E.2d 324 (N.C. Ct. App. 1987); People v. Dawson, 397 N.W.2d 277 (Mich. Ct. App. 1986), aff'd, 427 N.W.2d 886 (Mich. S. Ct. 1988); Commonwealth v. Smith, 615 A.2d 321 (Pa.S. Ct. 1992); Bauder v. State, 921 S.W.2d 696 (Tex. Ct. Crim. App. 1996).

TITLE: State v. Lettice

INDEX NO.: J.10.b.

CITE: 585 N.W.2d 171 (WiS. Ct. App. 1998)

SUBJECT: Double Jeopardy Bar Where Prosecutor's Misconduct Was Unknown to D & Did Not Result in Mistrial

HOLDING: Wisconsin Court of Appeals extends double jeopardy bar to case in which prosecutor's misconduct was intended to prevent acquittal, either by provoking mistrial motion or distracting defense counsel and impairing performance. Several days prior to trial, state filed criminal complaint against defense counsel, alleging that he had disclosed confidential health record in connection with case. D filed motion to dismiss charges due to prosecutorial misconduct. Motion was denied and D was convicted, and charges against defense counsel were dismissed. At D's post-conviction hearing, deputy prosecutor testified that prosecutor had filed charges against counsel for purpose of obtaining continuance, or at least to distract counsel and impair his performance. Defense counsel explained that he had not sought mistrial, because he had not known full extent of prosecutor's misconduct. Court of Appeals holds that double jeopardy bars new trial, despite fact that D was convicted and sought to set aside that conviction rather than obtaining mistrial. Court sees no valid reason for making existence of double jeopardy bar turn on prosecutor's cleverness in keeping full nature of misconduct hidden during trial.

TITLE: State v. Minnitt
INDEX NO.: J.10.b.
CITE: 203 Ariz. 431, 55 P.3d 774 (Ariz. 2002)
SUBJECT: Prosecutorial Misconduct Can Bar Retrial Even Absent Mistrial Request
HOLDING: Prosecutorial misconduct that would be egregious enough to require mistrial, but which is concealed from court until after trial, can trigger state constitutional double jeopardy bar to retrial, even if defense knew of misconduct and failed to move for mistrial. Here, D was tried three times for capital murder. The first trial resulted in a conviction and death sentence, which was vacated on appeal. The second trial resulted in a hung jury. At both of these trials, the prosecutor bolstered the credibility of a jailhouse snitch by concealing fact that police had already identified D as a suspect at time they were contacted by informer. This fact would have supported defense theory that police had "fed" information to informer. In both his opening statements and closing arguments, prosecutor stated that police learned of D from informer. He also elicited perjured testimony from officer about how he first learned of D. Defense knew of this, but did not attempt to impeach witness in order to avoid opening door to damaging testimony that prosecutor threatened to elicit regarding officer's knowledge of D. Court finds that prosecutor's misconduct was egregious, sufficiently so that defense's silence did not matter, particularly since defense had been "bull[ied] ... into submission." Further, the third, "clean" trial could not repair the damage done, since it should have been barred by double jeopardy. Held, D's conviction and death sentence vacated and Tr. Ct. ordered to dismiss charges with prejudice.

TITLE: State v. Quitog
INDEX NO.: J.10.b.
CITE: 85 Haw. 128; 938 P.2d 559 (Haw. 1997)
SUBJECT: Double Jeopardy -- Retrial Barred on Offense Prosecutor Took Away from Jury
HOLDING: Hawaii Supreme Court holds that state constitution's double jeopardy clause bars retrial of charged offense which prosecutor voluntarily took from jury by asking for conviction on lesser included offense instead. Jury deadlocked and failed to render verdict on either charged offense, or lesser included offense which prosecutor asked them to convict on in final argument. State then sought to retry D on charged offense, arguing that recognizing double jeopardy bar to retrial would elevate prosecutorial arguments to level of binding legal determinations. Court disagrees, characterizing case as one in which state's deliberate trial strategy accompanied termination of first trial without verdict, and state then adopted retrial strategy that was "mutually inconsistent" with stance it took at first trial.

TITLE: State v. Rogan
INDEX NO.: J.10.b.
CITE: 984 P.2d 1231 (Haw. 1999)
SUBJECT: Retrial After Mistrial -- Misconduct by Prosecutor
HOLDING: Hawaii Supreme Court holds that under its state constitution, reprosecution of a D after a mistrial or reversal on appeal as a result of prosecutorial misconduct is barred if the prosecutorial misconduct was so egregious that, from an objective standpoint, the D was denied a fair trial. Court rejects the requirement set out by the U.S. Supreme Court in Oregon v. Kennedy, that D must show that the prosecution acted with the specific intent of provoking a mistrial before the federal double jeopardy clause bars retrial. In rejecting the Kennedy specific intent requirement, the Court noted that determining intent necessarily requires a guess, and that a guess is not an appropriate means by which to attempt to vindicate constitutional rights. Misconduct here was statement in closing argument that finding "some black, military guy on top of your daughter" is "every mother's nightmare." Court found that first part of remark was an appeal to racism, and second part was an improper plea to evoke sympathy for the complainant's mother and an invitation for the jury to put themselves in her position. The appeal to racial prejudice, in particular, was an egregious act that denied the D a fair trial.

TITLE: Tyson v. State
INDEX NO.: J.10.b.
CITE: (4th Dist. 9/14/89), Ind. App., 543 N.E.2d 415
SUBJECT: Double jeopardy (DJ) - manifest necessity for mistrial; absence of state's witness
HOLDING: Absence of state's witness did not create manifest necessity warranting mistrial over D's objection, & DJ barred 2d trial. D was charged with burglary & theft. Evidence shows that D was driven to & from scene of burglary by friend, who was not charged. Jury had been impaneled & 5 witnesses had testified, when state sought continuance to locate driver, who had been subpoenaed but did not appear. When state was unable to locate driver, it moved for mistrial, which was granted over D's objection. At commencement of 2d trial, D moved for dismissal on DJ grounds, which Tr. Ct. denied. D was convicted of both counts. On appeal, D argues that manifest necessity did not require mistrial, & that DJ barred 2d trial. Generally, D may not be retried following mistrial, but exception exists where mistrial resulted from manifest necessity. In Downum v. US (1963), 372 U.S. 734, 83 S. Ct. 1033, 10 L.Ed.2d 100, U.S.S. Ct. found that such necessity did not exist where key prosecution witness, who had not been subpoenaed or had attendance secured in any other way, did not appear. In Cornero v. US (1931), 48 F.2d 69, 9th Cir. commented that state took chance when it impaneled jury without ascertaining presence of witnesses. Although Ind. courts have not faced issue directly, Ind. S. Ct. has noted with disapproval ease with which prosecutor could create "manifest necessity" if it were found in such circumstances. Maddox 102 N.E.2d 225. Here, it is clear that testimony of driver would have aided state's case, but her absence did not create manifest necessity warranting mistrial. Held, convictions reversed. Chezem, J., DISSENTS.

TITLE: U.S. v. Doyle
INDEX NO.: J.10.b.
CITE: 121 F.3d 1078 (7th Cir. 1997)
SUBJECT: Double Jeopardy -- Mistrial; Prosecutorial Misconduct
HOLDING: Seventh Circuit Court of Appeals refuses to expand upon U.S. Supreme Court exception to rule that, where D seeks or agrees to mistrial, double jeopardy does not bar retrial. In Oregon v. Kennedy, 456 U.S. 667 (1982), U.S. Supreme Court held that double jeopardy will bar retrial where prosecutorial misconduct was intended to provoke mistrial. Other jurisdictions have broadened this exception somewhat, to preclude retrial where prosecutor knew or should have known that misconduct would prompt mistrial. Here, somewhat greater leap was requested, extending exception to case in which prosecutor's misconduct was intended simply to prevent acquittal. Seventh Circuit did not find that this showing was made as to prosecutor's intent, and held that it would not expand Kennedy to fit this situation even if showing was made.

TITLE: U.S. v. Gaytan
INDEX NO.: J.10.b.
CITE: 115 F.3d 737 (9th Cir. 1997)
SUBJECT: Double jeopardy -- Mistrial -- Consent of D
HOLDING: Where circumstances surrounding hastily declared mistrial did not give D chance to either consent or object, double jeopardy bars retrial. In middle of federal drug trial, government revealed that it had failed to disclosed that government witness was himself dealing drugs. Prosecutor explained she had misunderstood government's obligation under Brady. Court responded by angrily admonishing prosecutor, dismissing case and leaving bench. Next day, D's attorney stated on record that if given opportunity, he would have moved only to strike witness' testimony. Court of Appeals found that D had temporarily lost all ability to influence course of proceedings and double jeopardy barred retrial.

TITLE: U.S. v. Stevens
INDEX NO.: J.10.b.
CITE: 177 F.3d 579 (6th Cir. 1999)
SUBJECT: Government Witness' Refusal to Testify Did Not Create Manifest Necessity for Mistrial
HOLDING: Essential government witness' unexpected decision to face contempt sanctions rather than testify did not create manifest necessity for mistrial for double jeopardy purposes. Witness announced during trial that he would not testify because of threats made against his family. (Tr. Ct. found no evidence linking threats to D.) Trial continued for three weeks, during which time witness sat in jail and continued to refuse to testify. Judge declared mistrial and denied D's motion to dismiss due to double jeopardy, ruling that mistrial was prompted by manifest necessity. Court of Appeals reverses. While timing of prosecutor's knowledge that witness will refuse to testify may be important in case in which prosecutor gambled on availability of witness, here there was nothing government could have done differently. Therefore, proper focus of inquiry is purpose served by declaring mistrial. There were only two possible purposes for mistrial here: (1) to allow government time to gather substitute evidence; or (2) to give government time to change witness' mind. Mistrial for either purposes violates double jeopardy clause. Government further argued that mistrial was manifestly necessary because of prejudice it suffered when, after telling jury what it expected witness to say, it failed to produce him. Because government's evidence was legally insufficient to sustain conviction absent witness' testimony, fact that government may have looked bad in eyes of jury was irrelevant.

TITLE: White v. State
INDEX NO.: J.10.b.
CITE: (3/5/84), Ind., 460 N.E.2d 132
SUBJECT: Double jeopardy - retrial after mistrial; instructions
HOLDING: Double jeopardy may be proved as defense under plea of not guilty (Greenwalt 209 N.E.2d 254; Holt 59 N.E.2d 563); however, Tr. Ct. properly refused D's tendered instructions re double jeopardy. Here, D's first trial ended in mistrial, declared sua sponte because coroner refused to testify re cause of death. D contends he had right to present issue to second jury. Court finds manifest necessity existed for mistrial; determinations made by Tr. judge were legal rather than factual, thus jury had no issue to decide. Held, no error.

TITLE: Whitehead v. State
INDEX NO.: J.10.b.
CITE: (3d Dist. 2/14/83), Ind. App., 444 N.E.2d 1253
SUBJECT: Double jeopardy (DJ) - effect of motion for/consent to mistrial
HOLDING: Interlocutory appeal. If D moves for or consents to a mistrial, right to raise DJ in further proceedings is forfeited (Cabell 372 N.E.2d 1176), unless motion was necessitated by governmental conduct "intended to provoke D into moving for a mistrial." OR v. Kennedy (1982), 456 U.S. 667, 102 S. Ct. 2083, 72 L.Ed.2d 416. Failure to timely object to discharge of jury waives DJ. Moyer, App., 379 N.E.2d 1036. Here, jury was selected, given preliminary instructions, opening statements given, state's first witness presented. Judge informed parties jury had not been sworn. D's motion for a mistrial was denied subject to reconsideration. Over D's objection, jury was sworn & state's first witness was again examined. State then advised Tr. Ct. it had no objection to D's motion for a mistrial. Motion was then granted. D reiterated objection to swearing of jury but did not object to granting of mistrial or discharge of jury. Tr. judge disqualified himself & another judge was selected. D's motion for discharge, alleging future prosecution would violate prohibition against DJ, was denied. Held, no error in denial of motion for discharge. Affirmed on direct appeal following conviction; Whitehead 511 N.E.2d 284.

TITLE: Wright v. State
INDEX NO.: J.10.b.
CITE: (06/24/92), Ind., 593 N.E.2d 1192
SUBJECT: Retrial following mistrial - no double jeopardy (DJ)
HOLDING: Mention of polygraph in opening argument & use of posters by co-D's counsel, was sufficient to mandate mistrial by manifest necessity, & therefore D's retrial was not barred by DJ. Co-Ds were tried together for murder & conspiracy to commit murder, & both were found guilty.

Tr. Ct.'s determination to grant mistrial is discretionary & accorded great deference, & Tr. Ct. has authority to declare mistrial where manifest necessity for it exists. If manifest necessity exists, retrial of D may not be barred, even where jeopardy has attached. Court found Tr. Ct. acted appropriately, & even though D did not consent to discharge of jury, retrial was not precluded. Although only one D's counsel precipitated mistrial, other D's counsel joined in objection to motion for mistrial, & neither party has right to have case decided by jury tainted by bias. Held, convictions affirmed, DeBruler, J., dissenting, finding polygraph was used as tool of interrogation & coercion, & so normal reasons for exclusion didn't apply.

RELATED CASES: Pavey, App., 764 N.E.2d 692 (D's retrial was not barred by double jeopardy, because mistrial order was supported by showing of manifest necessity); Brown, 703 N.E.2d 1010 (DJ did not bar D's re-prosecution where record supported Tr. Ct.'s conclusion that there was manifest necessity to order new trial; State was not responsible for juror's failure to divine that he was in fact an unsuitable juror); Peterson, App., 653 N.E.2d 1022 (Tr. Ct. could reasonably conclude that manifest necessity warranted mistrial, where D's counsel moved to withdraw because he believed that representing D created conflict or appearance of impropriety).

J. CONSTITUTIONAL LAW

J.10. Double jeopardy (5th Amend; IndConst Art 1, 14) (see, also L.7.d)

J.10.c. Reprosecution following acquittal or dismissal

TITLE: State v. Johnson

INDEX NO.: J.10.c.

CITE: (02/23/2022), 183 N.E.3d 1118 (Ind. Ct. App)

SUBJECT: Double jeopardy did not bar state prosecution for attempted murder and related charges following acquittal on federal kidnapping charge stemming from same event

HOLDING: A prior conviction or acquittal in another jurisdiction bars a subsequent Indiana state prosecution for the "same conduct." IC 35-41-4-5. Indiana statutory double jeopardy analysis centers on comparing the conduct alleged in the charging instruments. Here, Defendant was charged in State Court with attempted murder, two counts of kidnapping, aggravated battery, battery by means of a deadly weapon, battery resulting in serious bodily injury and intimidation. A month later, Defendant was indicted in Federal court on a single federal kidnapping charge stemming from the same event. The State moved to dismiss the charges due to the federal charge having been filed, and the trial court granted the motion. Defendant was later acquitted of the kidnapping in federal court. The State then refiled an information charging Defendant with the offenses it had charged earlier but absent the two kidnapping charges. Defendant filed a motion to dismiss, arguing that pursuant to Indiana's double jeopardy statute, his acquittal on the federal kidnapping charge barred his prosecution on the refiled charges. The trial court agreed and granted the motion, but the Court of Appeals reversed and remanded for trial, finding "scant Indiana caselaw applying (Indiana Code) section 35-41-4-5," but found that Indiana statutory double jeopardy analysis centers on comparing the conduct alleged in the charging instruments. Here, the federal kidnapping allegation and the State's charges were not based on the "same conduct" for purposes of Indiana Code section 35-41-4-5.

J. CONSTITUTIONAL LAW

J.10. Double jeopardy (5th Amend; IndConst Art 1, 14) (see, also L.7.d)

J.10.d. Reprosecution following conviction

TITLE: Bravo-Fernandez, et al. v. United States
INDEX NO.: J.10.d.
CITE: (11/29/2016), 137 S. Ct. 352 (U.S. 2016)
SUBJECT: Inconsistent verdicts do not collaterally estop retrial of vacated conviction
HOLDING: The collateral estoppel/issue preclusion part of the Double Jeopardy Clause does not bar retrial of a vacated bribery conviction where the same jury acquitted D of conspiracy to commit bribery. The burden lies on a defendant to show that the issue he seeks to shield from reconsideration by retrial was actually decided by a prior jury's verdict of acquittal. Schiro v. Farley, 510 U.S. 222, 233 (1994). When the same jury returns irreconcilably inconsistent verdicts on the issue in question, a defendant cannot meet that burden. Thus, the acquittal on the conspiracy charge creates no preclusive effect on the count for which D was convicted. United States v. Powell, 469 U.S. 57, 68-69 (1984). Held, cert. granted, First Circuit opinion at 790 F.3d 41 affirmed, and judgment affirmed.
Ginsburg, J., for the unanimous Court; Thomas, J., concurring.

TITLE: Calvert v. State
INDEX NO: J.10.d.
CITE: (7/31/2014), 14 N.E.3d 818 (Ind. Ct. App. 2014)
SUBJECT: Retrial not barred after erroneous trial in absentia of D deployed with U.S. Army
HOLDING: Tr. Ct. committed reversible error when it denied D's motion for continuance and tried him in absentia while he was on active duty with U.S. Army in Afghanistan.

D argued that a retrial would violate Article 1, Section 14 of the Indiana Constitution, because the State advocated a position clearly in conflict of well-established law with willful disregard of the resulting reversal, and misrepresented to Tr. Ct. the timing of D's enlistment in the Army and his motion to continue prior trial date. But D did not move for mistrial, and the challenged misconduct occurred in argument prior to D's trial and cannot be construed to have been intended to goad D into moving for a mistrial. Thus, Court declined D's invitation to adopt rule in State v. Kennedy, 666 P.2d 1316 (Or. 1983), that retrial is barred if State knows its conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal. Held, conviction reversed and remanded for retrial.

TITLE: Carr v. State

INDEX NO.: J.10.d.

CITE: (3d Dist. 10/17/91), Ind. App., 579 N.E.2d 663

SUBJECT: Prosecution not barred for offenses arising from same transaction where D previously pled guilty to other offenses

HOLDING: D was arrested because of woman's complaint, & after attempted flight where handgun & case holding hypodermic needle were abandoned & heroin was found in D's hand, he was charged with possession of paraphernalia, resisting arrest, & disorderly conduct. He pled guilty to two of these offenses. Later he was charged with possession of heroin & handgun & was found guilty on possession charge.

Relying on Grady v. Corbin (1990), 495 U.S. 508, 110 S. Ct. 2084, D argued that second prosecution was barred because he had already pled guilty to other offenses arising out of the same transaction/incident. Court of Appeals rejected argument, noting that in Grady subsequent barred prosecution was utilizing same conduct D had pled to, to prove subsequent offense. Court distinguished instant case from Grady because the required elements to sustain second prosecution were different from those in already adjudicated conduct, i.e., possession of heroin as opposed to possession of paraphernalia, resisting arrest, & disorderly conduct. Court noted that Grady held that "`Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the D has already been prosecuted.'" 110 S. Ct. at 2087. Held, conviction affirmed.

RELATED CASES: Thomas, App., 764 N.E.2d 306 (Tr. Ct. erred in denying D's motion to dismiss dealing in cocaine charge after he previously pled guilty to & was sentenced for conspiracy to deliver cocaine upon same evidence in another county; see full review, this section).

TITLE: Caspari v. Bohlen
INDEX NO.: J.10.d.
CITE: 510 U.S. 383, 114 S. Ct. 948, 127 L.Ed.2d 236 (1994)
SUBJECT: Double jeopardy (DJ) - non-capital sentencing proceeding
HOLDING: Extending DJ prohibition against twice subjecting D to capital sentencing proceeding to non-capital sentencing enhancement proceeding would be new rule that, under Teague, cannot be announced on federal habeas corpus review. D received enhanced sentence under state persistent offender law, based on prior convictions. State appellate court held that state had not proved prior convictions, & remanded for resentencing, at which D again received enhanced sentence. Eighth Circuit Ct. App. granted federal habeas relief, on ground that enhancement proceeding, like capital sentencing proceeding, was sufficiently like trial to invoke Double Jeopardy prohibition. Ct. App. held that it was "short step" to extend Double Jeopardy holding of Bullington v. MO to non-capital sentence enhancement proceeding. S. Ct. disagrees. Majority writes that reasoning of Bullington was based largely on unique circumstances of capital sentencing proceeding, so that application to non-capital sentencing proceedings is not dictated by Bullington but rather constitutes new rule. Stevens, J., DISSENTS would reach merits, because state did not raise Teague as question presented in its cert. petition, & would affirm Ct. App.

TITLE: Cuto v. State
INDEX NO.: J.10.d.
CITE: (2nd Dist., 4-21-99), Ind. App., 709 N.E.2d 356
SUBJECT: Double jeopardy - retrial when reversal of conviction is based on weight of evidence
HOLDING: When reversal of conviction is based upon weight rather than sufficiency of evidence, double jeopardy does not prohibit retrial. Tibbs v. Florida, 457 U.S. 31 (1982). Invoking thirteenth juror principle under T.R. 59(J)(7), Tr. Ct. in this case reweighed evidence & specifically determined that eyewitness's testimony was unreliable. Tr. Ct. then set aside murder & felony murder convictions & convicted D of lesser-included offense of aggravated battery. Ct. noted that reassessment of credibility of one witness implicated weight, not sufficiency of evidence. Reversal based on weight of evidence can occur only after State both has presented sufficient evidence to support conviction & has persuaded jury to convict. Tibbs. Retrial is allowed when conviction is reversed for error, & evidence at trial was sufficient to support original conviction. Evans v. State, 571 N.E.2d 1231 (Ind. 1991). Thus, retrial on murder charges did not violate principles of double jeopardy. Held, judgment affirmed.

TITLE: Jaramillo v. State
INDEX NO.: J.10.d.
CITE: (03-11-05), Ind., 823 N.E.2d 1187
SUBJECT: Double jeopardy - retrial of habitual following reversal for insufficiency
HOLDING: In light of Monge v. California, 524 U.S. 721 (1988), Double Jeopardy Clause of U.S. Constitution does not bar retrial of a habitual offender enhancement set aside on appeal for insufficient evidence. Notwithstanding Apprendi v. New Jersey, 530 U.S. 466 (2000), which largely adopted dissenting opinion in Monge that prior offense enhancement constitutes an element of an offense, Ct. held that Monge is good law & permits State to retry D because: 1) Apprendi discusses Monge without suggesting that it is no longer good law; 2) last year Ct. *cited* Monge for proposition that the Double Jeopardy Clause does not preclude retrial on a prior conviction used to support recidivist enhancement. Dretke v. Haley, 124 S. Ct. 1847 (2004). Given that Apprendi exempts from its reach the fact of a prior conviction, it makes sense that Monge, involving as it does a fact of a prior conviction, would be distinguishable from Apprendi. In holding that State may re-prosecute habitual offender enhancement after conviction therefore has been reversed on appeal for insufficient evidence, Ct. overruled Perkins v. State, 542 N.E.2d 549 (Ind. 1989) & other cases. Held, transfer granted, Ct. App.' opinion at 803 N.E.2d 243 vacated but summarily affirmed as to restitution issue, remanded to Tr. Ct.

RELATED CASES: Moore, App., 769 N.E.2d 1141 (Ind. DJ clause does not bar retrial of habitual offender charge when it as earlier reversed on basis of insufficient evidence).

TITLE: Moore v. State
INDEX NO.: J.10.d.
CITE: (2nd Dist., 7-18-95), Ind. App., 653 N.E.2d 1010
SUBJECT: Double jeopardy - retrial of greater offense if included offense is affirmed
HOLDING: Where Ct. affirmed D's conviction for factually included lesser offense of confinement, double jeopardy did not prevent retrial of greater offense of attempted criminal deviate conduct, which was reversed for erroneous admission of evidence. Retrial is barred only where reversal has been premised upon insufficiency of evidence. Warner v. State (1991), Ind., 579 N.E.2d 1307. One may not be subsequently reprosecuted for offense which was included in earlier conviction. Buie v. State (1994), Ind., 633 N.E.2d 250. Buie does not address whether greater offense may be reprosecuted after reversal when conviction upon included offense remains in place. If D is convicted after retrial on attempted criminal deviate conduct charge, included confinement conviction merges & must be vacated. Held, attempted criminal deviate conduct conviction reversed & remanded, confinement conviction affirmed pending possibility of merger with subsequent conviction upon further proceedings; Hoffman, J., dissenting.

RELATED CASES: Owens, App., 897 N.E.2d 537 (D's convictions for both murder and robbery resulting in serious bodily injury violated Ind. common law prohibition against DJ; charging information makes clear that the SBI that enhanced robbery charge from Class C to Class A felony-- victim's death-- was the exact same harm for which D was convicted and punished for murder); Moore, App., 698 N.E.2d 1203 (decision in Games, 684 N.E.2d 446, directs Tr. Ct. to include in its comparison of statutory elements an inquiry as to whether facially distinct elements are truly distinct before permitting multiple convictions); Redman, App., 679 N.E.2d 927 (where Ct. App. affirmed D's conviction for lesser included offense of aggravated battery, double jeopardy did not prevent retrial of greater offense of attempted murder, which was reversed for improper jury instruction.)

TITLE: Ohio v. Johnson
INDEX NO.: J.10.d.
CITE: 467 U.S. 493 (1984)
SUBJECT: Double jeopardy -- prosecution of greater offense following guilty plea
HOLDING: Acceptance of guilty plea to lesser included offense contained in same indictment does not bar trial of greater offense; there is no implied acquittal. This is different from case where one is convicted of lesser offense & then is separately charged with greater offense. Brown, 432 U.S. 161. Here, D indicted by grand jury on one count each of murder, involuntary manslaughter, aggravated robbery & grand theft. Tr. Ct. accepted his guilty pleas to involuntary manslaughter & grand theft, & then granted his motion to dismiss remaining charges, to which he had pled not guilty, on ground that their further prosecution was barred by double jeopardy prohibitions of Fifth & Fourteenth Amendments. Ct. held that Double Jeopardy Clause does not prohibit State from continuing its prosecution of D on charges for murder & aggravated robbery. Held, dismissal of murder & aggravated robbery charges reversed; Brennan, J., concurring in part & dissenting in part; Stevens & Marshall, JJ., dissenting.

RELATED CASES: Moore, App., 882 N.E.2d 788 (the State should have been permitted to proceed to trial with rape and CDC as Class A felonies despite the fact the D pled guilty to battery as a Class C felony based on the same injury that served the basis of the SBI element of the rape and CDC; any DJ problem could be resolved when judgment was entered).

TITLE: Ricketts v. Adamson

INDEX NO.: J.10.d.

CITE: 481 U.S. 1, 107 S. Ct. 2680, 97 L.Ed.2d 1 (1987)

SUBJECT: Breach of plea agreement / double jeopardy

HOLDING: Here, D was charged with first degree murder. He entered into plea agreement with state whereby D pled guilty to second degree murder & agreed to testify against accomplices. State agreed to drop request for death penalty & recommend specified prison term. D testified as promised. Accomplices' convictions were reversed by state appellate court. D refused to testify at retrial. Agreement provided that if D refused to testify, entire agreement would be null/void & original charge would automatically be reinstated. State revoked plea agreement & procured conviction of first degree murder & death sentence. Court finds jeopardy attached when D was sentenced originally for second degree murder. Absent special circumstances, double jeopardy clause would have precluded prosecution of D for first degree murder because of conviction for lesser included offense. Brown v. OH (1977), 432 U.S. 161, 168, 97 S. Ct. 2221, 53 L.Ed.2d 187. Court finds agreement's provision that in event of breach, parties would be returned to position occupied prior to agreement results in there being no available double jeopardy defense. Further, agreement specifying that charges may be reinstated given certain circumstances is equivalent to waiver of double jeopardy defense. Held, Double Jeopardy Clause is not violated by enforcement of agreement. Brennan, joined by Marshall, Blackmun, & Stevens, DISSENTS.

TITLE: State v. Klinger

INDEX NO.: J.10.d.

CITE: (2nd Dist, 7-24-98), Ind. App., 698 N.E.2d 1199

SUBJECT: Double jeopardy - reprosecution following deadlocked jury & conviction on lesser-included charge

HOLDING: Double jeopardy does not prohibit State from retrying D on charge after jury has deadlocked on that charge but convicted D on lesser-included charge in same prosecution. Retrial is barred only if there has been some event, such as acquittal, that terminates original jeopardy. Richardson v. U.S., 468 U.S. 317 (1984). Failure of jury to reach verdict is not event which terminates jeopardy. Id. Here, jury returned guilty verdict on pointing handgun charge but was unable to reach verdict on greater offense of attempted murder & Tr. Ct. declared mistrial. Jury's inability to reach verdict on attempted murder charge is not equivalent of acquittal & does not prevent retrial on that charge. Rather, subsequent trial on greater offense does no more than permit State to take additional step in continuous prosecution that has not yet been completed. Thus, Tr. Ct. erred in granting D's motion to dismiss. Held, reversed & remanded; Sullivan, J., concurring.

RELATED CASES: Haddix, App., 827 N.E.2d 1160 (D's double jeopardy rights were not violated by retrial when Tr. Ct. refused to enter previous jury conviction on lesser included offense into judgment; see full review at J.10.b); Davenport, App., 734 N.E.2d 622 (jury's determination of guilt on lesser included possession of cocaine charge but deadlock on greater dealing charge did not preclude State from retrying D for greater offense;) but see Mercer, App., 500 N.E.2d 1278 (conviction on LIO of criminal recklessness barred re-prosecution on greater offense of battery following hung jury).

TITLE: Thomas v. State
INDEX NO.: J.10.d.
CITE: (4th Dist., 3-13-02), Ind. App., 764 N.E.2d 306
SUBJECT: Double jeopardy (DJ) - subsequent prosecution after guilty plea to conspiracy charge
HOLDING: Tr. Ct. erred in denying D's motion to dismiss dealing in cocaine charge after he previously pled guilty to & was sentenced for conspiracy to deliver cocaine upon same evidence in another county. Indiana DJ Clause protects against second prosecution for same offense after conviction. Berry v. State, 725 N.E.2d 939 (Ind. Ct. App. 2000). Ct. agreed with Justice Boehm's concurring opinion in Richardson that test to be applied in subsequent prosecutions must necessarily be distinct from the "actual evidence" test adopted for multiple punishments, because in typical subsequent prosecution cases, it is likely that in second prosecution D will file a motion to dismiss on DJ grounds, & therefore, there will be no "actual evidence" to compare with first conviction. Justice Boehm argued that in cases involving subsequent prosecutions, Indiana should follow the "same conduct" analysis applied in Grady v. Corbin, 495 U.S. 508 (1990), which is no longer law under federal DJ Clause. Here, D pled guilty to & was convicted of conspiracy to deliver cocaine in Cass County. One of overt acts alleged in furtherance of conspiracy was transfer of cocaine to confidential informant in Howard County. This was same act that supported dealing in cocaine charge in Howard County. Thus, further prosecution of D in Howard County for same conduct of dealing in cocaine was barred by Indiana DJ Clause. Held, judgment reversed.

TITLE: U.S. v. Felix
INDEX NO.: J.10.d.
CITE: 503 U.S. 378, 112 S. Ct. 1377, 118 L.Ed.2d 25 (1992)
SUBJECT: Double jeopardy (DJ) - successive prosecutions; conspiracy; prior bad acts
HOLDING: DJ clause does not bar prosecution for criminal offense, evidence of which was introduced against same D as prior bad acts in earlier prosecution for different offense. Neither does DJ clause bar prosecution for conspiracy in which some overt acts alleged are proved with conduct that was prosecuted as substantive crimes in earlier, separate prosecution. Court begins discussion by noting that at its root, DJ clause forbids duplicative prosecution for "same offense". Precedents hold that mere overlap in proof between 2 prosecutions does not violate DJ. In Grady v. Corbin (1990), 495 U.S. 508, 110 S. Ct. 2084, 109 L.Ed.2d 548, Court disclaimed any intention of adopting "same evidence" test, & Dowling v. U.S. (1990), 493 U.S. 342, 110 S. Ct. 668, 107 L.Ed.2d 708 reinforced this point. At issue in Dowling was whether collateral estoppel prevented use of evidence of offense for which Dowling had been acquitted to establish his identity as perpetrator of separate offense. As Court points out here, it would not have reached that issue without endorsing principle that introduction of relevant evidence of particular misconduct is not same thing as prosecution for that conduct. Court goes on to address question of prosecution for both conspiracy & substantive offense, noting that long before Grady, case law held that conspiracy & substantive offense are not same offense for DJ purposes. Although language of Grady seems to contradict this principle, Court chooses to reconcile them by ruling simply that Grady did not overrule principle that DJ does not bar prosecution for both conspiracy & substantive offense. Stevens & Blackmun, JJ., CONCUR IN JUDGMENT.

TITLE: Webster v. Duckworth
INDEX NO.: J.10.d.
CITE: 767 F.2d 1206 (7th Cir. 1985)
SUBJECT: Double jeopardy - reversal for insufficient evidence
HOLDING: Ind. S. Ct. erred in affirming D's conviction for 2 murders where court had vacated original conviction based upon insufficient evidence. Ind. S. Ct. had distinguished Burks v. US (1978), 437 U.S. 1, 98 S. Ct. 2141, 57 L.Ed.2d 1, by finding that Tr. Ct.'s instruction was error & denied prosecution its one fair opportunity to offer whatever proof it could assemble. 7th Cir. holds that regardless of whether Tr. Ct. commits error that results in prejudice only to prosecution, if conviction is reversed for insufficient evidence, reviewing court is barred by double jeopardy clause from ordering retrial. Under double jeopardy analysis, "trial error" clearly means error that prejudices D, not the state. Reversal based on insufficiency of evidence is constitutional equivalent of acquittal. 7th Cir. notes its decision simply reaffirms Burks & finds state's reliance on cases that predate Burks foreclosed by U.S. S. Ct.'s implied overruling of them. Held, remanded to district court with instruction to grant writ of habeas corpus (conviction reversed). Ind. S. Ct. opinion at 442 N.E.2d 1034 impliedly overruled.

TITLE: Williams v. State

INDEX NO.: J.10.d.

CITE: (10/4/89), Ind., 544 N.E.2d 161

SUBJECT: Double jeopardy (DJ) - retrial after conviction; reversal based on erroneous admission of evidence

HOLDING: DJ does not prevent retrial following reversal for erroneous admission of evidence where all evidence, including that which should have been excluded, was sufficient to support conviction. D's conviction for robbery was reversed due to erroneous admission of hearsay evidence. In Lockhart v. US (1988), 488 U.S. 33, 109 S. Ct. 285, 102 L.Ed.2d 265, U.S. S. Ct. held that where evidence was erroneously admitted at trial, reviewing court should look at all evidence to determine sufficiency. Where evidence admitted at trial is sufficient, reversal is based on trial error, & DJ does not prohibit retrial. This is true despite fact that properly admitted evidence may not have been sufficient. Indiana has adopted reasoning of Lockhart. See, e.g., Perkins 542 N.E.2d 549. Here, evidence admitted at trial was sufficient to support conviction & retrial is proper. Held, reversed & remanded for new trial.

TITLE: Yeager v. United States
INDEX NO.: J.10.d.
CITE: (06-18-09), U.S., 08-67, 129 S. Ct. 2360
SUBJECT: Double jeopardy can bar retrial on hung counts related to acquitted counts
HOLDING: If a jury finds an individual guilty on some counts, but can't agree on others, prosecutors may not try that individual again on the "hung" counts if they had a common element with those on which the jury acquitted. Double Jeopardy Clause precludes government from re-litigating any issue that was necessarily decided by a jury's acquittal in a prior trial. Ashe v. Swenson, 397 U.S. 436 (1970). Here, D was acquitted of securities fraud, but the jury was unable to reach a verdict on insider trading and money laundering counts. The government re-indicted D on the hung counts, and D moved to dismiss on double jeopardy grounds. In determining what a jury "necessarily decided," judges must scan the record to decide "whether a rational jury could have grounded its verdict upon an issue other than that which the D seeks to foreclose from consideration." Id. Although Ashe involved an acquittal on a single-count indictment, the Ashe approach is not rendered inapplicable by the existence of other charges on which the jury deadlocked. The lower courts should not have considered the jury's failure to reach a verdict when assessing which issues the jury's acquittals necessarily resolved. Held, Fifth Circuit Court of Appeals' opinion at 521 F.3d 367 reversed and remanded to revisit its factual determination regarding whether jury necessarily resolved in D's favor an issue of ultimate fact on fraud counts that government would have to prove in order to convict him of insider trading. Kennedy, J., CONCURRING IN PART AND CONCURRING IN JUDGMENT; Scalia, J., joined by Thomas, J., and Alito, J., DISSENTING, argued that the Ashe approach should not be extended to cases involving deadlocked juries; Alito, J., joined by Scalia, J., and Thomas, J., DISSENTING.

Note: This case represents a more expansive interpretation of the collateral estoppel component of the Fifth Amendment Double Jeopardy Clause. Distinguishing United States v. Powell, 469 U.S. 57 (1984), a case involving inconsistent verdicts, Court emphasized that a hung jury, unlike a verdict, is a "nonevent" that cannot support conclusions about what jurors thought. Richardson v. United States, 468 U.S. 317 (1984), which held that Double Jeopardy Clause does not bar a retrial on charges on which a jury deadlocked, is limited to situation where a D claims that hung counts, standing alone, have a preclusive effect.

RELATED CASES: Bravo-Fernandez, 137 S. Ct. 352 (2016) (Issue preclusion part of DJ Clause does not bar retrial of a vacated bribery conviction where same jury acquitted D of conspiracy to commit bribery; see full review, this section).

J. CONSTITUTIONAL LAW

J.10. Double jeopardy (5th Amend; IndConst Art 1, 14) (see, also L.7.d)

J.10.e. Reprosecution by different sovereign

TITLE: Brewer v. State
INDEX NO.: J.10.e.
CITE: (6/4/2015), 35 N.E.3d 284 (Ind. Ct. App. 2015)
SUBJECT: Double jeopardy - former prosecution in Kentucky for same conduct
HOLDING: A former prosecution in any other jurisdiction bars subsequent prosecution by Indiana for the "same conduct." See Ind. Code § 35-41-4-5. Here, D's Kentucky conviction for receiving stolen property prohibited Indiana's prosecution for auto theft. Swenson v. State, 868 N.E.2d 540 (Ind. Ct. App. 2007). However, D's Kentucky conviction for fleeing/evading police does not prohibit Indiana from prosecuting him for resisting law enforcement, even though he committed one act of fleeing the police. Ind. Code § 35-41-4-5 only applies when "the alleged conduct constitutes an offense within the concurrent jurisdiction of Indiana and another jurisdiction." D's conviction in Kentucky was for his conduct in fleeing from a Kentucky officer and occurred only in Kentucky. His conviction in Indiana was for fleeing from an Indiana officer and occurred only in Indiana. Because D's act of fleeing was "wholly within the jurisdiction of both states," the double jeopardy statute did not prohibit Indiana's prosecution for this offense. Held, judgment affirmed in part, reversed in part, and remanded with instructions to vacate auto theft conviction.

TITLE: Dill v. State
INDEX NO.: J.10.e.
CITE: (8/22/2017), 82 N.E.3d 909 (Ind. Ct. App. 2017)
SUBJECT: Dismissal not required under successive prosecution statute
HOLDING: On interlocutory review, the Court of Appeals ruled that the Tr. Ct. did not violate Indiana's successive prosecution statute by denying D's motion to dismiss her state charge for possessing methamphetamine with intent to deliver, where D had earlier pled guilty in federal court to conspiracy to possess and distribute methamphetamine. Even though the factual basis for the federal conspiracy offense referred to the facts that resulted in the state charge, D's federal plea was only to conspiracy, not possession with intent to deal, so the successive prosecution statute did not require dismissal of the state charge. Between June 2014 and March 3, 2015, D agreed with Amanda Sims to obtain and distribute methamphetamine. On several occasions, D coordinated purchases of methamphetamine for other individuals from Sims. On March 3, 2015, police executed a search warrant on a hotel room occupied by D. Police seized 13.4 grams of methamphetamine. The State charged D with Possessing Methamphetamine with Intent to Deliver. A few weeks later, the federal government indicted D and thirteen co-Ds, and D pled guilty to the conspiracy charge. The factual basis for D's federal plea referred to the March 3, 2015 search warrant and seizure of methamphetamine that formed the basis of the state charge. D moved to dismiss the state court charges, contending that further prosecution would violate the successive prosecution statute, particularly noting that the federal factual basis referred to the seizure of the methamphetamine from the hotel room that led to the state charge. Indiana's Successive Prosecution Statute provides that a former prosecution in any other jurisdiction bars subsequent prosecution by Indiana for the "same conduct." See Ind. Code § 35-41-4-5. Unlike double jeopardy analysis, a challenge brought under this statute requires examination of whether the charges brought in state and federal court involve the same conduct. State v. Allen, 646 N.E.2d 965 (Ind. Ct. App. 1995). The reference in the federal factual basis to the activities at the hotel did not preclude the state charge because, in the federal case, D pled to conspiracy to deal, not actually possession with intent to deliver. See Smith v. State, 993 N.E.2d 1185 (Ind. Ct. App. 2013); Swenson v. State, 868 N.E.2d 540 (Ind. Ct. App. 2007); cf. State v. Allen, 646 N.E.2d 965 (where federal and state conspiracy charges rested on the same conduct, state charge must be dismissed). Thus, the same conduct was not at issue in both cases, so dismissal under the successive prosecution statute would have been inappropriate. Held, judgment affirmed.

TITLE: Gamble v. State
INDEX NO.: J.10.e.
CITE: (6/17/19), 139 S. Ct. 1960 (U.S. 2019)
SUBJECT: Double jeopardy - "separate sovereigns" doctrine upheld
HOLDING: The Constitution's double jeopardy clause guarantees that no one shall "be twice put in jeopardy" "for the same offence." The longstanding dual-sovereignty doctrine – under which two offenses are not the "same offence" for double jeopardy purposes if prosecuted by separate sovereigns – is upheld. The "separate sovereigns" doctrine is not an exception to the double jeopardy clause at all, but instead is part and parcel of the clause itself because the clause bars successive prosecutions for the same offense – not for the same conduct. Offenses are defined by laws, which are in turn defined by sovereigns. "So where there are two sovereigns, there are two laws," and therefore two offenses. "[A] crime against two sovereigns constitutes two offenses because each sovereign has an interest to vindicate." Held, federal conviction for felon in possession of firearm after state conviction for identical conduct affirmed. Ginsburg, J., DISSENTING, complained that the "division of authority between" the federal and state governments was intended to provide extra protection for the rights of the people, but that today's decision takes advantage of that division to take away some of those rights. Gorsuch, J., DISSENTING on same grounds but was significantly more critical of the majority's opinion on stare decisis.

TITLE: Heath v. Alabama
INDEX NO.: J.10.e.
CITE: 474 U.S. 82, 106 S. Ct. 433, 88 L.Ed.2d 387 (1985)
SUBJECT: Reprosecution by different sovereign
HOLDING: Double Jeopardy Clause does not prohibit successive prosecutions by different states for identical offense where criminal conduct violates laws of both states. Dual sovereignty doctrine is founded on common law conception of crime as offense against sovereignty of government. When D in single act violates "peace & dignity" of 2 sovereigns by breaking laws of each, D has committed 2 distinct "offenses." U.S. v. Lanza (1922), 260 U.S. 377, 43 S. Ct. 141, 67 L.Ed.2d 314. Whether entities seeking to successively prosecute D can be termed separate sovereigns turns on whether entities draw their authority to punish offender from distinct sources of power. Power of states to undertake criminal prosecutions derives from separate & independent sources of power & authority originally belonging to them before admission to union & preserved by 10th Amend. States, therefore, are sovereign entities & as such may successively prosecute D for identical conduct. Held, D's convictions in AL & GA for his single act that constituted a crime in both states, affirmed. Brennan & Marshall DISSENT WITH SEPARATE OPINIONS, in which both joined. **NOTE:** In Indiana, Ind. Code 35-41-4-5 is absolute bar to prosecution following prosecution in another jurisdiction for same offense.

TITLE: Puerto Rico v. Sanchez Valle
INDEX NO.: J.10.e.
CITE: (6/9/2016), 136 S. Ct. 1863 (U.S. 2016)
SUBJECT: DJ exception for dual sovereignty doesn't apply to Puerto Rico
HOLDING: The federal double jeopardy clause bars Puerto Rico from prosecuting D for illegally selling firearms after he pled guilty in federal court for the same transactions under an analogous federal statute; the dual sovereignty exception to the double jeopardy prohibition does not apply here because the source of Puerto Rico's authority to impose punishment for criminal offenses is Congress, not a source of law independent of Congress. The test for whether the dual sovereignty exception applies is not whether the entity exercises self-governance or possesses the ability to enact and enforce its own laws – as Puerto Rico plainly does – but whether the ultimate source of power supporting the respective prosecutions comes from independent sources. United States v. Wheeler, 435 U.S. 313, 320 (1978). Because Puerto Rico's ultimate source of authority comes from Congress, it may not prosecute D. Held, cert granted; judgment affirmed. Kagan, J., joined by Roberts, C.J., Kennedy, Ginsburg, Alito, JJ; Ginsburg, concurring, joined by Thomas, J.; Thomas, J., concurring in part and concurring in judgment; Breyer, J., dissenting, Joined by Sotomayor, J.

TITLE: Smith v. State
INDEX NO.: J.10.e.
CITE: (9/13/2013), 993 N.E.2d 1182 (Ind. Ct. App. 2013)
SUBJECT: Double jeopardy - former federal prosecution for same conduct
HOLDING: Double jeopardy barred further prosecution of 20 out of 25 charges in state court after D's guilty plea to charges of federal conspiracy to commit mail and wire fraud. Ind. Code 35-41-4-5 provides that a former conviction in any other jurisdiction bars subsequent prosecution by Indiana for the "same conduct." Here, both federal indictment and state charges arise from the same overarching Ponzi scheme and conduct involving numerous victims in multiple states who were harmed by D's actions. Federal court's judgment included all of the victims and all of the losses identified in the Franklin County indicment.

However, allegations that D transacted business as a broker-dealer without having registered with the Indiana Secretary of State and without being exempt from registration, involve different conduct from that which formed the basis of D's federal conviction for devising and participating in the Ponzi scheme to defraud investors. Held, judgment affirmed in part, reversed in part, and remanded; Vaidik, J., concuring in part and dissenting in part, believes that two other charges which allege that D knowingly transacted business as a broker-dealer without being registered to do so, are also barred by double jeopardy.

See also Smith v. State, No. 15A05-1208-CR-411 (Ind. Ct. App. 9-13-13) (15 of 18 counts in Dearborn County were barred by double jeopardy, because State prosecution was for same conduct as that included in D's federal conviction).

TITLE: Swenson v. State
INDEX NO.: J.10.e.
CITE: (1st Dist., 06-21-07), Ind. App., 868 N.E.2d 540
SUBJECT: Double jeopardy - theft charge barred by former prosecution in Kentucky
HOLDING: Tr. Ct. erred in determining that State's theft charge was not barred by former prosecution in Kentucky for receipt of stolen property. Ind. Code 35-41-4-5 provides that a former conviction in any other jurisdiction bars subsequent prosecution by Indiana for the "same conduct." State v. Allen, 646 N.E.2d 965 (Ind. Ct. App. 1995). In Indiana, a person may not be convicted of both theft & receiving stolen property with regard to property appropriated in same transaction or series of transactions. Gibson v. State, 643 N.E.2d 885 (Ind. 1994). Here, State acknowledged that the overt act at issue in both prosecutions was identical--namely, that D stole prescription pads in Indiana & took them to Kentucky. It was undisputed that D's possession of stolen prescription forms was the basis of his Kentucky conviction. Thus, D was entitled to dismissal under Ind. Code 35-41-4-5 & Gibson. Held, judgment reversed.

J. CONSTITUTIONAL LAW

J.10. Double jeopardy (5th Amend; Ind.Const Art 1, 14) (see, also L.7.d)

J.10.f. Multiple convictions/ punishments (see, also E.11)

TITLE: Alexander v. State
INDEX NO: J.10.f.
CITE: (2nd Dist., 5-30-02), Ind. App., 768 N.E.2d 971
SUBJECT: Double jeopardy - Richardson/Spivey test
HOLDING: D's convictions for unlawful possession of a firearm by a serious violent felon & carrying handgun without license violated Double Jeopardy Clause of Indiana Constitution. In Spivey v. State, 761 N.E.2d 831 (Ind. 2002), Ct. indicated that there will be a double jeopardy violation only where evidentiary facts establishing all of essential elements of one offense also establish all of essential elements of second challenged offense. Notwithstanding manner in which Spivey seems to phrase the Richardson actual evidence test, in application Ct. has consistently overturned convictions where evidentiary facts establishing an essential element of one offense also establish all of essential elements of a second challenged offense. Here, D demonstrated that there was a reasonable possibility that evidentiary facts used to establish an essential element of his conviction for unlawful possession of firearm by serious violent felon, i.e., that he constructively possessed a firearm, were also used to establish that he possessed a handgun without a license. Held, remanded with instructions to vacate conviction & sentence for carrying handgun without license.

RELATED CASES: Ellis, 29 N.E.3d 792 (Ind. Ct. App. 2015) (where independent evidence existed to support convictions for attempted theft and theft, committed 30 minutes apart, State's comment during closing argument suggesting it was seeking only one conviction did not create double jeopardy violation under Indiana Constitution where D was convicted of both offenses); Carpenter, 15 N.E.3d 1075 (Ind. Ct. App. 2014) (no DJ violation for convictions for possession of firearm by SVF and possession of handgun with altered identifying marks because not all of the elements of both offenses were established by the gun that was entered into evidence; See Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002)); Speer, 995 N.E.2d 1 (Ind. Ct. App. 2013) (prosecutor in final argument mentioned ammonium mixture containing two precursors to support both Class B Felony Manufacturing Methamphetamine and D Felony possession of two or more precursors; this created reasonable probability that jurors used those same pieces of evidence to establish essential elements of both crimes, thus Ct. vacated class D Felony possession of precursors conviction); Chappell, 966 N.E.2d 124 (Ind. Ct. App. 2012) (DJ found where some of the evidentiary facts establishing elements of Class A felony burglary also established *all* of the essential elements of Class B felony burglary); Troutner, 951 N.E.2d 603 (Ind. Ct. App. 2011) (Spivey does not require D to demonstrate a "complete evidentiary overlap" in order to satisfy the Richardson actual evidence test); Stokes, 947 N.E.2d 1033 (Ind. Ct. App. 2011) (where three different weapons, not one, supported D's conviction for unlawful possession of a firearm by a SVF and enhancements for robbery and criminal recklessness, there was no violation of double jeopardy prohibition in Art. 1, § 14 of Indiana Constitution); Jones, 938 N.E.2d 1248 (Ind. Ct. App. 2010) (enhancement of both resisting arrest and criminal recklessness by the same act–D's attempt to flee scene with his vehicle–violated DJ under Ind. Constitution); Calvert, 930 N.E.2d 633 (Ind. Ct. App. 2010) (convictions for possession of sawed-off

shotgun and possession of firearm by SVF based on the possession of the same gun violated common law double jeopardy); Graham, App., 889 N.E.2d 1283 (where D fired three shots at victim's car--two of which hit the truck and caused property damage and one of which did not--it was not reasonably possible that jury used same facts to sustain D's convictions for criminal recklessness and criminal mischief); Smith, App., 872 N.E.2d 169 (although there may be sufficient evidence to support two convictions based on different evidence, where there is a reasonable possibility that the convictions were supported by the same evidence, double jeopardy is violated); Alexander, App., 772 N.E.2d 476 (on rehearing, Ct. affirmed earlier holding & noted that Richardson actual evidence test, as applied by Indiana S. Ct., has found double jeopardy to be violated when evidentiary fact(s) establishing one or more elements of one challenged offense establish all of elements of second challenged offense. It is not required that evidentiary facts establishing *all* of elements of one challenged offense also establish *all* of essential elements of second challenged offense).

TITLE: Armstead v. State
INDEX NO.: J.10.f.
CITE: (1st Dist. 2/7/90), Ind. App., 549 N.E.2d 400
SUBJECT: Battery & resisting law enforcement; no double jeopardy (DJ) bar
HOLDING: DJ does not bar convictions for both battery, Class D felony, & resisting law enforcement, Class D felony, based on same act. D hit police officer in nose during arrest, & was convicted of both battery on officer & resisting law enforcement. On appeal, D argues that DJ bars 2 convictions based on same act. However, where state must prove additional fact to prove each offense, single act can serve as basis for both convictions. Christie, App., 536 N.E.2d 531; Blockburger v. US (1932), 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306. Resisting law enforcement is Class D felony when person committing it "inflicts bodily injury on another person." Ind. Code 35-44-3-3. State must simply prove bodily injury to another person, who need not be law enforcement officer. Battery as Class D felony requires proof of injury to law enforcement officer but does not require proof of other elements of resisting law enforcement. Each offense requires proof of element which other does not. Thus, DJ does not bar conviction for both battery as Class D felony & resisting law enforcement as class D felony. Held, convictions affirmed.

RELATED CASES: Scott, App., 859 N.E.2d 749 (convictions for resisting law enforcement & attempted battery did not violate actual evidence test under Ind. Constitution when RLE was based on struggle with police and attempted battery was based on D's release of dogs on police); Armstrong, App., 742 N.E.2d 972 (where D pointed handgun at 3 separate and distinct times at 3 different people D was properly convicted on 3 counts of pointing handgun, although 3 convictions occurred during single incident); Delahanty, App., 658 N.E.2d 600 (D's convictions for both battery causing bodily injury & sexual battery did not violate DJ, because offenses as charged were not same, & battery causing bodily injury is not necessarily or inherently included offense of sexual battery); Jackson, 643 N.E.2d 905 (offenses of robbery & confinement each require proof of element that other does not, & therefore pass Blockburger test); Ellis, App., 634 N.E.2d 771 (Convictions for both criminal contempt & escape based on same actions were not barred by double jeopardy. (D ran from Ct.)).

TITLE: Bald v. State
INDEX NO.: J.10.f.
CITE: (4-22-02), Ind., 766 N.E.2d 1170
SUBJECT: Felony murder & arson - no double jeopardy violation
HOLDING: D's convictions & sentences for three felony murders & one count of arson did not violate Article 1, section 14 of Indiana Constitution. Ct. recently clarified actual evidence test set forth in Richardson v. State, 717 N.E.2d 32 (Ind. 1999). Under the Richardson actual evidence test, Indiana Double Jeopardy Clause is not violated when evidentiary facts establishing essential elements of one offense also establish only one or even several, but not all, of essential elements of a second offense. Spivey v. State, 761 N.E.2d 831 (Ind. 2002). Here, evidentiary facts used to establish felony murder established some, but not all, of elements of arson offense. To find D guilty of class A felony arson, jury was required to find victim was injured as result of arson. In finding D guilty of each felony murder, jury was required to find evidence of a separate victim's death. Thus, each conviction required proof of at least one unique evidentiary fact. Accordingly, D's convictions do not violate the Richardson/Spivey actual evidence test. Held, judgment affirmed.

See also: Tyson, 766 N.E.2d 715 (under actual evidence test, D established that it was reasonably possible that evidence used by jury to establish essential elements of conspiracy charge were also used to prove all essential elements of dealing charge).

RELATED CASES: Frazier, 988 N.E.2d 1257 (Ind. Ct. App. 2013) (double jeopardy does not bar conviction for both sexual battery and official misconduct based on same incident, because victim of official misconduct is the public; because the two crimes have separate victims, double jeopardy does not prohibit conviction for both); Montgomery, App., 804 N.E.2d 1217 (distinguishing Land, DJ precluded D from being charged with both arson of the dwelling of another & arson resulting in property damage of $5,000); Land, App., 802 N.E.2d 45 (D's Class B felony arson conviction for the fire damage to the home & a Class D felony conviction for the fire damage to his wife's property inside the home did not violate double jeopardy); Williamson, App., 798 N.E.2d 450 (double jeopardy would not have precluded State from charging D with five arson charges after a Tr. Ct. determined he caused a fire at his property that spread to four other owners' properties; thus appellate counsel was not ineffective for failing to argue Belser, App., 727 N.E.2d 457, as basis for vacating all but one of his arson convictions).

TITLE: Barrozo v. State

INDEX NO.: J.10.f.

CITE: (09/24/2020), 156 N.E.3d 718 (Ind. Ct. App. 2020)

SUBJECT: One of two reckless driving convictions resulting from fatal car crash violated double jeopardy

HOLDING: Defendant pleaded guilty without a plea agreement to several charges resulting from a three-car crash that killed three people and severely injured two others. The trial court sentenced Defendant to three counts of Level 5 felony reckless homicide, two counts of Class A misdemeanor reckless driving and one misdemeanor count of leaving the scene of an accident, all to run consecutively for a total sentence of 18 years. The Court of Appeals analyzed the case under Wadle v. State and Powell v. State, recent cases which provide a substantive overhaul of Indiana's double jeopardy precedent. Under the Wadle analysis, which looks at a single act that implicates multiple statutes, the Court found that none of the offenses here are included in the others, thus there was no double jeopardy violation stemming from the convictions for reckless homicide, reckless driving and leaving the scene of an accident. However, under the Powell analysis, which considers a single act with multiple victims, the Court found that the crime of reckless driving is complete once the defendant engages in the prohibited conduct. Stated differently, the crime of reckless driving is one unit of prosecution and may only be punished once. Thus, the Court vacated one of the reckless driving convictions and remanded for re-sentencing.

TITLE: Bass v. State
INDEX NO.: J.10.f.
CITE: (4/27/2017), 75 N.E.3d1100 (Ind. Ct. App. 2017)
SUBJECT: Double jeopardy - lesser included offense vacated
HOLDING: A concerned citizen found Defendant passed out in his vehicle in the middle of an intersection in Columbus. Defendant displayed the tell-tale signs of intoxication, and a subsequent blood draw showed he had methadone, oxycodone, and zolpidem in his blood. Defendant was charged two counts of OWI, one as a Class A misdemeanor (for the alleged endangerment of others) and one as a Class C misdemeanor (for operating with a schedule I or II controlled substance in the body).

At his bench trial, Defendant invoked the statutory defense, afforded to those who "consumed the controlled substance under a valid prescription . . . ." Ind. Code § 9-30-5-1(d). The Tr. Ct. rejected the defense, finding that Defendant's intoxication showed he had not taken the prescriptions "in the manner in which they were prescribed." Thus, the Tr. Ct. found Defendant guilty of both counts of OVWI and entered a "judgment" but not as to specific counts, stating the counts "merge for purposes of sentencing."

Entry of conviction for both an offense and its lesser-included offenses is impermissible under both state and federal double jeopardy rules. Whitham v. State, 49 N.E.3d 162, 168 (Ind. Ct. App. 2015). If a Tr. Ct. does not formally enter a judgment of conviction on a finding of guilt, then it need not vacate the conviction, and merger is appropriate. Townsend v. State, 860 N.E.2d 1268, 1270 (Ind. Ct. App. 2007). However, if the Tr. Ct., as here, enters judgment of conviction on finding of guilt, then simply merging the offenses is insufficient and the lesser offense must be vacated. See id. Accordingly, Defendant's lesser C misdemeanor conviction should be vacated on remand. Held, reversed and remanded with instructions.

May, J., dissenting, arguing that the majority should have vacated Defendant's Class C misdemeanor conviction on sufficiency of evidence grounds. While Tr. Ct. found that the statutory defense meant Defendant needed to take the drugs in the manner prescribed, the language of the defense is actually ambiguous, and thus should be interpreted in Defendant's favor to meaning he needed to merely show he had a valid prescription, which he did.

Note: In 2017, IC 9-30-5-5(d) (Operating with controlled substance causing death) was amended to require prescriptions be taken in accordance with the prescription, which would result in a different outcome in death cases beginning 7/1/17.

TITLE: Berg v. State
INDEX NO.: J.10.f.
CITE: (10/30/2015), 45 N.E.3d 506 (Ind. Ct. App. 2015)
SUBJECT: Double jeopardy - evidence establishing one offense must establish all essential elements of the other offense
HOLDING: Tr. Ct. did not violate D's double jeopardy rights under Richardson v. State, 717 N.E.2d 32 (Ind. 1999), when it entered its judgment of conviction against him for both operating while intoxicated (OWI), as a Class D felony and reckless driving, as a Class B misdemeanor. D argued, and State conceded, that State used the same evidence it had presented to the jury to support the reckless-driving charge to demonstrate the endangerment element of the OWI charge. But the Richardson test cannot be met where, as here, one offense required evidence of intoxication and the other offense did not. Instead, the evidentiary footprint underlying all the elements of both offenses must be the same. Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002).

Here, the State's evidentiary facts establishing the offense of reckless driving established the element of endangerment for the OWI offense, but that evidence did not establish all of the essential elements of OWI. Thus, there is no reasonable possibility that the jury latched on to exactly the same facts for both convictions.

Court also found no common law double jeopardy violation, because the behavior underlying D's reckless driving conviction was not "the very same behavior" underlying his OWI conviction. Rather, D's reckless-driving conviction was based on the excessive speed with which D drove his vehicle, while his OWI conviction was enhanced to a Class D felony based on a prior conviction within five years. Held, judgment affirmed.

TITLE: Boss v. State
INDEX NO.: J.10.f.
CITE: (02-18-11), 944 N.E. 2d 16 (Ind. Ct. App. 2011)
SUBJECT: Double jeopardy - ordinance proceeding not a criminal penalty
HOLDING: Tr. Ct. did not abuse its discretion by denying D's motion to dismiss on double jeopardy grounds. The federal Double Jeopardy Clause protects only against the imposition of multiple criminal punishments for the same offense. When determining whether a statutorily defined penalty is civil or criminal, the courts apply the intent-effects test. First, the courts ask whether the legislature in establishing the penalizing mechanism indicated either expressly or impliedly a preference for one label or the other. Even if the intent is to establish a civil penalty, a statutory scheme that is so punitive either in purpose or effect transforms the intended civil remedy into a criminal penalty.

Here, three dogs D kept on her property attacked two victims, causing them serious bodily injury. As a result of the attack, the City of Indianapolis issued fifteen citations for ordinance violation, to which the D admitted twelve and was fined $1150.00 and ordered to pay court costs of $114.00. The State also charged D with six counts of dog biting resulting in serious bodily injury as class A misdemeanors and six counts of harboring a non-immunized dog as class B misdemeanors based on the same conduct on which the ordinance action was based. D moved to dismiss the charges as they violated double jeopardy. However, the legislature intended the ordinances to be a civil remedy, not a criminal penalty. The legislature authorized local units of government to create ordinances and establish the manner in which those ordinances are to be enforced but withheld from the units the powers to prescribe a penalty for conduct constituting a crime or infraction and to prescribe imprisonment for an ordinance violation. The legislature also limited the amount of a fine that may be imposed. Moreover, the purposes and effects of the ordinances do not transfer the ordinances into criminal penalties. Although the facts that underlie the ordinance violations also give rise to the criminal charges, imposition of a civil fine and a criminal sanction for the same transgression is permissible. The alternative purpose for the ordinances is promotion of public health and safety. Because there is little evidence that the ordinance enforcement actions serve a punitive purpose, the criminal prosecution does not place D in jeopardy a second time for the same offense. Held, judgment affirmed. May, J., concurring on the basis that there is no technical violation of double jeopardy, but Indianapolis did not have the authority to enact the ordinances under which D was first penalized because they prescribe a penalty for conduct also constituting a crime and that D's uncounseled admission in the ordinance proceedings may have denied D her presumption of innocence and right to counsel in her criminal proceedings.

TITLE: Bracksieck v. State
INDEX NO.: J.10.f.
CITE: (2nd Dist., 2-20-98), Ind. App., 691 N.E.2d 1273
SUBJECT: Double jeopardy - pointing a firearm & criminal recklessness
HOLDING: D's convictions & sentences for both pointing firearm & criminal recklessness violated prohibition against double jeopardy. Where same act or transaction constitutes violation of two distinct statutory provisions, test to determine whether there are two offenses or only one, is whether each provision requires proof of additional fact which other does not. Person who knowingly or intentionally points firearm at another person commits Class D felony. Ind. Code § 35- 47-4-3. Person who recklessly, knowingly, or intentionally performs act that creates substantial risk of bodily injury to another person while armed with deadly weapon commits criminal Recklessness, Class D felony. Ind. Code § 35-42-2-2(b)(1). Although many acts create substantial risk of bodily harm, no situation in which pointing loaded firearm at another person does not also create substantial risk of bodily injury to that person. Thus, when firearm is involved, as here, elements of both statutes consist only of knowingly or intentionally pointing firearm at another person. Under these circumstances, pointing firearm, as class D felony & criminal recklessness, as class D felony, are same offense for double jeopardy purposes & D cannot be convicted of both offenses without violating both state & federal prohibitions against double jeopardy. Held, conviction & sentence for pointing firearm reversed.

TITLE: Bradley v. State
INDEX NO.: J.10.f.
CITE: (10/30/2018), 113 N.E.3d 742 (Ind. Ct. App. 2018)
SUBJECT: Double jeopardy violation - "very same act" test
HOLDING: There is a distinction in double jeopardy law between the actual evidence test and the common law “very same act” test adopted in Guyton v. State, 771 N.E.2d 1141 (Ind. 2002). But subsequent case law has not clearly delineated the two tests or articulated how they might be different. Here, D was convicted of two counts of Level 1 felony child molesting, one count of Level 4 felony child molesting and one count of incest. There was no Art. 1, Section 14 double jeopardy violation under Richardson's actual evidence test. But Court concluded there was a reasonable possibility that the behavior underlying D's convictions for the two Level 1 felony counts was coextensive with the very same acts that were the bases of his convictions for the other two counts. Held, judgment affirmed in part and remanded with instructions to vacate Level 4 felony child molesting and incest convictions.

TITLE: Britt v. State
INDEX NO.: J.10.f.
CITE: (1st Dist., 6-29-04), Ind. App., 810 N.E.2d 1077
SUBJECT: Double jeopardy - which conviction to vacate
HOLDING: Finding a double jeopardy violation, Ct. dismissed a possession of marijuana conviction as a Class D felony while affirming a possession conviction as a Class A misdemeanor. While typically a double jeopardy violation will result in the greater penalty remaining, Ct. kept the lesser-penalized conviction because of inconsistent judgments that found D guilty of cultivating less than 30 grams of marijuana while possessing over 30 grams of marijuana. Vacation of the conviction & sentence for the included offense of possession will result in D standing convicted of the offense having an additional element of proof but a lesser penalty. See Footnote 5. Held, judgment affirmed in part; remanded to vacate Class D felony possession conviction & to sentence accordingly.

TITLE: Brown v. State
INDEX NO.: J.10.f.
CITE: (1st Dist., 09-10-09), 912 N.E.2d 881 (Ind. Ct. App. 2009)
SUBJECT: Double jeopardy claim - possession of child pornography/child exploitation
HOLDING: D's multiple convictions for three counts of child exploitation and five counts of possession of child pornography did not violate double jeopardy. D argued that relating separate pornographic images to each count does not differentiate these crimes sufficiently to overcome risk of double jeopardy. However, definition of "matter" at Ind. Code 35-49-1-3 evidences legislature's intent to criminalize as a distinct occurrence the dissemination of each book or picture. Thus, the dissemination of each image of child pornography was a separate crime supported by different facts, i.e., the specific, singular image so disseminated. In so holding, Court noted that those like D who view and/or make available to others child pornography harm the individual children depicted: (1) by perpetuating the abuse initiated by the creator of material; (2) by invading the child's privacy; and 3) by providing an economic motive for producers of child pornography. Court's analysis with regard to multiple convictions for child exploitation applies equally to the propriety of multiple convictions for possession of child pornography under Ind. Code 35-42-4-4(c).

Rejecting D's claim under Indiana Constitution, Court held that under actual evidence test, although much of evidence to prove elements of each group of crimes overlapped, State established each challenged offense by separate and distinct image of child pornography. Finally, Court rejected D's argument that multiple punishments disallows reformation as provided for in Indiana Constitution, article 1, section 18. The limitation on consecutive sentencing imposed for an episode of criminal conduct prevents excessive punishment and removes any incentive to State to excessively prosecute. Held, judgment affirmed.

Note: But see Scuro v. State, 849 N.E.2d 682 (Ind. Ct. App. 2006) (a D may not be convicted of more than one count of dissemination of matter harmful to minors based on one occurrence, even if there was more than one victim); Adams v. State, 804 N.E.2d 1169 (Ind. Ct. App. 2004) (the sale of four videotapes to a detective constituted one act of distribution of obscene matter).

RELATED CASES: Pontius, 930 N.E.2d 1212 (Ind. Ct. App. 2010) (while two of D's convictions were based upon possession of a single identical digital video file, he downloaded that file at two separate times, onto two separate computers and hard drives located at two separate residences; thus, no DJ violation).

TITLE: Brown v. State
INDEX NO.: J.10.f.
CITE: (5/6/2016), 52 N.E.3d 945 (Ind. Ct. App. 2016)
SUBJECT: Multiple convictions not barred by single larceny rule
HOLDING: D's convictions for Class A felony robbery and Class A felony burglary violated double jeopardy because they were both enhanced by the same bodily injury. However, the single larceny rule did not apply among D's three carjacking convictions and robbery conviction, which involved individual property of three separate victims. Also, as to two of the victims, rule did not apply to property taken from the bank and from the house because they were not taken at the same time from the same place. With respect to the third victim, although separate property was taken from the same place at the same time (electronics, money, keys, and car), rule did not apply because some of the property was charged under the theft statute and the car was charged as a separate violation under the auto theft statute. See J.R. v. State, 982 N.E.2d 1037 (Ind. Ct. App. 2013). Held, judgment affirmed in part and reversed in part on other grounds.

TITLE: Bruce v. State
INDEX NO.: J.10.f.
CITE: (4th Dist., 5-22-01), Ind. App., 749 N.E.2d 587
SUBJECT: Double jeopardy - multiple offenses committed as part of protracted criminal episode
HOLDING: Where evidence & defense counsel's own argument presented shooting as completely separate event from subsequent confinement & battery of victim, Ct. found no reasonable possibility that jury convicted D of attempted aggravated battery & criminal confinement with deadly weapon using same facts, thus double jeopardy did not preclude convictions for both offenses. However, Ct. vacated D's conviction for battery resulting in bodily injury because there was reasonable possibility jury used same evidentiary facts to convict him of confinement with deadly weapon & battery. Ct. also rejected D's argument that it violates Sixth & Fourteenth Amendments to U.S. Constitution for appellate Cts. to determine whether there is "reasonable possibility" that jury used same evidence to convict D of two different crimes. Held, judgment affirmed in part, reversed in part, & remanded.

RELATED CASES: Anthony, 56 N.E.3d 705 (Ind. Ct. App. 2016) (D's two rape convictions – as an accomplice – do not violate DJ prohibition as the acts were distinct, differing in time and place).

TITLE: Bryant v. State
INDEX NO.: J.10.f.
CITE: (12-27-95), Ind., 660 N.E.2d 290
SUBJECT: Controlled substance excise tax (CSET) - double jeopardy (DJ)
HOLDING: Assessment of Ind.'s CSET & its 100% penalty against D was punishment & thus a jeopardy attachment, barring subsequent criminal drug prosecution. After arresting D, police contacted Indiana Department of Revenue. Department assessed tax, met with D & demanded payment. Because D did not immediately pay CSET, Department served him with "Record of Jeopardy Findings & Jeopardy Assessment Notice & Demand," which required payment of CSET plus 100% penalty for nonpayment. State next charged D with failure to pay CSET & other criminal drug-related charges. After D was convicted on all criminal charges, he appealed criminal penalty on DJ grounds.

Ct. first held that as in Montana Dep't of Revenue v. Kurth Ranch, 114 S. Ct 1937, Ind.'s CSET has punitive characteristics that subject it to constraints of DJ Clause. Under "same elements" analysis for DJ, CSET's civil & criminal sanctions are punishments for same offense. Ct. reviewed Ind. Code 6-7-3-11(a) & (b) and, with exception of mens rea requirement, found no distinction between criminal penalty for nonpayment & civil penalty & assessment. Here, jeopardy first attached when Dept. of Revenue served D with its Jeopardy Assessment, which was judgment against D for CSET & 100% nonpayment penalty. When jury was sworn in D's criminal trial for nonpayment of CSET, second jeopardy attached & barred criminal conviction for nonpayment. D's convictions for growing & possessing marijuana were also subsequent jeopardies barred by DJ Clause. Held, transfer granted, convictions for failure to pay CSET, growing & cultivating marijuana vacated, conviction for maintaining common nuisance affirmed; DeBruler, J., concurring & dissenting; Sullivan, J., dissenting. **Note:** See also Collins & Whitt, this section. See other decisions on this issue at K.8.k.

RELATED CASES: Tuan Chu, 991 N.E.2d 142 (Ind. Ct. App. 2013) (even assuming Bryant is still good law and is applicable in determining whether a civil sanction is a punishment for Indiana double jeopardy purposes, D did not show that the nonpayment penalties were punishments for double jeopardy purposes); Garcia, App., 686 N.E.2d 883 (convictions for dealing & possession of marijuana which occurred after CSET assessment violated DJ); Mohler, 694 N.E.2d 1129 (does not apply retroactively to cases on collateral review).

TITLE: Buchanan v. State
INDEX NO.: J.10.f.
CITE: (1st Dist., 01-23-09), Ind. App., 913 N.E.2d 712
SUBJECT: Double jeopardy - continuing crime doctrine; false reporting & related robbery
HOLDING: D's convictions for false reporting and robbery were barred by the continuing crime doctrine, which provides that actions that are sufficient in themselves to constitute separate crimes "may be so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." Riehle v. State, 823 N.E.2d 287 (Ind. Ct. App. 2005). Here, D phoned in false bomb threats as a diversionary tactic to facilitate his robbery of a bank, during which he used a shotgun to intimidate bank's employees into giving him money in vault. These crimes fell within the continuing crime doctrine. Court also held that D's command for bank employees to lie on the ground did not constitute confinement more extensive than necessary to commit the robbery. Held, false reporting, intimidation and confinement convictions vacated, robbery conviction affirmed; Brown, J., dissenting on this issue.

RELATED CASES: Anthony, 56 N.E.3d 705 (Ind. Ct. App. 2016) (D's two rape convictions as an accomplice do not violate DJ prohibition as the acts were distinct, differing in time and place); Pugh, 52 N.E.3d 945 (Ind. Ct. App. 2016) (continuing crime doctrine did not bar D's two rape convictions because even though the crimes were committed close in time and place, they were distinct, chargeable offenses); Chavez, 988 N.E.2d 1226 (Ind. Ct. App. 2013) (where D was charged with touching the alleged victim in two places while kissing her, and then touching her while kissing her a second time, continuing crime doctrine prohibits convictions for each kiss or touch); Borum, 951 N.E.2d 619 (Ind. Ct. App. 2011) (where D attempted to carjack a car and then rob two people outside of the car, there was not one continuous act; D was properly sentenced for both attempted carjacking and attempted robbery); Walker, 932 N.E.2d 733 (Ind. Ct. App. 2010) (disagreeing with Buchanan, Ct. noted that offenses of burglary, robbery of one victim, and criminal confinement of another victim did not violate continuing crime doctrine, as each offense was a distinct, chargeable crime); Baugh, 926 N.E.2d 497 (Ind. Ct. App. 2010), *sum. aff'd*, 933 N.E.2d 1277 (D's two convictions for class B felony sexual misconduct with a minor did not violate continuing crime doctrine because the several acts of intercourse occurred over a four-month period in two different residences and thus were not "so compressed in time, place, singleness of purpose, and continuity of action as to constitute a single transaction").

TITLE: Buford v. State

INDEX NO.: J.10.f.

CITE: (12-23-2019), 139 N.E.3d 1074 (Ind. Ct. App.)

SUBJECT: Double jeopardy prohibited contempt finding for violation of same No Contact Order serving as basis for invasion of privacy conviction in separate cause

HOLDING: Defendant was charged with domestic battery and at trial his jail calls where admitted into evidence. In the calls, Defendant could be heard speaking with the complaining witness in violation of a No Contact Order. Defendant was found guilty of domestic battery. After the trial, the court set the matter for a hearing on a rule to show cause and found Defendant to be in contempt of court for violation of the court's No Contact Order. Under a separate cause number, the State charged Defendant with several more counts of Invasion of Privacy, including for the same jail phone call for which he was found to be in Contempt of Court. The Court of Appeals found the Contempt of Court was punitive and therefore the Contempt of Court and Invasion of privacy conviction for the same conduct violated double jeopardy. Held, Contempt of Court finding vacated.

TITLE: Cameron v. State

INDEX NO.: J.10.f.

CITE: (11-25-80), Ind., 412 N.E.2d 1194

SUBJECT: Multiple punishments - prosecution for lesser-included offense after reversal of greater offense

HOLDING: D's armed robbery conviction at second trial, which occurred after convictions from first trial were reversed, did not violate double jeopardy. Charging D with greater offense, in effect, necessarily charges D with lesser-included offenses. Here, D was convicted of inflicting injury during commission of robbery at first trial & separate armed robbery count was dismissed prior to first trial. However, armed robbery charge effectively remained part of first trial as lesser-included offense of inflicting injury during commission of robbery, which resulted in conviction. Thus, D was never acquitted of armed robbery in first trial, & second trial did not result in conviction on charge of which D was previously acquitted. Held, judgment affirmed.

TITLE: Chavez v. State

INDEX NO.: J.10.f.

CITE: (2nd Dist., 1-28-00), Ind. App., 722 N.E.2d 885

SUBJECT: Double jeopardy violation - Indiana Constitution; dealing & conspiracy to commit dealing

HOLDING: D's convictions for dealing marijuana & conspiracy to commit dealing in marijuana constituted multiple punishment for "same offense" as proscribed by Art I, § 14 of Indiana Constitution. Under "actual evidence" test set forth in Richardson v. State, 717 N.E.2d 32 (Ind. 1999), Ct. concluded that D's activities relative to conspiracy counts were very same activities upon which State relied at trial to tie D to dealing counts & prove his status as accomplice. Further, manner in which D was charged & jury was instructed rendered occurrence of substantive crime, i.e., possession of marijuana with intent to deliver, an overt act in furtherance of conspiracy. Convictions for both conspiracy & underlying offense are not permitted where overt act charged in conspiracy is the underlying offense. Derado v. State, 622 N.E.2d 181 (Ind. 1993). D's state double jeopardy rights were violated on these counts because State was required to prove no fact to obtain conviction for dealing as accomplice in addition to those facts that it was required to prove to obtain conspiracy conviction.

However, D's convictions under Indiana's RICO statute & for predicate offenses supporting RICO charge were not subject to same "actual evidence" analysis under Richardson, & convictions for both RICO violation & its predicate offenses did not violate Indiana Constitution. Held, affirmed in part & remanded with instructions to vacate conspiracy convictions.

RELATED CASES: Lamagna, App., 776 N.E.2d 955 (there was reasonable possibility that evidentiary facts used by jury to establish D was dealing in cocaine were also used to establish that D conspired to possess cocaine); Thomas, App., 764 N.E.2d 306 (Tr. Ct. erred in denying D's motion to dismiss dealing in cocaine charge after he previously pled guilty to & was sentenced for conspiracy to deliver cocaine upon same evidence in another county; see full review, at J.10.d).

TITLE: Chiesi v. State
INDEX NO.: J.10.f.
CITE: (12-14-94), Ind., 644 N.E.2d 104
SUBJECT: No double jeopardy (DJ) - conspiracy & murder
HOLDING: There was no error in charging & convicting D with both murder & conspiracy to commit murder. In Buie, 633 N.E.2d 250, conspiracy & killing were alleged to have occurred virtually simultaneously, & only overt act in furtherance of conspiracy was murder itself. Here, charging information did not define overt act or who committed overt act, & evidence presented at trial revealed commission of two separate crimes. D not only entered into lengthy conspiracy but committed several overt acts in furtherance of conspiracy & also committed several acts after completion of conspiracy to carry out murder. Held, convictions affirmed.

RELATED CASES: Jack, App., 870 N.E.2d 444 (In view of jury instructions & evidence presented, Ct. found no substantial likelihood that evidentiary facts used by jury to establish essential elements of aiding, inducing, or causing murder may have also been used to establish essential elements of conspiracy to commit murder); Ziebell, App., 788 N.E.2d 902 (no DJ violation occurred as result of D's convictions for both murder & conspiracy to commit murder); Spivey, 761 N.E.2d 831 (in 3-2 decision, Ct. held that D's convictions for felony murder & conspiracy to commit burglary did not violate Indiana's DJ Clause under Richardson, even though only overt act supporting conspiracy charge was burglary itself, for which D had already been punished by reason of felony murder conviction; dissenting opinion invoked traditional common law rules reaffirmed in Pierce. 761 N.E.2d 826 (this section)); Neal, 659 N.E.2d 122 (Ct. vacated conspiracy to commit murder conviction where overt act alleged in support of conspiracy was murder itself); Parker, App., 660 N.E.2d 1025 (DJ did not preclude convictions for both criminal confinement & conspiracy to commit criminal confinement, where D performed acts independent of actual confinement which could have supported conspiracy conviction & jury instructions were not intrinsically bound to charging documents).

TITLE: Collier v. State

INDEX NO.: J.10.f.

CITE: (4th Dist.; 8-31-99), Ind. App., 715 N.E.2d 940

SUBJECT: Double jeopardy - same elements; criminal recklessness & carrying handgun without license

HOLDING: D's convictions & consecutive sentences for both criminal recklessness as Class D felony based upon use of deadly weapon & carrying handgun without license violated federal constitutional protection against double jeopardy. Where same act or transaction constitutes violation of two distinct statutory provisions, test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of additional fact which other does not. Games, 684 N.E.2d 466, modified on other grounds, 690 N.E.2d 211 (Ind. 1997). Conviction of possession of handgun without license requires only proof of possession of deadly weapon. Proof that D does not possess license to carry handgun is not element of statute, but rather proof of valid license is defense to crime. Because only statutory element of possession of handgun without license is proof of possession of deadly weapon which is also element of criminal recklessness as class D felony, possession of handgun does not require proof of additional fact that is not required by Class D felony criminal recklessness. Held judgment reversed in part & affirmed in part; Bailey, J., concurring in part & dissenting in part.

RELATED CASES: Woods, App., 768 N.E.2d 1024 (disagreeing with Collier, Ct. held that convictions for carrying handgun without license & criminal recklessness with deadly weapon do not violate double jeopardy principles because each offense requires proof of additional fact that other does not); Burk, App. 716 N.E.2d 39 (convictions for resisting law enforcement while drawing handgun & possession of handgun without license did not violate federal double jeopardy because, based on Fields, App., 676 N.E.2d 27, lack of valid license is element of possession of unlicensed handgun for double jeopardy purposes).

TITLE: Curry v. State

INDEX NO.: J.10.f.

CITE: (2nd Dist., 12-28-00), Ind. App., 740 N.E.2d 162

SUBJECT: Double jeopardy - enhanced criminal deviate conduct, attempted rape & burglary convictions

HOLDING: D was subjected to double jeopardy when he was charged with & convicted of criminal deviate conduct (CDC), attempted rape, & burglary as Class A felonies, because there was reasonable possibility jury based its guilty verdicts for three counts on same act by D. Battery information alleged that D strangled victim around neck which resulted in serious bodily injury, i.e., unconsciousness. Victim sustained multiple injuries during beating she suffered after she regained consciousness, but beating that apparently supported enhancement of CDC, attempted rape & burglary charges consisted of single episode of brutality & cannot be classified as separate & distinct incidents. Furthermore, State presented no evidence at trial that would have indicated to jury that "force" elements of three charges were to be satisfied by distinct acts of violence. There was reasonable possibility jury used same facts to establish essential elements of force or injury that were used to enhance all three charges to Class A felonies, thus D was subjected to double jeopardy. Held, convictions of battery as Class C felony & attempted rape as Class A felony affirmed. Burglary & CDC convictions reduced to Class B felonies. Darden, J., dissenting in part, would affirm attempted rape conviction, reduce CDC conviction to Class B felony & vacate burglary & battery convictions.

RELATED CASES: Girtin, 136 N.E.3d 1160 (Ind. Ct. App.) (strangulation and rape convictions violated actual evidence test); Porter, 935 N.E.2d 1228 (Ind. Ct. App. 2010) (enhancement of D's two nonsupport offenses to Class C felony status based on the same $20,000 arrearage violated Indiana's common law double jeopardy tradition that prohibits multiple enhancements based upon a single act); Baltimore, App., 878 N.E.2d 253 (given two separate instances of touching, there was no reasonable possibility jury used same facts to sustain sexual battery & burglary resulting in bodily injury convictions); Morrison, App., 824 N.E.2d 734 (D's two counts of attempted criminal deviate conduct & convictions for two counts of sexual battery violated DJ); Holloway, App., 773 N.E.2d 315 (D's convictions for both criminal deviate conduct & rape as Class A felonies violated common law double jeopardy principles because serious bodily injury supporting both convictions stemmed from single criminal episode, despite fact that multiple blows were delivered); Hancock, App., 758 N.E.2d 995 (there was no reasonable possibility that evidentiary facts used by jury to establish essential elements of rape were also used to establish essential elements of criminal deviate conduct).

TITLE: Curtis v. State
INDEX NO.: J.10.f.
CITE: (8/26/2015), 42 N.E.3d 529 (Ind. Ct. App. 2015)
SUBJECT: Two separate robbery convictions and auto theft conviction did not violate single larceny rule
HOLDING: Tr. Ct. did not abuse its discretion in entering judgment of conviction and sentences for two counts of Class B felony armed robbery based on two separate and distinct persons. D first robbed a CVS pharmacist and demanded Opana pills. Seconds later, he turned his gun on the pharmacy technician and demanded her car keys. Single larceny rule does not apply where, as here, a robber takes the individual property of separate individuals. Ferguson v. State, 273 Ind. 468, 470, 405 N.E.2d 902, 904 (1980); see also McKinney v. State, 272 Ind. 689, 400 N.E.2d 1378 (1980) (robbery of a business and of the business's owner constituted two separate and distinct robberies).

D's convictions for taking pharmacy technician's car keys during the robbery then taking her car seconds later were based on separate and distinct acts and likewise did not violate the single larceny rule. The CVS parking lot was not part of the actual pharmacy. Bivins v. State, 642 N.E.2d 928, 945 (Ind. 1994). Moreover, D was charged with separate and distinct crimes of armed robbery (Ind. Code35-42-5-1) and auto theft (Ind. Code35-43-4-2.5), thus the single larceny rule did not apply. J.R. v. State, 982 N.E.2d 1037 (Ind. Ct. App. 2013). Held, judgment affirmed.

RELATED CASES: Dupree, 51 N.E.3d 1251 (Ind. Ct. App. 2016) (single larceny rule did not apply among three carjacking charges, and to D's convictions for robbing victim of various personal property and then stealing her car).

TITLE: Derado v. State
INDEX NO.: J.10.f.
CITE: (10-29-93), Ind., 622 N.E.2d 181
SUBJECT: Double Jeopardy (DJ) - Conspiracy & substantive offense
HOLDING: Although DJ does not necessarily preclude convictions for both conspiracy to commit felony & underlying felony, they are precluded if overt acts alleged in furtherance of conspiracy are same as acts supporting conviction for underlying felony; reversing memorandum decision. D was convicted of 5 counts of dealing cocaine & conspiracy to deal cocaine. He did not actually deliver any cocaine, & dealing convictions were based on accomplice liability. Information for dealing alleged D & co-D knowingly delivered cocaine on 5 occasions. Conspiracy information alleged same parties agreed to commit offense of dealing & that overt acts in furtherance of conspiracy were co-D's delivery of cocaine on same occasions charged in dealing counts. D's activities relative to conspiracy were same activities giving rise to accomplice liability on dealing counts. Although Blockburger v. U.S., 284 U.S. 299, says whether there are two offenses or only one is determined by whether each statutory provision requires proof of additional fact other does not, manner in which offenses are charged must also be considered, Tawney, 439 N.E.2d 582. Where, as charged, acts involved are same necessary elements, DJ will preclude multiple convictions, Hall, 493 N.E.2d 433, Wethington, 560 N.E.2d 496.

Statutes defining dealing & conspiracy to deal raise theoretical possibility that convictions on both could be permissible because each requires proof of element other does not; i.e., conspiracy requires proof of agreement to deal plus overt act in furtherance, but does not require actual dealing, while dealing charge requires actual delivery. In D's case, however, State chose to allege commission of dealing as requisite overt act in furtherance of conspiracy & was required to prove no facts to obtain dealing conviction in addition to those proven to obtain conspiracy conviction. Therefore, dealing was not merely offense occurring in same criminal episode as conspiracy, it was necessary element of conspiracy as charged.

Ct. noted decision did not necessary affect body of case law that convictions for both underlying felony & conspiracy to commit felony were possible, see e.g., Witte, 550 N.E.2d 68, U.S. v. Felix, 112 S. Ct. 1377. Holding is limited to instances where information & instructions rely on same facts to prove both accomplice liability on underlying offense & overt act in furtherance of conspiracy, Givan, J., dissenting.

RELATED CASES: James, 953 N.E.2d 1191 (Ind. Ct. App. 2011) (where the charging information, the evidence adduced at trial, and the argument of the prosecutor all support a conclusion that the jury did not use the same evidence to convict D of both conspiracy to commit robbery and aiding in the commission of robbery, no dj violation; conspiracy and robbery were based on different events); Turnley, 725 N.E.2d 87 (even if there was separate agreement to murder & agreement to commit burglary, D's conviction of conspiracy to commit murder & murder violated Indiana Double Jeopardy Clause); Grinstead, 684 N.E.2d 482 (Derado is no longer accurate statement of DJ claims under 5th Amendment; see review, this section); Moore, App., 666 N.E.2d 109 (because robbery of victim was not overt act element alleged in conspiracy charge, State was permitted to try D again on robbery charge); Parker, App., 660 N.E.2d 1025 (DJ did not preclude convictions for both criminal confinement & conspiracy to commit criminal confinement, where D performed acts independent of actual confinement which could have supported conspiracy conviction & jury instructions were not intrinsically bound to charging documents); Morgan, App., 648 N.E.2d 1164 (conviction for dealing vacated where State could have gained conspiracy conviction based upon same overt act supporting dealing conviction;

neither charging information nor final jury instruction specified dates upon which D allegedly committed offenses).

TITLE: Dixon v. State
INDEX NO.: J.10.f.
CITE: (10-28-02), Ind. App., 777 N.E.2d 110
SUBJECT: Voluntary & involuntary manslaughter convictions - double jeopardy violation
HOLDING: D's convictions for both voluntary & involuntary manslaughter violated double jeopardy. Here, D was convicted of killing her husband in sudden heat by raising gun to "show him" when it went off, fatally wounding him. In order to prove voluntary manslaughter, State must show that D knowingly, or intentionally killed another human being. Evidence that D admitted killing husband after raising gun & stating she would "show him" supported jury's conclusion that D pointed gun while knowing of high probability of resulting death or serious injury. In order to prove involuntary manslaughter, State must show that D killed person while committing or attempting to commit felony of pointing loaded firearm at another person, act that inherently poses risk of serious bodily injury. Same evidence supported jury's conviction for involuntary manslaughter. Therefore, there is reasonable possibility that evidentiary facts used by jury to establish that D committed offense of voluntary manslaughter may also have been used to establish essential elements of offense of involuntary manslaughter. Guyton v. State, 771 N.E.2d 1141 (Ind. 2002). Held, involuntary manslaughter conviction vacated.

TITLE: Eckelbarger v. State

INDEX NO.: J.10.f.

CITE: (12/10/2015), 46 N.E. 3d 1267 (Ind. Ct. App. 2015)

SUBJECT: Delivery and manufacturing methamphetamine convictions did not violate double jeopardy; consecutive sentences affirmed

HOLDING: D's convictions for three counts of Class B felony dealing in methamphetamine did not violate double jeopardy. Two convictions were based on deliveries of methamphetamine during controlled buys on two separate dates a week apart, while the third conviction was based on manufacturing methamphetamine. To prove manufacture, the State relied on evidence seized from D's home the day after the second delivery and his prior year history of pseudoephedrine purchases. Thus, the acts of delivering and manufacturing were not part of the same continuous offense and did not fit the continuing crime doctrine.

Moreover, because the crimes were distinct in nature and not part of a continuous transaction, D's crimes were not part of a single episode of criminal conduct. Therefore, Tr. Ct. did not abuse its discretion by ordering consecutive sentences in excess of the maximum 30-year advisory sentence for a Class A felony pursuant to Ind. Code § 35-50-1-2(c). Held, judgment affirmed.

TITLE: Fields v. State
INDEX NO.: J.10.f.
CITE: (2nd Dist., 1-17-97), Ind. App., 676 N.E.2d 27
SUBJECT: Criminal recklessness & possession of handgun without license - double jeopardy claim
HOLDING: Convictions for criminal recklessness & possession of handgun without license did not violate double jeopardy. Charging information for possession of handgun alleged that D carried unlicensed handgun, while criminal recklessness charge alleged that D created substantial risk of bodily injury while armed with handgun. Ct. found that possession of handgun without license is not inherently included offense of criminal recklessness, because it has element that criminal recklessness does not, i.e.: lack of valid license. Further, because each conviction was supported at trial by different conduct, there was no double jeopardy violation. Held, convictions affirmed, remanded on other grounds for new sentencing hearing; Sullivan, J., dissenting.

NOTE: Majority concluded that although lack of valid license to carry handgun is not element of crime of possession of handgun, lack of valid license is nevertheless an element of offense for purposes of double jeopardy analysis.

TITLE: Flores v. State
INDEX NO.: J.10.f.
CITE: (11/21/2018), 114 N.E.3d 522 (Ind. Ct. App. 2018)
SUBJECT: Two child molesting convictions violated continuous crime doctrine
HOLDING: Following the reasoning and logic of Chavez v. State, 988 N.E.2d 1226 (Ind. Ct. App. 2013), Court held that D's two Level 4 felony child molesting convictions constituted only "one chargeable crime" and thus violated the continuous-crime doctrine. Evidence showed that D put his penis between C.G.'s butt cheeks while he touched her vagina over her underwear. These acts were closely connected in time, place, and continuity of action and therefore constitute a single transaction. Held, judgment reversed and remanded to vacate one of D's convictions.

TITLE: Francis v. State
INDEX NO.: J.10.f.
CITE: (11-30-01), Ind., 758 N.E.2d 528
SUBJECT: Double jeopardy - murder & robbery
HOLDING: After D was convicted of murder & three counts of Class A robbery, Tr. Ct. erred in imposing sentences for Class B felony robberies. Tr. Ct. imposed sentences for Class B felony robberies because serious bodily injury alleged in each count - death to victim - was element State relied upon to support murder charge & to elevate robbery offenses to A felonies. Ct. remanded to impose sentences for Class C felony robberies because phrase "mortal gunshot wound" in charging information cannot be said to have put D on notice that he was being charged with "armed with deadly weapon" variety of Class B felony robbery. Thus, Class B felony robbery was not factually included lesser offense of robbery as Class A felony in this case. Held, robbery convictions vacated & remanded for new sentencing order that imposes sentences for robbery as Class C felonies; Boehm, J., dissenting.

RELATED CASES: Minnick, 965 N.E.2d 124 (Ind. Ct. App. 2012) (where stab to victim's back was cause of death and also cited as serious bodily injury element for class A felony robbery, convictions for murder and class A felony robbery violated DJ; remanded with instructions to reduce robbery conviction to class B felony); Orta, 940 N.E. 2d 370 (Ind. Ct. App. 2011) (Tr. Ct. alleviated any potential double jeopardy problem by reducing D's conviction for class B felony operating with a controlled substance in the blood causing death to class A misdemeanor, instead of vacating D's murder conviction); Deloney, 938 N.E.2d 724 (Ind. Ct. App. 2010) (DJ where same bodily injury, death, was used to enhance D's conviction of both burglary and attempted robbery to Class A felony; held, remanded for reduction of conviction to Class C felony attempted robbery); Owens, App., 897 N.E.2d 537 (D's convictions for both murder and robbery resulting in serious bodily injury violated Ind. common law prohibition against DJ; charging information makes clear that the SBI that enhanced robbery charge from Class C to Class A felony - victim's death - was the exact same harm for which D was convicted and punished for murder); McBride, App., 837 N.E.2d 182 (State's failure to provide D with notice in the charging information alleging that robbery was committed while armed with a deadly weapon required the conviction to be reduced to a Class C felony; see full review at A.3.a).

TITLE: Games v. State
INDEX NO.: J.10.f.
CITE: (7-22-97), Ind., 684 N.E.2d 466
SUBJECT: Double Jeopardy (DJ) - multiple punishments
HOLDING: When analyzing claim of multiple punishments imposed in single criminal proceeding, U.S. S. Ct. has declared that sole purpose of DJ clause is to ensure that Ct. imposes no more punishment on D than legislature intended. Missouri v. Hunter, 103 S. Ct. 673 (1983). Whether multiple punishments may be imposed against D in single proceeding is, thus, solely matter of legislative intent. Iannelli v. U.S., 95 S. Ct. 1284. It is only when legislative intent to impose multiple punishments is uncertain that further inquiry is required. This inquiry, known as "same elements," test, determines whether legislature intended to impose separate punishments for multiple offenses arising in course of single act or transaction. Blockburger v. U.S., 52 S. Ct. 180 (1932). Whether there are two offenses or only one under Blockburger is determined by whether each statutory provision requires proof of an additional fact which the other does not. If Blockburger is satisfied, Ct. assumes that statutes are not punishing same offense & multiple punishment is constitutionally permitted.

Constrained by Supremacy Clause to bring decisions interpreting federal DJ Clause in line with federal jurisprudence, Ct. recognized that "same elements" test requires that Ct. look only to statutory elements of offenses, not to charging information, jury instructions outlining elements of crime, or underlying proof needed to establish elements. Held, judgment of post- conviction Ct. affirmed, with exception that conviction for conspiracy to commit battery must be vacated on DJ grounds; Sullivan, J., concurring.

Note: Ct. expressed no opinion as to whether DJ clause of Ind. Constitution, Art. I, Sec. 14, provides distinction between "successive prosecution" & "successive punishment" strands of DJ.

RELATED CASES: Kunberger, 46 N.E.3d 966 (Ind. Ct. App. 2015) (D didn't waive direct review of double jeopardy claim by pleading guilty because he pled in open court without benefit of a plea deal); Richardson, 717 N.E.2d 32 (Ind. Constitution provides broader protection against DJ than U.S. const.; see card at J.10.f); Fulk, App., 686 N.E.2d 164 (imposition of maximum consecutive sentences for battery & invasion of privacy did not violate DJ); Sharp, App., 684 N.E.2d 544 (no DJ violation to base conspiracy conviction & prior conviction on same illegal drug activity).

TITLE: Games v. State
INDEX NO.: J.10.f.
CITE: (3-20-01), Ind., 743 N.E.2d 1132
SUBJECT: Guilty plea waived double jeopardy claim
HOLDING: D waived his right to challenge his sentence for murder, robbery & conspiracy to commit robbery when he entered plea agreement for sentence between sixty & 118 years. As part of plea agreement, State agreed to drop its request for death penalty. Once D bargained for reduced charge, he could not challenge sentence on double jeopardy grounds. Griffin v. State, 540 N.E.2d 1187 (Ind. 1989). Held, 110-year sentence affirmed.

RELATED CASES: Wharton, 42 N.E.3d 539 (Ind. Ct. App. 2015) (D pleaded guilty in open court without an agreement that might have brought him some benefit in return; thus, he did not waive his right to challenge his convictions); Fields, App., 825 N.E.2d 841 (notwithstanding plea agreement, Tr. Ct. did not err at sentencing when it merged attempted robbery & conspiracy to commit robbery to comply with Ind. Code 35-41-5-3; merger at sentencing is not collateral attack); Mays, App., 790 N.E.2d 1019 (although advising D to plead guilty to offenses which violate double jeopardy principles may be seriously questioned, it is not per se ineffective where D does not present any evidence to support his claim); O'Connor, App., 789 N.E.2d 504 (D waived his DJ claim by entering into a plea agreement regarding both forfeiture action & multiple criminal charges on same day); Mapp., 770 N.E.2d 332 (there is no exception to this rule for facially duplicative charges).

TITLE: Garrett v. State
INDEX NO.: J.10.f.
CITE: (8/28/2013), 992 N.E.2d 710 (Ind. 2013)
SUBJECT: Double jeopardy actual evidence test applies to charge retried
HOLDING: In issue of first impression, Court held that the Indiana double jeopardy "actual evidence test" applies to cases in which a jury acquits a D of one charge but cannot reach a verdict on a second charge, and where the D is subsequently convicted of the second charge on retrial. See Richardson v. State, 717 N.E.2d 32, 53 (Ind. 1999). Here, D was charged with two counts of rape, Rape A and Rape B. D was acquitted of Rape A, and the jury hung on Rape B. D was convicted of Rape B in the second trial. The State's evidence of Rape B largely consisted of the evidence it used in the first trial in trying to prove Rape A. Because of this and "given the relative paucity of evidence on retrial concerning Rape B, . . . there is reasonable possibility that the evidentiary facts used by the jury in the first trial to establish the essential elements of Rape, for which [D] was acquitted, may also have been used on retrial to establish all of the essential elements of Rape [B] for which [D] was convicted." Thus, D was twice prosecuted for the same offense in violation of article 1, section 14 of the Indiana Constitution. Held, transfer granted, Court of Appeals opinion at 965 N.E.2d 115 vacated, and judgment affirmed.

RELATED CASES: Cleary, 23 N.E.3d 664 (Ind. 2015) (despite Garrett, Ct. rejected D's argument that Indiana's double jeopardy clause barred retrial after Tr. Ct. refused to enter judgment of conviction on previous jury verdict on lesser included misdemeanor offenses; second trial on greater offenses that deadlocked the first jury was "simply a continuation of the jeopardy"); Harris, 992 N.E.2d 887(Ind. Ct. App. 2013) (applying same evidence test on rehearing in light of Garrett, Ct. concluded that double jeopardy did not bar retrial on Class C felony sexual misconduct with minor charge after jury hung on that charge and acquitted D on Class B felony rape charge).

TITLE: Geiger v. State
INDEX NO.: J.10.f.
CITE: (1st Dist., 05-23-07), Ind. App., 866 N.E.2d 380
SUBJECT: Double jeopardy (DJ) - impersonating a public servant
HOLDING: A D may not be convicted of more than one count of impersonating a public servant pursuant to Ind. Code 35-44-2-3 based on the same occurrence, even if there are multiple victims.
There are two different types of criminal statutes: 1) result-oriented statutes intended to criminalize activity where a "bad result" must occur for the D to be convicted of the crime, & 2) conduct-oriented statutes intended to criminalize "activity likely to produce bad results if not nipped in the bud," which do not require a victim to actually suffer a bad result for the D to be convicted. Kelly v. State, 527 N.E.2d 1148, 1154 (Ind. Ct. App. 1988), summarily *aff'd*, 539 N.E.2d 25 (Ind. 1989). Multiple convictions may be sustained pursuant to a result-oriented criminal statute if D's conduct involved multiple victims. Scuro v. State, 849 N.E.2d 682 (Ind. Ct. App. 2006). However, D may only be convicted once for a violation of a conduct-oriented statute even if his actions affect multiple victims because the harm to the victims is not included in the statutory definition of the crime. As drafted, Ind. Code 35-44-2-3 is a conduct-oriented statute that focuses on D's act of impersonating a public servant & his intent to mislead another person. Statute does not require victim to actually believe or be induced by misrepresentation to act to his detriment. Held, judgment affirmed in part & remanded to vacate one of D's convictions for impersonating a public servant.

TITLE: Grafe v. State
INDEX NO: J.10.f.
CITE: (2nd Dist., 10-21-97), Ind. App., 686 N.E.2d 890
SUBJECT: Double jeopardy - enhancements; deadly weapon
HOLDING: Ind. Constitution's Double Jeopardy Clause forbids single act from providing basis for one conviction & at same time being used to elevate another conviction. Bevill, 472 N.E.2d 1247. However, there is no double jeopardy violation to elevate multiple offenses on basis that they were committed while armed with deadly weapon if D was armed during commission of each offense. Here, D was convicted of rape, criminal deviate conduct, confinement & battery of one victim & criminal confinement & attempted murder of another victim. Most of these convictions were enhanced based on D being armed with deadly weapon or act resulting in serious bodily injury. Although sex offenses & criminal confinement could not be enhanced by fact that they resulted in serious bodily injury, enhancements were proper because D was armed with deadly weapon. In so holding, Ct. noted that interpretation of Double Jeopardy Clause of Ind. Constitution was not altered by Ind. S. Ct.'s recent decision in Games, 684 N.E.2d 466. Held, judgment affirmed.

RELATED CASES: Sistrunk, 36 N.E.3d 1051 (Ind. 2015) (Ct's recognition in Richardson of the common law rule establishing that enhancements cannot be imposed for "the very same behavior" could not have included the use of a single deadly weapon during the commission of separate offenses); Ellerman, App., 786 N.E.2d 788 (because D fired only one shot, it is clear that conviction for attempted battery arose from same evidence that also gave rise to attempted murder conviction); Oeth, App., 775 N.E.2d 696 (D's convictions for aggravated battery & battery violated DJ, where same "touching" supported both convictions); Walker, App., 758 N.E.2d 563 (it was improper for evidence of use of handgun to be used to enhance both voluntary manslaughter conviction & robbery conviction); Williams, App., 757 N.E.2d 1048 (there was reasonable possibility that evidentiary facts used by jury to establish essential elements of robbery as Class A felony were also used to establish essential elements of attempted murder); Hopkins, App., 747 N.E.2d 598 (D's convictions for Class A felony robbery & attempted murder violated Double Jeopardy under Article I, Section 14 of Indiana Constitution); Spears, 735 N.E.2d 1161 (Ct. reduced Class A robbery conviction to C felony because jury used same evidentiary facts to support murder & elevated robbery convictions); Noble, App.,734 N.E.2d 1119 (D's convictions for battery with deadly weapon & battery resulting in serious bodily injury violated Ind. constitutional prohibition against double jeopardy); Vanzandt, App., 731 N.E.2d 450 (because evidence that D used gun to order victim to ground was used to prove robbery & confinement, conviction for confinement must be vacated); Cutter, 725 N.E.2d 401 (class A felony rape due to deadly force & murder convictions violated DJ; rape reduced to class B felony); Richardson, 717 N.E.2d 32 (Ind. Const. provides broader protection against DJ than U.S. const.; see card at J.10.f); Smith, App., 717 N.E.2d 1277 (considering evidence presented of confinement well beyond robbery & Tr. Ct.'s instructions for application of this evidence, there was no reasonable possibility that evidentiary facts used by jury to establish essential elements of criminal confinement may also have been used to establish essential elements of robbery; no double jeopardy violation).

TITLE: Grinstead v. State

INDEX NO.: J.10.f.

CITE: (7-22-97), Ind., 684 N.E.2d 482

SUBJECT: Double jeopardy - "same elements" test; multiple punishment claim under Federal Constitution

HOLDING: Review of multiple punishments under Double Jeopardy Clause of Federal Constitution requires that Ct. look only to relevant statutes in applying Blockburger "same elements" test, & no further. Factual elements in charging instrument & jury instructions are not part of this inquiry. For reasons explained in Games, this section, rule of Derado v. State & other cases suggesting additional consideration of instructions & manner in which offenses are charged, is no longer accurate statement of federal double jeopardy law. Here, D advanced his double jeopardy claim only under Federal Constitution. Convictions & consecutive sentences for murder & conspiracy to commit murder passed "same elements" test & did not violate D's federal constitutional right to be free from double jeopardy. Held, convictions affirmed.

RELATED CASES: Richardson, 717 N.E.2d 32 (Ind. Constitution provides broader protection against DJ than U.S. const.; see card at J.10.f); Potter,684 N.E.2d 1127 (convictions for rape & intimidation based on D's same threats to victim did not violate DJ).

TITLE: Guyton v. State
INDEX NO.: J.10.f.
CITE: (7-25-02), Ind., 771 N.E.2d 1141
SUBJECT: Double jeopardy - murder & carrying handgun without license
HOLDING: D's convictions for murder & carrying handgun without license did not violate Indiana Double Jeopardy Clause. Under Richardson actual evidence test, Indiana Double Jeopardy Clause is not violated when evidentiary facts establishing essential elements of one offense also establish only one or even several, but not all, of essential elements of a second offense. Spivey v. State, 761 N.E.2d 831 (Ind. 2002). Here, carrying gun along street was one crime & using it was another. Mickens v. State, 742 N.E.2d 927 (Ind. 2001). Held, murder & carrying handgun without license convictions affirmed; attempted murder conviction reversed & remanded for retrial on other grounds. Boehm, J., concurring, proposed methodology that modifies Richardson actual evidence test by considering whether *facts* rather than *evidence* supporting two crimes are same or distinct; Dickson, J., concurring, believes Justice Boehms' proposed analysis significantly lessons protection provided by Indiana Double Jeopardy Clause.

RELATED CASES: Phillips, 25 N.E.3d 1284 (Ind. Ct. App. 2015) (convictions for reckless homicide and involuntary manslaughter violated Indiana common law double jeopardy prohibition because both convictions were based on the same act, causing the death of an infant); Newgent, App., 897 N.E.2d 520 (convictions for aiding in murder and confinement resulting in SBI violated one of the five categories of double jeopardy violations set forth in Guyton because information alleged that D aided in murder by confining victim); Firestone, App., 774 N.E.2d 109 (separate criminal acts of confinement supported D's convictions for kidnapping & conspiracy to commit murder & did not constitute DJ); Vestal, 773 N.E.2d 805 (D's convictions for burglary & theft did not violate DJ clause of Ind. Const.).

TITLE: Haggard v. State
INDEX NO.: J.10.f.
CITE: (3/3/83), Ind., 445 N.E.2d 969
SUBJECT: Double jeopardy (DJ) - continuing act
HOLDING: D convicted of confinement in one county may not be convicted of confinement in another county when one continuing & uninterrupted act of confinement is at issue. Second conviction violates DJ & constitutes fundamental error. Here, D robbed liquor store in Bartholomew County. He forced cashier to drive him away in her car. They crossed 2 counties. D forced cashier to park in hospital lot in Harrison County where he raped her at knifepoint. D pled guilty to robbery, confinement & 2 counts of theft in Bartholomew County & was sentenced to 20 years. D pled guilty to rape & confinement in Harrison County. At sentencing, D objected to being sentenced on both charges, arguing that confinement was lesser included of rape. He was sentenced to consecutive terms of 20 & 30 years. D raised DJ violation on appeal. Court determines that confinement began in Bartholomew County & continued, uninterrupted, in Harrison County. As such, it was a single offense against the state. See US v. Wheeler (1978), 435 U.S. 313, 98 S. Ct. 1079, 55 L.Ed.2d 303. Held, conviction & sentence for confinement violates DJ (fundamental error) & is ordered vacated.

RELATED CASES: Bunch, 937 N.E. 2d 839 (Ind. Ct. App. 2010) (D's three convictions for confining one victim violated double jeopardy because there was just one continuance confinement, but D's ten convictions of confinement of different victims and his conviction for robbery did not violate double jeopardy); Boss, App., 702 N.E.2d 782 (consecutive sentences which resulted from 3 separate charges & convictions of nonsupport constituted multiple punishments for same offense).

TITLE: Hardister v. State
INDEX NO.: J.10.f.
CITE: (06-28-06), Ind., 849 N.E.2d 563
SUBJECT: Possession of cocaine & firearm - lesser included offense of dealing
HOLDING: Tr. Ct. did not err in sua sponte vacating D's conviction for possession of cocaine & a firearm, which was "included offense" of class A felony dealing in cocaine based on D's possession of cocaine with intent to deal. Ind. Code 35-38-1-6 provides that if a D is charged with an offense & an included offense in separate counts & is found guilty of both counts, judgment & sentence may not be entered against D for the included offense. Here, same possession of cocaine used to support the Class A felony dealing charge was also used to support the C felony possession of cocaine & firearm charge. Enhancement of a cocaine possession charge because of simultaneous possession of a gun or proximity to a school or park is irrelevant to lesser-included offense analysis--there is only one base offense of possession of cocaine with multiple possible penalty enhancements. Thus, Ct. should regard possession of cocaine under Ind. Code 35-48-4-6 (possession without intent to deliver) as one crime under all circumstances that is not made a different, separate, or distinct crime by whatever enhancing circumstances might exist. Held, transfer granted, class A felony dealing conviction affirmed, class C felony possession of cocaine & firearm conviction reversed.

RELATED CASES: Brown, App., 880 N.E.2d 1226 (no IAC where appellate counsel failed to challenge possession of cocaine and firearms as LIO of dealing pre-Hardister).

TITLE: Harvey v. State
INDEX NO.: J.10.f.
CITE: (2nd Dist.; 11-10-99), Ind. App., 719 N.E.2d 406
SUBJECT: Double jeopardy - Indiana Code; includes factually lesser included offenses
HOLDING: Ind. Code 35-38-1-6 protects Ds charged with offense & included offense from being found guilty of both charges, as this is tantamount to convicting D twice for same conduct. Although lead opinion in Emery, 717 N.E.2d 111, stated that Ind. Code 35-38-1-6 was implicated only when dealing with inherently included offense, lead opinion was only joined by one other justice on this point. Thus, because Emery was affirmed by equally divided Ct. in two separate opinions, it does not represent precedent for which this Ct. must follow. Here, Ct. chose to follow earlier Indiana S. Ct. cases that held that Ind. Code 35-38-1-6 does not just protect against convictions for greater & inherently lesser included offenses, but also against convictions for greater & factually included lesser offenses. See Wright, 658 N.E.2d 563. D was convicted of confinement & armed robbery; however, force used to support conviction of robbery was same force which created confinement. Thus, confinement was lesser included offense of robbery, & Ind. Code 35-38-1-6 required that confinement conviction be vacated. Held, judgment affirmed in part & reversed in part.

RELATED CASES: Jacobs, 2 N.E.3d 116 (Ind. Ct. App. 2014) (convictions for B felony deviate conduct and C felony confinement violated double jeopardy prohibition in Art. I, § 14 of Indiana Constitution where force used to confine victim did not exceed the scope of force used to commit criminal deviate conduct); Smith, App., 881 N.E.2d 1040 (although confinement is usually inherently lesser included offense of robbery, here, there was separate confinement; force used to drag officer to bathroom & hold her there was beyond that used & necessary for robbery); Polk, App., 783 N.E.2d 1253 (State failed to prove that D's confinement was any greater than necessary to accomplish robbery); Gates, 759 N.E.2d 631 (D's confinement of victim was distinct & elevated from restraint necessary to commit other charged crimes).

TITLE: Haynes v. State
INDEX NO.: J.10.f.
CITE: (2nd Dist., 10-17-95), Ind. App., 656 N.E.2d 505
SUBJECT: Harassment & intimidation convictions did not violate double jeopardy
HOLDING: Convictions & sentences for intimidation & harassment based on one telephone call to complaining witness (CW) did not violate prohibition against double jeopardy. Applying "same elements" test, Ct. concluded that legislature specifically authorized cumulative punishment for separate offenses of intimidation & harassment in single trial. Comparison of statutes shows that intimidation requires proof of additional fact which harassment does not, i.e., perpetrator entertains intent that other person be placed in fear of retaliation for prior lawful act. Harassment requires proof of additional fact which intimidation does not, i.e., perpetrator entertains intent to harass, annoy, or alarm other person. In Indiana, double jeopardy analysis also involves consideration of manner in which offenses are charged. Collins v. State (1995), App., 645 N.E.2d 1089. Here, charging information alleged that D communicated threat to "bash [CW's] head in" for assisting police in investigation involving D. Separate count for harassment alleged that D made telephone call to CW with intent to harass, annoy, or alarm CW, but with no intent of legitimate communication. Ct. held that telephone call & communication of threat during conversation constituted separate offenses. Held, convictions affirmed.

TITLE: Heckard v. State

INDEX NO.: J.10.f.

CITE: (2/11/2019), 118 N.E.3d 823 (Ind. Ct. App. 2019)

SUBJECT: Despite closeness in time, D's two child molesting convictions did not violate continuous crime doctrine

HOLDING: Continuous crime doctrine was not violated based on two convictions for two separate, distinct actions of Level 1 felony child molesting even though the two actions were committed very close in time and fell under the same statutory heading, i.e., performing or submitting to "other sexual conduct." Ind. Code 35-42-4-3(a)(1). The continuity of D's actions--performing a sexual act on complaining witness (C.W.), then forcing C.W. to perform a sexual act on him--does not negate the fact that the acts were separate criminal acts accomplished by D's separate actions. D was not performing the same sexual acts on C.W. in close succession. Thus, his convictions did not violate the continuous crime doctrine because D was not charged twice with the same continuous offense.

RELATED CASES: Hedrick, 124 N.E.3d 1273 (Ind. Ct. App. 2019) (multiple forgery convictions for multiple fraudulent prescriptions, issued on different days to different patients, did not implicate the continuous crime doctrine).

TITLE: Hill v. State

INDEX NO.: J.10.f.

CITE: 157 N.E.3d 1225 (Ind. Ct. App. 2020) (10/02/2020)

SUBJECT: Reckless homicide convictions arising from two fatalities did not violate double jeopardy under either old law or recently adopted test

HOLDING: Defendant's two reckless homicide convictions arising from one collision resulting in two fatalities did not violate double jeopardy under either the prior standard of Richardson v. State, 717 N.E.2d 32 (Ind. 1999) or the new standard set forth in Wadle v. State, 151 N.E.3d 227 (Ind. 2020) and Powell v. State, 151 N.E.3d 256 (Ind. 2020), which did away with all existing rules and constitutional tests for substantive double jeopardy. "The only common-law rule that survived Wadle and Powell is the continuous-crime doctrine, though only as part of the new tests, not as a separately enforceable double-jeopardy standard." In a footnote, the Court noted that it disagreed with prior Court of Appeals cases issued last month — Shepherd v. State and Rowland v. State — that "left undisturbed" the five categories of common-law protections identified by Justice Sullivan's concurring opinion in Richardson and later adopted by the full court in Guyton v. State, 771 N.E.2d 1141 (Ind. 2002). Regardless, Defendant's convictions did not run afoul of the "very same act" rule, which prohibits "[c]onviction and punishment for a crime which consists of the very same act as another crime for which the defendant has been convicted and punished."

TITLE: Hines v. State
INDEX NO.: J.10.f.
CITE: (5/19/2015), 30 N.E.3d 1216 (Ind. 2015)
SUBJECT: Double jeopardy - Richardson analysis rather than continuous crime doctrine is applicable to distinct offenses
HOLDING: D's convictions for Criminal Confinement and Battery did not violate the common law continuous crime doctrine, but did violate the Double Jeopardy Clause of the Indiana Constitution. The continuous crime doctrine is a rule of statutory construction and common law limited to situations where a D has been charged multiple times with the same offense.

To the extent Buchanan v. State, 91 N.E.2d 712 (Ind. Ct. App. 2009), stands for the proposition that the continuous crime doctrine may be judicially extended to two distinct criminal offenses, the Court disagrees. However, two distinct offenses may violate the actual evidence test under the Ind. Constitution. Under this test, there is a double jeopardy violation if the court concludes there is a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of an offense for which the D was convicted or acquitted may also have been used to establish all the essential elements of a second challenged offense. Reasonable possibility turns on a practical assessment of whether the jury may have latched onto exactly the same facts for both convictions.

Here, D was charged with Battery as a Class D felony and Confinement as a Class C felony for pushing and pinning a correctional officer against a wall. Because confinement and battery are distinct offenses, the continuous crime doctrine does not apply. However, at issue in the actual evidence analysis is whether there is a reasonable possibility that the evidence used by the fact-finder to establish the "touched the officer in a rude, insolent, or angry manner" elements of battery may also have been used to establish the "confined" element of criminal confinement. Although the State's strategy was to support the battery charge with the lunge into the officer and the confinement charge with the act of pinning the officer against the wall, at trial the State failed to specifically allege and communicate to the jury what different evidence supported what charge. Neither the final instructions nor the charges informed the jury what different evidence supported each charge.

The State's arguments at trial were confusing. Thus, based on the charges, the jury instructions and arguments of counsel, there was a reasonable possibility that the same evidence used by the jury to establish the essential elements of battery was also included among the evidence used by the jury to establish the essential elements of criminal confinement. Thus, D's conviction for Battery is vacated. Held, transfer granted, judgment reversed and remanded and Court of Appeals' memorandum Opinion is vacated; Massa, J., concurring in result.

RELATED CASES: Gomez, 56 N.E.3d 697 (Ind. Ct. App. 2016) (acts alleged in the three battery convictions were so connected as to constitute a single uninterrupted transaction); Dilts, 49 N.E.3d 617 (Ind. 2015) (Tr. Ct. erred by vacating one of D's two child molesting convictions pursuant to continuing crime doctrine, where one conviction was for sexual intercourse and the other was for deviate sexual conduct that occurred on different days); Seal, 38 N.E.3d 717 (Ind. Ct. App. 2015) (even if they had occurred closer in time, D's convictions for class A felony child molesting and class B felony sexual misconduct with a minor did not fall within the continuous crime doctrine because they were different crimes); Chavez, 988 N.E.2d 1226 (Ind. Ct. App. 2013) (where D was charged with touching the alleged victim in two places while kissing her, and then touching her while kissing her a second time, continuing crime doctrine prohibits convictions for each kiss or touch); Borum, 951 N.E.2d 619 (Ind. Ct. App. 2011) (where D attempted to carjack a car and then rob two people outside of the car, there was not one continuous act; D was properly sentenced for both attempted carjacking and attempted robbery);

Walker, 932 N.E.2d 733 (Ind. Ct. App. 2010) (disagreeing with Buchanan, Ct. noted that offenses of burglary, robbery of one victim, and criminal confinement of another victim did not violate continuing crime doctrine, as each offense was a distinct, chargeable crime); Baugh, 926 N.E.2d 497 (Ind. Ct. App. 2010), sum. aff'd, 933 N.E.2d 1277 (D's two convictions for class B felony sexual misconduct with a minor did not violate continuing crime doctrine because the several acts of intercourse occurred over a four-month period in two different residences and thus were not "so compressed in time, place, singleness of purpose, and continuity of action as to constitute a single transaction").

TITLE: H.M. v. State
INDEX NO: J.10.f.
CITE: (2nd Dist., 08-28-08), Ind. App., 892 N.E.2d 679
SUBJECT: Double jeopardy - multiple true findings in single juvenile delinquency adjudication
HOLDING: Following D.B. v. State, 842 N.E.2d 399 (Ind. Ct. App. 2006), Court held that double jeopardy principles attach where a juvenile faces multiple charges under a single delinquency adjudication. Court rejected State's argument that double jeopardy prohibition against multiple punishments in the same case does not apply to juvenile delinquency proceedings in which there is only one finding of delinquency and one disposition. Notwithstanding fact that juvenile court may issue one delinquency disposition relating to multiple true findings, there may be penal consequences for an offender later in life relating to these multiple true findings. Tr. Ct., when evaluating a D's criminal history, can look to the number of juvenile true findings and enhance the D's sentence based upon this history. Lacy v. State, 755 N.E.2d 576 (Ind. 2001).

If Court concludes that true findings in a delinquency adjudication violate double jeopardy principles, Court may reduce either true finding to a less serious classification if that will eliminate the violation or, if not, Court must vacate one of the true findings. Id. Here, separate evidence supported battery finding that was not used to support attempted theft finding. Held, judgment affirmed.

RELATED CASES: D.J., 88 N.E.3d 236 (Ind. Ct. App. 2017) (D.J.'s adjudications for criminal confinement and armed robbery violated Indiana Constitution's prohibition on double jeopardy; the fact that there was only one adjudication does not mean there was no double jeopardy violation), C.H., 15 N.E.3d 1086 (Ind. Ct. App. 2014) (true findings for unlawful entry into a car and criminal trespass violated the Richardson test).

TITLE: Ho v. State
INDEX NO.: J.10.f.
CITE: (2nd Dist.; 3-31-00), Ind. App., 725 N.E.2d 988
SUBJECT: Double jeopardy - no violations under Indiana Constitution
HOLDING: Two or more offenses are "same offense" in violation of Article I, Section 14 of Indiana Constitution, if, with respect to either statutory elements of challenged crimes or actual evidence used to convict, essential elements of one challenged offense also establish essential elements of another challenged offense. Richardson, 717 N.E.2d 32. First, D alleges that his convictions for robbery & theft violate double jeopardy. Although theft does not contain element which is not contained in robbery, fact that theft charge included additional property taken from home & additional victim supported separate conviction of theft apart from robbery. Second, D alleges that his convictions for armed robbery & carrying handgun without license violated same elements test. However, evidentiary facts were used to prove that D committed robbery while armed with handgun, while lack of evidentiary facts were used to prove that D did not have license to carry handgun. Thus, both convictions can stand. Third, D alleges that his convictions for robbery & criminal confinement are based on same evidence &, thus, violate double jeopardy. However, here, D confined victim more extensively than necessary to commit robbery, & thus, both convictions are based on different evidence. Held, judgment affirmed.

RELATED CASES: Merriweather, App., 778 N.E.2d 449 (no DJ violation where D's confinement of manager & employee was more extensive than necessary to effect robbery); Skaggs, App., 751 N.E.2d 318 (D did not demonstrate reasonable probability that same evidentiary facts may have been used to establish essential elements of criminal recklessness & carrying handgun without license); Newman, App., 751 N.E.2d 265 (convictions of both aggravated battery & carrying handgun without license did not violate DJ under Ind. Const.); Mickens, 742 N.E.2d 927 (no reasonable possibility that same evidentiary facts were used to support murder & carrying handgun without license convictions; carrying gun along street was one crime & using it was another).

TITLE: Hoffman v. State
INDEX NO.: J.10.f.
CITE: (11-17-11), 957 N.E.2d 992 (Ind. Ct. App. 2011)
SUBJECT: Double jeopardy claim - criminal prosecution after military punishment
HOLDING: D's OWI conviction after he was disciplined by the Army for the same conduct did not violate double jeopardy, where record was insufficient to establish that D was actually prosecuted by the Army, rather than simply disciplined. Other than his own testimony, the only evidence D provided was his reduction in rank from a sergeant to a specialist. Under the Uniform Code of Military Justice, military commanders can punish service personnel through judicial proceedings--taking the form of general, special, or summary courts martial--or by imposing non-judicial punishment (NJP). For most purposes, NJP is deemed an administrative rather than a criminal proceeding. Piersall v. Winter, 507 F.Supp.2d 23 (D.D.C. 2007). Further, a commanding officer may order as NJP a reduction to the next inferior pay grade. Here, order for D's reduction in rank order reflects that his reduction was for failure to complete training, unsatisfactory participation, and failure to complete or attend noncommissioned officers education system. Record undermines D's assertion that punishment was for operating a vehicle while intoxicated. Held, judgment affirmed.

TITLE: Howell v. State
INDEX NO.: J.10.f.
CITE: (3/13/2018), 2018 Ind. App. LEXIS 95 (Ind. Ct. App. 2018)
SUBJECT: Attempted robbery and criminal recklessness convictions violated double jeopardy
HOLDING: Based on charging informations, jury instructions and closing arguments, Court found a reasonable possibility that the evidentiary facts used to establish that D took a substantial step toward committing robbery may also have been used to establish that D performed an act that created a substantial risk of bodily injury to victim. Thus, D's convictions for attempted robbery and criminal recklessness violate prohibition against double jeopardy. Held, judgment affirmed in part and remanded with instructions to vacate Level 6 felony criminal recklessness conviction.

TITLE: Idle v. State
INDEX NO.: J.10.f.
CITE: (2d Dist. 03/05/92), Ind. App., 587 N.E.2d 712
SUBJECT: Multiple convictions for confinement of same person in same incident precluded
HOLDING: Although confinement statute allows for 2 different bases for liability, multiple convictions for confinement of one person in one continuous incident are precluded, even if D is separately charged under both provisions. D was charged & convicted of 3 counts of confinement, 2 of which had same victim. Victim initially opened door to D, who pointed rifle at her, at which time she went screaming into mother's bedroom. D followed her, entered bedroom & shut door, & confined her to bedroom. Double jeopardy concerns prohibit imposition of 2 punishments for single offense arising from one set of operative circumstances, Haggard 445 N.E.2d 969. Although Ind. S. Ct. has held that confinement statute does define 2 separate criminal activities, Kelly 535 N.E.2d 140, issue raised in Kelly was different.

In general, some break in confinement or kidnapping is required for new offense to occur. Ind. has subscribed to "continuous act" theory in discussing confinement in other contexts, e.g., Haggard, supra, finding one confinement although occurring in different geographical boundaries, & Hopper 475 N.E.2d 20, barring convictions for both confinement & confinement with deadly weapon for activities occurring in one continuous act. "Violation of Ind. Code 35-42-3-3 during one continuous confinement may result in only one confinement conviction, notwithstanding that the D engaged in 2 different acts, one proscribed in subsection one, & the other in subsection two." While victim in instant case was confined by removal when she was compelled at gunpoint to move into bedroom, & by restraint when she was held in bedroom, she never escaped from original confinement. Because there were not 2 distinct periods of confinement, double jeopardy considerations preclude 2 convictions for confinement against this victim.

RELATED CASES: Koch, 952 N.E.2d 359 (Ind. Ct. App. 2011) (confinement and kidnapping convictions violated double jeopardy);Taylor, App., 879 N.E.2d 1198 (where D confined children by removing them and continued to confine them by hijacking, confinement merged into kidnapping by hijacking); Penrod, 810 N.E.2d 345 (Ct. vacated two confinement convictions & affirmed D's kidnapping conviction where evidence established only one continuous confinement); Boyd, App., 766 N.E.2d 396 (D's convictions for criminal confinement & attempted criminal confinement violated Indiana Constitution's prohibition against double jeopardy; "continuous crime doctrine" is not obsolete; see full review at K.3.c.2); Curry, App., 643 N.E.2d 963 (Ct. vacated criminal confinement conviction where evidence established only one continuous confinement).

TITLE: J.R. v. State

INDEX NO.: J.10.f.

CITE: (6/25/2018), 100 N.E.3d 256 (Ind. 2018)

SUBJECT: Where parties agreed juvenile adjudications violated double jeopardy, vacating adjudication on another ground was inappropriate

HOLDING: On transfer, the Indiana Supreme Court ruled that where the parties agreed that the juvenile's adjudications violated the double jeopardy, the Court of Appeals should have vacated one of the adjudications on that ground, not on a ground that the parties had not briefed. J.R. was adjudicated delinquent for both dangerous possession of a firearm by a juvenile (Ind. Code § 35-47-10-5(a)) and carrying a handgun without a license ("CHWOL") (Ind. Code § 35-47-2-1(a)). In the original opinion, the Court of Appeals, sua sponte, ruled that it was impossible, as a matter of law, for a juvenile to commit CHWO since a juvenile is not eligible to get a license to carry a handgun. In its rehearing petition, the State contended this was error, arguing the statute enacted a blanket prohibition on carrying an unlicensed handgun, regardless of the reason the gun was not licensed. In its rehearing decision, the Court of Appeals affirmed its earlier decision and rationale. It also observed that the two statutes pertained to the same subject, and because the statute governing a juvenile's dangerous possession of a firearm was the more specific statute, it and it alone applied to the juvenile. See Sanders v. State, 466 N.E.2d 424, 428 (Ind. 1984) (where two statutes address the same topic, one generally and the other more specifically, the two statutes should be harmonized but if the statutes irreconcilably conflict, the more specific statute shall apply).

In granting transfer, the Supreme Court offered no analysis; it merely noted that the parties agreed there was a double jeopardy violation, and that the Court of Appeals should have vacated the CHWOL adjudication on that ground ("As the parties agree on disposition of the double jeopardy issue, we remand to the juvenile court to vacate the delinquency adjudication for CHWOL, and we affirm the delinquency adjudication for dangerous possession of a firearm."). See also J.G. v. State, 93 N.E.3d 1112, 1125 (Ind. Ct. App. 2018) (affirming delinquency adjudication for dangerous possession of a firearm and remanding to vacate adjudication for CHWOL where juvenile argued, and State conceded, the CHWOL adjudication should be vacated on double jeopardy grounds). Held, transfer granted, Court of Appeals ruling on suppression issue summarily affirmed, remaining part of Court of Appeals opinion vacated, and remanded.

TITLE: Jordan v. State
INDEX NO.: J.10.f.
CITE: (2nd Dist., 1-28-97), Ind. App., 676 N.E.2d 352
SUBJECT: Pleading guilty to facially duplicative charges - no waiver of double jeopardy claim
HOLDING: Although guilty plea generally acts as waiver of double jeopardy claim, D who has pleaded guilty to charges which are facially duplicative of previous convictions is entitled to challenge resulting convictions. United States v. Broce, 109 S. Ct. 757 (1989); Griffin v. State, 540 N.E.2d 1187. Here, D knowingly & voluntarily entered into plea agreement which provided for consecutive sentences for felony murder & robbery. Ct. found that D's convictions were facially duplicative, as person convicted of felony murder & underlying felony in reality stands twice convicted of underlying felony. Fact that convictions were imposed pursuant to plea agreement did not remove double jeopardy infirmity. Rather than vacating both convictions & remanding for retrial, Ct. followed Odom, App., 647 N.E.2d 377, trans. denied, & opted to vacate D's conviction for robbery. Held, post-conviction Ct. reversed, robbery conviction vacated, felony murder conviction affirmed.

RELATED CASES: Class v. U.S., 138 S. Ct. 798 (2018) (guilty plea does not automatically waive challenge to constitutionality of statute defendant was charged under, if the challenge questions the State's very right to bring the charge), Douglas, App., 878 N.E.2d 873 (D who pleads guilty without benefit of agreement does not waive constitutional issues for appeal); Games, 743 N.E.2d 1132 (D waived his right to challenge his sentence for murder, robbery & conspiracy to commit robbery when he entered plea agreement for sentence between sixty & 118 years).

TITLE: Kendall v. State
INDEX NO.: J.10.f.
CITE: (2nd Dist., 04-18-05), Ind. App., 825 N.E.2d 439
SUBJECT: Possession of cocaine & firearm - lesser included offense of dealing
HOLDING: Tr. Ct. did not err in sua sponte vacating D's conviction for possession of cocaine & a firearm, which was "included offense" of class A felony dealing in cocaine based on D's possession of cocaine with intent to deal. Ind. Code 35-38-1-6 provides that if a D is charged with an offense & an included offense in separate counts & is found guilty of both counts, judgment & sentence may not be entered against D for the included offense. Possession of cocaine is a lesser-included offense of possession of cocaine with intent to deliver. Molino v. State, 546 N.E.2d 1216 (Ind. 1989). Here, same possession of cocaine used to support the Class A felony dealing charge was also used to support the C felony possession of cocaine & firearm charge. Enhancement of a cocaine possession charge because of simultaneous possession of a gun or proximity to a school or park is irrelevant to lesser-included offense analysis--there is only one base offense of possession of cocaine with multiple possible penalty enhancements. Thus, Ct. should regard possession of cocaine under Ind. Code 35-48-4-6 (possession without intent to deliver) as one crime under all circumstances that is not made a different, separate, or distinct crime by whatever enhancing circumstances might exist. Held, judgment affirmed; Najam, J., dissenting on this issue.

TITLE: Kendrick v. State
INDEX NO.: J.10.f.
CITE: (05-26-11), 947 N.E.2d 509 (Ind. Ct. App. 2011)
SUBJECT: Feticide and attempted murder - double jeopardy
HOLDING: D's convictions for attempted murder and two counts of feticide violated double jeopardy clause in Indiana Constitution, article 1, section 14. The evidentiary facts used to establish the feticide convictions established all of the elements of the attempted murder conviction. Both convictions resulted from one act, the shooting of victim in stomach. To establish feticide convictions, State was required to present additional evidence regarding victim's pregnancy and the resulting termination thereof, but no additional evidence was required to establish the attempted murder. Thus, there is more than a reasonable possibility that the evidentiary facts used by the jury to establish the essential elements of feticide may also have been used to establish all of the essential elements of attempted murder. Held, feticide convictions vacated, remanded for resentencing on remaining counts. In particular, Tr. Ct. may now consider the victim's pregnancy and termination thereof in crafting sentence for attempted murder.

NOTE: In 2009, legislature enacted Ind. Code 35-50-2-16, which allows the State to seek an additional fixed term of imprisonment of between six and twenty years when State can show beyond a reasonable doubt that the D, while committing or attempting to commit murder, caused the termination of a human pregnancy.

TITLE: Kincaid v. State
INDEX NO.: J.10.f.
CITE: (11-12-02), Ind., 778 N.E.2d 789
SUBJECT: D entitled to credit for time served on probation when resentenced on same offense
HOLDING: Double jeopardy requires that time served on probation must be credited toward a new sentence of probation imposed for same conviction after D successfully petitions for post- conviction relief. Ind. Code 35-50-1-5 & Post-Conviction Rule 1(10) require credit for time served on probation by successful post-conviction petitioner whose original sentence is set aside & is resentenced. In this case, Tr. Ct. did not credit D with 636 days of probation he had already served for his first conviction, which was subsequently vacated as result of successful post- conviction petition. D then served an additional term of punishment (probation) for a second conviction based on very same offense. Federal constitution required that D receive 636 days credit from first sentence toward second sentence. North Carolina v. Pearce, 395 U.S. 711 (1969). Moreover, in this case D cannot be said to have agreed in plea agreement to forego his constitutional right to credit for time served.

However, because D did not appeal his sentence until after he violated terms of his probation, Tr. Ct. did not commit reversible error by requiring him to serve out unexecuted portion of his sentence. Even though D's sentence was erroneous, D was not entitled to make that determination unilaterally & disregard terms of his probation. Held, transfer granted, Tr. Ct.'s order to serve remainder of sentence affirmed.

TITLE: Kocielko v. State
INDEX NO.: J.10.f.
CITE: (02-22-11), 943 N.E. 2d 1282 (Ind. Ct. App. 2011)
SUBJECT: Double jeopardy - single incident analysis
HOLDING: Court granted State's petition for rehearing of its opinion at 938 N.E.2d 243, which held that because D committed acts against a single victim in one confrontation, double jeopardy prevents his being convicted and sentenced upon both deviate sexual conduct and fondling. D argued that he could not receive multiple sentences for these sexual misconduct convictions because of rule announced in Bowling v. State, 560 N.E.2d 658 (Ind. 1990), specifically "the imposition of two sentences for the same injurious consequences sustained by the same victim during a single confrontation violated both Federal and State double jeopardy prohibitions."

Regardless of whether this principle remains a viable part of double jeopardy analysis, Bowling nonetheless espoused a sentencing rule that has not been explicitly rejected, i.e., a sentence must reflect the episodic nature of the crimes committed. This "single incident analysis" for sentencing purposes has been embraced in other contexts. See Beno v. State, 581 N.E.2d 922 (Ind. 1991) (improper to impose consecutive sentences for multiple drug-dealing convictions based on nearly identical State-sponsored sales as part of an ongoing operation). Thus, unless instructed to the contrary, Court should consider episodic nature of multiple violent crimes when committed against a single victim in a single confrontation. Here, Court held that imposition of concurrent sentences, as opposed to consecutive sentences, fairly reflects the episodic nature of the crimes committed by D. Held, rehearing granted, Tr. Ct. affirmed in all respects, except thirty-year habitual offender enhancement on Class C felony conviction should be vacated because Class B felony conviction was so enhanced.

TITLE: Lewis v. State
INDEX NO.: J.10.f.
CITE: (11/30/2015), 43 N.E.3d 689 (Ind. Ct. App. 2015)
SUBJECT: Double jeopardy - resisting law enforcement; car chase followed by fleeing on foot
HOLDING: D's actions of fleeing law enforcement by vehicle and then on foot constitute one continuous act of resisting law enforcement. Thus, following Arthur v. State, 824 N.E.2d 383 (Ind. Ct. App. 2005), Court held that convictions on both counts cannot stand. Holding is consistent with Hines v. State, 30 N.E.3d 1216 (Ind. 2015), which clarified that continuous crime doctrine applies only where a D has been charged multiple times with the same continuous offense. Held, judgment reversed and remanded with instructions to vacate D's conviction for Class A misdemeanor resisting law enforcement.

RELATED CASES: Norris, 113 N.E.3d 1245 (Ind. Ct. App. 2018) (D's actions of fleeing by a vehicle and then on foot constitute one continuous act of resisting law enforcement)

TITLE: Luke v. State
INDEX NO.: J.10.f.
CITE: (2/24/2016), 51 N.E.3d 401 (Ind. Ct. App. 2016)
SUBJECT: Double jeopardy - stalking and invasion of privacy; separate trials
HOLDING: D's convictions for stalking and invasion of privacy violated the actual evidence test under double jeopardy principles. D was charged with invasion of privacy for his acts between January 3-7, 2014. He was also charged with stalking in a different court for conduct that occurred between January 2012 and February 2014. He had two trials and was found guilty on both cases.

In the second trial for stalking, the State presented evidence about the entire two-year period but also included evidence of the conduct between Jan. 3-7, 2014 that was the basis of the invasion of privacy case. Court concluded that this was a violation of double jeopardy under the actual evidence test because the juries could have used the same evidentiary facts to reach convictions in both cases. See also Burton v. State, 665 N.E.2d 924 (Ind. Ct. App. 1996).

Based on Ind. Code § 35-41-4-3, which codifies protections against being placed in jeopardy more than once for the same offense, the proper remedy is to vacate D's conviction for stalking, as judgment from the first invasion of privacy prosecution bars the second conviction for stalking. Held, stalking conviction vacated, invasion of privacy convictions affirmed; Altice, J., concurring, would rely on Ind. Code § 35-41-4-4 (successive prosecution statute) rather than Ind. Code § 35-41-4-3, as the subsequent stalking conviction was not "for commission of the same offense" as invasion of privacy, but he agreed the principles of double jeopardy had been violated.

TITLE: Mehidal v. State

INDEX NO.: J.10.f.

CITE: (5th Dist., 11-09-93), Ind. App., 623 N.E.2d 428

SUBJECT: Double Jeopardy (DJ) OWI causing serious injury (OWI injury) & OWI with prior conviction (OWI prior)

HOLDING: D's convictions for both OWI injury & OWI prior violated DJ, because result of injury & fact of prior conviction are merely enhancers, not elements of offense. Crimes have same elements & D cannot be convicted of both. D was involved in 5-car accident while intoxicated. Passenger in one car & her husband were seriously injured & drivers of two other cars also suffered injuries. D was charged with two counts of OWI injury, one count of OWI, & one count of OWI prior. Convictions were entered on all counts, but D was sentenced only on one count of OWI injury & OWI prior. Person may not be twice punished for single offense arising from one set circumstances, Hutcherson, 380 N.E.2d 1219, but he can be convicted & punished for multiple offenses stemming from same act if offenses are not identical, Zachary, 469 N.E.2d 744. Recent decision, U.S. v. Dixon (1993), 113 S. Ct. 2849, reaffirmed "same elements," Blockburger test, i.e., if each offense contains no element not contained in other, they are same offense & multiple punishments are barred by DJ. Applying test, Ct. determined elements of OWI injury & OWI prior are same, & multiple convictions were precluded. Elements of both are (1) operating motor vehicle (2) while intoxicated. Result of serious bodily injury is fact enhancing penalty, as is proof of prior OWI, but neither is element of offense. Because elements of offenses are identical, D can be convicted & punished only for one. Held, remanded for vacation of one of convictions & resentencing. **NOTE:** 1994 amendment to OWI injury statute, Ind. Code 9-30-5-4, provides for separate offense for each victim.

TITLE: Miller v. State
INDEX NO: J.10.f.
CITE: (6-25-03), Ind., 790 N.E.2d 437
SUBJECT: Double jeopardy - repeated use of single weapon to enhance several convictions
HOLDING: Ct. has recognized a series of statutory construction & common law that supplements constitutional protections afforded by Indiana Double Jeopardy Clause. Pierce v. State, 761 N.E.2d 826 (Ind. 2002). Pierce applied rule that two crimes may not be enhanced by same bodily injury. This was application of broader rule previously expressed by Justice Sullivan prohibiting conviction & punishment for enhancement of crime where enhancement is imposed for "very same behavior or harm" as another crime for which D has been convicted & punished. Repeated use of weapon to commit multiple separate crimes is not "the very same behavior" precluding its use to separately enhance resulting convictions. Rather, as here, use of single deadly weapon during commission of separate offenses may enhance level of each offense. Gates v. State, 759 N.E.2d 631 (Ind. 2001). D's convictions for class B felony criminal confinement, class B felony robbery, & two counts of class A felony criminal deviate conduct did not violate Indiana Double Jeopardy Clause. Held, transfer granted, memorandum opinion of Ct. App. vacated, judgment affirmed; Sullivan, J., concurring.

RELATED CASES: A.W., 192 N.E.3d 227 (Ind. Ct. App. 2022) (juvenile's adjudications for possession of a machine gun and dangerous possession of a firearm were factually included and thus, entry of judgment on both counts was a violation of double jeopardy; A.W. was found culpable twice for possession of the same weapon at the same time where possession of that weapon was the means used to commit both crimes); Springfield, 124 N.E.3d 610 (Ind. 2019) (two or more distinct offenses may be enhanced due to the use of the same weapon during the commission of each offense, but double jeopardy protections prevent enhancement due to the continuous possession of the weapon); Cross, 15 N.E.3d 569 (Ind. 2014) (D's 5-yr. firearm sentence enhancement vacated; it violated common law prohibition on basing enhanced punishment on very same behavior as underlying conviction); Leggs, 966 N.E.2d 204 (Ind. Ct. App. 2012) (D made a decision to involve his knife in each of his crimes, thus repeated use of knife justified multiple enhancements to crimes committed); Rawson, App., 865 N.E.2d 1049 (because D's conduct involved multiple victims & separate & distinct acts, there was no DJ violation for convictions of attempted aggravated battery, intimidation & criminal recklessness); Marshall, App., 832 N.E.2d 615 (Ct. affirmed multiple enhancements on three counts of child molesting even though D only held knife to victim's throat once); Rodriguez, App., 795 N.E.2d 1054 (enhancing D's convictions for Rape as class A felony & Criminal Confinement as class B felony because a shotgun was used during both crimes did not violate prohibition against double jeopardy).

TITLE: Mills v. State

INDEX NO.: J.10.f.

CITE: (05-18-23), 211 N.E.3d 22 (Ind. Ct. App. 2023)

SUBJECT: Wadle double-jeopardy test does not permit consideration of evidence presented at trial to determine whether an offense is "included" in another

HOLDING: The Court of Appeals applied the test articulated in Wadle v. State, 151 N.E.3d 227 (Ind. 2020), to conclude Defendant's convictions for both neglect of a dependent resulting in catastrophic injury or death as a Level 1 felony and battery resulting in serious bodily injury as a Level 3 felony did not violate double jeopardy. In drawing its conclusion, the Court stated the three-part test in Wadle "does not permit us to look to the evidence presented at trial to determine whether an offense is included in another for purposes of substantive double jeopardy." Instead, the Court applied only the first two steps of the test and concluded that neither the neglect-of-a-dependent statute not the battery statute clearly permits multiple punishment and that neither offense is included in the other either inherently or as charged and noted, "[a]s such, there is no double-jeopardy violation, and our analysis ends here." The Court acknowledged that its interpretation may produce harsh results and that other panels have looked at the evidence presented at trial, but quoted the language from Wadle and stated, "once a court has determined an offense is not included inherently or "as charged" in another offense, there is no need to look at the evidence presented at trial." Held, affirmed.

TITLE: Moala v. State

INDEX NO.: J.10.f.

CITE: (06-27-12), 969 N.E.2d 1061 (Ind. Ct. App. 2012)

SUBJECT: Double jeopardy - considering "penal consequences" in deciding which conviction to vacate

HOLDING: When one of two convictions must be vacated to remedy a double jeopardy violation, Tr. Ct. need not undertake a full sentencing reevaluation, but rather the reviewing court will make this determination itself, being mindful of the penal consequences that the Tr. Ct. found appropriate. Richardson v. State, 717 N.E.2d 32, 54 (Ind. 1999). In this case, State conceded that Tr. Ct. violated double jeopardy in entering convictions for both Class C misdemeanor operating a vehicle while intoxicated and Class B misdemeanor public intoxication. However, State requested that the public intoxication conviction be vacated because the Class C misdemeanor operating while intoxicated could have more severe penalties, such as license suspension, and may lead to a future Class D felony charge if D is arrested again for drunk driving.

The severity of penal consequences has largely been determined by the class of crime or by the length of the sentence imposed. Here, Court concluded that the Class C misdemeanor has the less severe penal consequences. As made clear in Schrefler v. State, 660 N.E.2d 585 (Ind. Ct. App. 1996), a license suspension is not punitive, and Court does not consider any such suspension in determining the "penal consequences" of each of D's convictions. Moreover, potential future consequences (i.e, conviction could serve as a predicate for Class D felony OWI charge) should not be considered as part of the penal consequences of a conviction. Considering future consequences would be speculative and raises the possibility of disparate treatment in sentencing. Finally, although the prosecuting attorney has discretion in charging a D and Tr. Ct. has discretion in sentencing, it is the reviewing court that will determine what is the appropriate remedy for a double jeopardy violation? Richardson v. State, 717 N.E.2d 32, 54 (Ind. 1999). Prosecutorial discretion does not extend to the determination of which conviction should be vacated upon a finding of double jeopardy. Appropriate remedy for double jeopardy violation in this case is to vacate the operating while intoxicated conviction, which has the less severe penal consequences. Held, judgment reversed and remanded.

RELATED CASES: Owens, 60 N.E.3d 1106 (Ind. Ct. App. 2016) (because Tr. Ct. made domestic violence determination on D's battery conviction, D's criminal recklessness conviction had the less serious penal consequence and thus should be vacated to cure the double jeopardy violation).

TITLE: Montgomery v. State
INDEX NO: J.10.f.
CITE: (7/23/2014), 14 N.E.3d 76 (Ind. Ct. App. 2014)
SUBJECT: Failure to register convictions do not violate double jeopardy
HOLDING: Conviction in Vanderburgh County for failing to register as sex offender (Ind. Code 11-8-8-17) would not violate Indiana's double jeopardy prohibition or statutory bar on successive prosecutions (Ind. Code 35-34-1-4(a)(7)) where D had already pled guilty in Pike County to the same charge. Even though only one act precipitated the charges in both counties - D moving from his registered residence in Pike County to Vanderburgh County - this one act constituted "two divisible offenses": 1) not residing at his registered Pike County address; and 2) failing to register as a sex offender in Vanderburgh County. See Richardson v. State, 717 N.E.2d 32, 49-50 (Ind. 1999); Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002). Accordingly, the Vanderburgh County Tr. Ct. did not err in denying D's motion to dismiss the failure to register charge. Held, judgment affirmed and remanded.

TITLE: Moore v. State
INDEX NO.: J.10.f.
CITE: (6-22-95), Ind., 652 N.E.2d 53
SUBJECT: Murder & robbery - double jeopardy claim
HOLDING: Convictions for both murder & robbery of same victim did not violate constitutional prohibition against double jeopardy. Jury found D guilty of murder while in commission of robbery (Felony Murder) & knowing & intentional murder. Tr. Ct. only entered judgment on latter count, & also entered judgment of conviction on robbery count. To support double jeopardy claim, D must demonstrate that same act constitutes violation of two distinct statutory provisions which do not require proof of additional fact. Wethington v. State, Ind., 560 N.E.2d 496. Here, murder & robbery statutes contain mutually exclusive elements - killing of another human being & taking of property from another person. Applying decisions in Mitchell v. State, Ind., 541 N.E.2d 265, & Flowers v. State, Ind., 481 N.E.2d 100, Ct. rejected D's double jeopardy claim.

However, Ct. vacated Class A enhancement of D's conviction & sentence for robbery. D may not be convicted & sentenced for both murder & robbery (Class A) where act that is basis for elevating robbery to Class A felony is same act upon which murder conviction is based. Mitchell. Held, remanded with instructions to vacate Class A robbery enhancement, & enter judgment of conviction & sentence for robbery as Class C felony.

RELATED CASES: Sanchez, App., 794 N.E.2d 488 (D's convictions for both felony murder & armed robbery violated double jeopardy because the conviction for felony murder could not be had without proof of the armed robbery)

TITLE: Moritz v. State
INDEX NO.: J.10.f.
CITE: (1st Dist. 6/26/84), Ind. App., 465 N.E.2d 748
SUBJECT: Double jeopardy - one punishment for one transaction
HOLDING: Tr. Ct. must vacate 3 of 4 counts of bribery where one transaction occurred between chemical salesman & D, resulting in numerous sales orders, & D (Mayor of Seymour) was paid in single lump-sum in exchange for orders. Here, court finds single intent & design, relying on Williams, 395 N.E.2d 239 (taking money from 4 tellers at same time is one robbery) & Isaac, App., 439 N.E.2d 1193 (exhibiting obscene film to number of people at one time is one offense). Held Count 1 affirmed; Tr. Ct. directed to vacate sentences for counts 2, 3 & 4.

RELATED CASES: Winn, App., 722 N.E.2d 345 (D sending money or letter to prosecutor 7 times constituted one continuous transaction because D had single intent & design to engage in one long-term bribery); Stout, 479 N.E.2d 563 (Crim L 29; Tr. Ct. erred in entering judgment & sentence on 2 counts of theft where D took items from victim's house & garage).

TITLE: Morrison v. State

INDEX NO.: J.10.f.

CITE: (1/24/2019), 118 N.E.3d 61 (Ind. Ct. App. 2019)

SUBJECT: Convictions for resisting law enforcement while operating a vehicle in a manner that causes death and operating a vehicle with a controlled substance in the body causing serious bodily injury do not violate double jeopardy

HOLDING: Convictions for resisting law enforcement while operating a vehicle in a manner that causes death and operating a vehicle with a controlled substance in the body causing serious bodily injury do not violate double jeopardy under either a statutory or constitutional argument. Distinguishing Edmonds v. State, 100 N.E.3d 258 (Ind. 2018), which involved multiple convictions arising from a single act of resisting, Court noted that resisting law enforcement and operating with a controlled substance are separate statutes. In addition, there was no constitutional violation because the resisting caused harm to one victim and the operating with a controlled substance caused harm to others.

TITLE: Nicoson v. State

INDEX NO.: J.10.f.

CITE: (12-15-10), Ind., 938 N.E.2d 660

SUBJECT: Double enhancement for "using" firearm while "armed" does not violate state double jeopardy prohibition

HOLDING: Five-year enhancement under Ind. Code 35-50-2-11 for "using" a firearm while committing criminal confinement, where criminal confinement conviction was also elevated to a B felony for committing the offense while "armed" with a deadly weapon (Ind. Code 35-42-3-3(b)(2)(a)) does not violate Indiana Constitution's prohibition on double jeopardy. See Ind. Const., Art. I, § 14.

Generally, double enhancements are impermissible absent explicit legislative direction. Mills v. State, 868 N.E.2d 446, 452 (Ind. 2007). The difference between possessing a firearm and using it has been recognized before. Mickens v. State, 742 N.E.2d 927 (Ind. 2001). The fact that a criminal confinement conviction is elevated for being armed while the sentence for criminal confinement can be enhanced for use of a firearm is compelling evidence the legislature intended to allow the double enhancements used here. The record clearly shows that D was not only armed with a deadly weapon but that he used it by firing the gun in the air, ordering the victims from the vehicle with it, and firing at the victims' car as they drove away. Held, transfer granted, Court of Appeals' opinion at 919 N.E.2d 1203 vacated, judgment affirmed. Rucker and Sullivan, JJ. dissenting believe that D's sentence was enhanced "for the very same behavior" for which he was convicted and punished. D was "armed" the entire time he used the "gun".

RELATED CASES: Cooper, 940 N.E. 2d 1210 (Ind. Ct. App. 2011) (5-year enhancement of D's reckless homicide sentence pursuant to the firearm enhancement statute did not violate Indiana's double jeopardy principles, even though the evidence that D killed the victim with a gun was used to support both the reckless homicide conviction and the five-year firearm enhancement)

TITLE: None
INDEX NO.: J.10.f.
CITE: various
SUBJECT: Double jeopardy - multiple convictions/punishment
HOLDING: Brewington, 981 N.E.2d 585 (Ind. Ct. App. 2013), sum. aff'd 7 N.E.3d 946 (Ind. 2014) (Ct. vacated intimidation conviction because jury could have relied on same evidence to convict D of intimidation and attempted obstruction of justice); Williams, App., 892 N.E.2d 666 (there was more than a reasonable possibility that State used same evidentiary facts to convict D of both forgery and attempted theft); Lahr, App., 731 N.E.2d 479 (actual evidence State used to prove forgery also proved that D was guilty of obstruction of justice); Trotter, App., 733 N.E.2d 527 (there was reasonable possibility that evidentiary facts used by jury to establish substantial step for attempted fraud may have been used to establish theft); Davies, App., 730 N.E.2d 726 (convictions for child molesting by criminal deviate conduct & by fondling constituted double jeopardy under Ind. Const.); Jenkins, App., 695 N.E.2d 158 (D was improperly subjected to double jeopardy by his convictions of both robbery & carjacking of same car; fact that robbery charge also included purse does not change fact that all of elements of carjacking are found within robbery charge); Mitchell, App., 690 N.E.2d 1200 (under "same elements" test, legislature did not intend for D to be punished under both robbery & theft statutes for same offense); Fuller, App., 674 N.E.2d 576 (convictions for promoting or staging animal fighting contest & using animal in animal fighting contest based on same act subjected D to double jeopardy); Wright, App., 665 N.E.2d 2 (convictions for confinement in connection with attempted carjacking & child molesting violated double jeopardy); Burton, App., 665 N.E.2d 924 (double jeopardy barred conviction for both invasion of privacy & stalking).

RELATED CASES: Hatchett, 33 N.E.3d 1125 (Ind. Ct. App. 2015) (convictions on two counts of invasion of privacy based on same telephone call D made from jail violated Indiana Double Jeopardy Clause); Brewington, 981 N.E.2d 585 (Ind. Ct. App. 2013), sum. aff'd 7 N.E.3d 946 (Ind. 2014) (Ct. vacated intimidation conviction because jury could have relied on same evidence to convict D of intimidation and attempted obstruction of justice); White, 944 N.E. 2d 532 (Ind. Ct. App. 2011) (theft and receiving stolen property convictions violate Ind. DJ where D drove getaway car after accomplice stole cash register and cash from restaurant and both men later divvied up the cash); White, 25 N.E.3d 107 (Ind. Ct. App. 2014) (D was convicted and punished twice for making a false statement regarding his address on his voter registration; also, he was convicted and punished twice for voting in the wrong township); Osburn, 940 N.E.2d 853 (Ind. Ct. App. 2011) (D's DJ rights were violated because there is a reasonable probability that the jury used the same facts to establish the essential elements of both theft and obstruction of justice).

TITLE: Odom v. State
INDEX NO.: J.10.f.
CITE: (3rd Dist., 3-7-95), Ind. App., 647 N.E.2d 377
SUBJECT: Double jeopardy - elevating multiple charges based on single instance of bodily injury
HOLDING: Elevation of multiple burglary & robbery charges to Class A felonies based on serious bodily injury suffered by same victims violated prohibition against double jeopardy. Flowers v. State, 481 N.E.2d 100. Fact that D admitted allegations & entered guilty plea to facially duplicative charges did not bar challenge to resulting convictions. Griffin v. State, 540 N.E.2d 1187. Guilty pleas would not be vacated because D failed to allege prejudice. Held, conviction & sentence vacated, cause remanded for resentencing, Staton, J., concurring.

RELATED CASES: Peterson, App, 650 N.E.2d 339 (no error in enhancing robbery & rape convictions based upon D's possession of single deadly weapon during commission of offenses, despite fact that "injury" & "deadly weapon" enhancements appear together in various statutes).

TITLE: Owens v. State
INDEX NO.: J.10.f.
CITE: (5th Dist., 12-09-08), Ind. App., 897 N.E.2d 537
SUBJECT: Murder and Class A felony robbery convictions - double jeopardy
HOLDING: D's convictions for both murder and robbery resulting in serious bodily injury violated Indiana common law prohibition against double jeopardy. Indiana common law prohibits conviction and punishment for an enhancement of a crime where the enhancement is imposed for the very same behavior or harm as another crime for which the D has been convicted and punished. Richardson v. State, 717 N.E.2d 32, 56 (Ind. 1999) (Sullivan, J., concurring). Here, the charging information makes clear that the serious bodily injury that enhanced D's robbery charge from a Class C felony to a Class A felony-- victim's death-- was the exact same harm for which D was convicted and punished for murder.

Court declined to reduce D's conviction to theft, because evidence supported jury's finding that D was intent on robbing D at time of the shooting rather than taking money after victim was already dead. Court would not reduce robbery enhancement from Class A felony to Class B felony, because D was neither charged with nor instructed on the deadly weapon element. Spears v. State, 735 N.E.2d 1161 (Ind. 2000). Where there is no instruction on use of a deadly weapon, reduction to a Class C felony is proper remedy. Held, reversed, and remanded with instructions to reduce robbery conviction to a Class C felony and re-sentence D accordingly, including, if Tr. Ct. so chooses, on the murder conviction.

RELATED CASES: Martin, (10-11-19) 134 N.E.3d 1033 (Ind. Ct. App. 2019) (Tr. Ct. erroneously entered the robbery conviction as a Level 3 rather than Level 5 based on the use of a deadly weapon, which was neither alleged by the State nor found by the jury beyond a reasonable doubt; Ct. rejected State's reliance on invited error doctrine).

TITLE: Payne v. State
INDEX NO.: J.10.f.
CITE: (5th Dist., 10-24-02), Ind. App., 777 N.E.2d 63
SUBJECT: Erroneous merger of burglary & theft convictions
HOLDING: Tr. Ct. erred in merging D's burglary & theft convictions, because sentencing D for both convictions would not violate Indiana's double jeopardy clause. Under actual evidence test set forth in Richardson v. State, 717 N.E.2d 32 (Ind. 1999), there was no reasonable probability that jury used same evidentiary facts to convict D of both burglary & theft. Ind. Code 35-50-1-1 states that Tr. Ct. "*shall* fix the penalty of & sentence a person convicted of an offense." Thus, since sentencing D for both burglary & theft would not violate Indiana's double jeopardy clause, Tr. Ct. must sentence D on both counts pursuant to statute. Darden, J., dissenting, disagrees that Indiana Constitution requires that Tr. Ct. sentence D on both convictions, given precedents that emphasize Tr. Ct.'s discretion in sentencing.

TITLE: Perkins v. State
INDEX NO.: J.10.f.
CITE: (10/25/85), Ind., 483 N.E.2d 1379
SUBJECT: Double jeopardy (DJ) - conspiracy
HOLDING: Separate conspiracy convictions based upon same agreement violates DJ. Here, Ds were charged with, convicted of & sentenced for conspiracy to deal in marijuana & conspiracy to traffic with an inmate. When separate conspiracies are charged, relevant inquiry is whether more than one agreement to perform some illegal act(s) existed [citations omitted], not whether crimes of dealing & trafficking have different elements. Both, conspiracy counts center on same act, delivery of controlled substance to Ds at Pendleton. Participants in both counts were identical. Held, remanded with instructions to vacate one of Ds' conspiracy convictions.

RELATED CASES: Fosha, 747 N.E.2d 549 (because jury was instructed that D could be found guilty of murder as accomplice, it was reasonably possible that evidentiary facts used by jury to establish essential elements of conspiracy charge were also used to prove essential elements of murder); Redman, 743 N.E.2d 263 (given extensive evidence of protracted criminal episode & Tr. Ct.'s instructions, possibility that jury relied on evidence of abduction by removal to establish overt act element of conspiracy charge was remote, speculative, & therefore not reasonable); Holden, App., 815 N.E.2d 1049; Guffey, 717 N.E.2d 103 (because there was reasonable possibility that jury used same evidentiary facts-that D provided handgun to principal & waited on principal to commit robbery- to prove essential elements of conspiracy to commit armed robbery & essential elements of aiding armed robbery, conspiracy conviction must be vacated); Harris, 617 N.E.2d 912 (Where aiding of confederate is integral part of commission of crime, aiding conviction is merged into other, here felony murder); Smith 465 N.E.2d 1105 (DJ does not bar trial, conviction & sentence upon both murder & conspiracy to commit murder); Huff, App., 443 N.E.2d 1234 (commission of offense & conspiracy to commit same offense are separate offenses, thus acquittal of one is not bar to other [citations omitted]).

TITLE: Pickens v. State
INDEX NO.: J.10.f.
CITE: (7-10-01), Ind. App., 751 N.E.2d 331
SUBJECT: Detention as punishment for double jeopardy
HOLDING: D's detention time before her release for alcohol-related offense, & her subsequent trial & conviction did not subject her to double jeopardy. Ct. concluded that detention pursuant to Ind. Code 35-33-1-6 for alcohol-related offense is not punishment for double jeopardy purposes. This type of detention serves function of protecting general public from arrestees while intoxicated & jeopardy does not attach until there exists actual risk of trial & conviction, when the jury has been impaneled & sworn. Bryant v. State, 660 N.E.2d 290, 299 (Ind. 1995). Held, judgment affirmed.

TITLE: Pierce v. State
INDEX NO.: J.10.f.
CITE: (1-29-02), Ind., 761 N.E.2d 826
SUBJECT: Double jeopardy - multiple enhancement based on same bodily injury prohibited
HOLDING: D cannot be convicted of both burglary as Class A felony & robbery as Class B felony when both crimes are enhanced by same bodily injury, even though each of these crimes includes evidence or facts not essential to the other. Ct. has long adhered to series of rules of statutory construction & common law that are often described as double jeopardy but are not governed by constitutional test set forth in Richardson v. State, 717 N.E.2d 32 (Ind. 1999). Among these is the doctrine that where a burglary conviction is elevated to a Class A felony based on same bodily injury that forms basis of Class B robbery conviction, the two cannot stand. Held, remanded with instructions to reduce robbery conviction to Class C felony.

RELATED CASES: Street, 30 N.E.3d 41 (Ind. Ct. App. 2015) (Ct. reversed D's convictions of Class A felony attempted robbery, Class B felony attempted robbery and Class C felony battery based on double jeopardy concerns because those convictions were based on the same bodily injury that formed the enhancement for Class A felony burglary conviction); Phillips, 25 N.E.3d 1284 (Ind. Ct. App. 2015) (convictions for reckless homicide and involuntary manslaughter violated Indiana common law double jeopardy prohibition because both convictions were based on the same act, causing the death of an infant); Henderson, 769 N.E.2d 172 (Ct. reduced D's conspiracy conviction to class B felony because victim's death was basis for both murder & class A felony conspiracy).

TITLE: Porter v. State

INDEX NO.: J.10.f.

CITE: (10-27-10), 935 N.E.2d 1228 (Ind. Ct. App. 2010)

SUBJECT: Class C felony nonsupport - double jeopardy; same arrearage cannot support two elevated offenses

HOLDING: Child support arrearage under class D felony convictions cannot be added to subsequent arrearage to achieve the $15,000 needed to elevate nonsupport of a dependent to a class C felony. See Sanquenetti v. State, 917 N.E.2d 1287 (Ind. Ct. App. 2009). Here, D's two convictions for Class C felony nonsupport violated Indiana double jeopardy principles because State used same evidence from his prior Class D felony convictions to support the convictions in the instant case. Class C enhancement status was based upon child support arrearage of $54,889, an amount that included $35,497 arrearage underlying D's 2005 convictions. As such, the State proceeded against D twice for the same criminal transgression. Court concluded that error was harmless because D had accumulated an arrearage of over $20,000 in addition to the improperly included $35,497 arrearage.

However, enhancement of both nonsupport offenses to Class C felony status based on the same $20,000 arrearage violated Indiana's common law double jeopardy tradition that prohibits multiple enhancements based upon a single act. Holloway v. State, 773 N.E.2d 315 (Ind. Ct. App. 2002). The $20,000 child support arrearage sustaining both enhancements in this case is not separate and distinct to each child. Rather, it involves the same injurious conduct to the same children in the same household. Held, one Class C felony nonsupport conviction affirmed, second conviction reduced to a Class D felony for which the sentence shall be a term of one and one-half years, to be served consecutive to sentence for Class C felony.

TITLE: Powell v. State

INDEX NO.: J.10.f.

CITE: (8-18-20), Ind., 151 N.E.3d 256

SUBJECT: While Indiana's attempted-murder statute contains no clear unit of prosecution, the multiple shots defendant fired—despite their proximity in space and time—amount to two chargeable offenses based on his dual purpose of intent to kill both victims.

HOLDING: Defendant's actions of firing multiple shots in rapid succession at two men seated in a car, despite their proximity in space and time, amounted to two distinct, chargeable acts of attempted murder. In reaching its conclusion, the Indiana Supreme Court described and applied its framework for analyzing claims of multiplicity, a branch of substantive double jeopardy based on the charging of a single offense in several counts. The Court framed the key question as whether the same act may be punished as two counts of the same offense and its task as determining whether the statute permits punishment for a single course of criminal conduct or for certain discrete acts within that course of conduct. The inquiry involves a two-step process: first, a review of the text of the statute to discern whether expressly or by judicial construction it indicates a unit of prosecution and then, if the statute is ambiguous, determining whether the facts indicate a single offense or distinguishable offenses. Any doubt counsels against turning a single transaction into multiple offenses. Here, while the attempted murder statute does not contain a clear unit of prosecution, Defendant's criminal acts indicate distinguishable offenses. First, the Court considered the attempted murder statute and concluded that alternative readings of it reveal equally legitimate ways of thinking about the statute's unit of prosecution: ether by conduct or by result. Given the ambiguity, the Court then examined the facts to conclude that the multiple shots Defendant fired--despite their proximity in space and time--amount to two chargeable offenses based on Defendant's dual purpose of intent to kill both men.

RELATED CASES: Moore, 181 N.E.3d 442 (Ind. Ct. App. 2022) (two criminal recklessness convictions based on two shots fired in quick succession with the unified purpose of scaring the CWs out of her house constitute double jeopardy under Powell test); Kerner, 178 N.E.3d 1215 (Ind. Ct. App. 2021) (Ct. sua sponte concluded that D's two attempted robbery convictions violated double jeopardy though that conduct-based crime does not "fit neatly within the Powell framework"; although both victims suffered serious bodily injury, there was only one act of attempted robbery); Morales, 165 N.E.3d 1002 (Ind. Ct. App. 2021) (facts of case as charged and as proven establish D's two arson counts were a single offense).

TITLE: Ransom v. State
INDEX NO.: J.10.f.
CITE: (2nd Dist., 07-13-06), Ind. App., 850 N.E.2d 491
SUBJECT: Double jeopardy - confinement & battery
HOLDING: Under "actual evidence test," D's convictions for both battery as a class B felony & confinement as a class C felony violate double jeopardy under Indiana Constitution. Although jury instructions could portray separate incidents, prosecutor's closing argument did not clearly separate the evidentiary facts that the State was alleging to constitute separate offenses. Evidence established that almost immediately upon entering house, Co-D walked toward victim & backed victim against a wall; that Co-D struck victim repeatedly with handgun; that at some point he touched it to her face & placed it in her mouth; & that she ended up on floor attempting to protect her head. Sequence of events was unclear, & events occurred within a relatively short period of time. Further, State did not clearly explain to jury that certain evidentiary facts were alleged to constitute confinement of victim, & that separate evidentiary facts allegedly constituted the battery of victim. Thus, there was reasonable probability that jury found D guilty of confinement for victim's having been confined against her will when Co-D was striking her with handgun, & that jury also relied on that same evidence -- including use of handgun-- to find her guilty of battery as class C felony. Held, confinement conviction affirmed, class C felony battery conviction vacated, remanded for entry of conviction of battery as a class A misdemeanor. Kirsch, C.J., concurring in part & dissenting on this issue; Sullivan, J., concurring in part & dissenting in part, noted that D was not convicted of class C felony battery, but class A misdemeanor battery, which also violates double jeopardy because there was no confinement separate & apart from battery.

RELATED CASES: Singh, 40 N.E.3d 981 (Ind. Ct. App. 2015) (Under actual evidence test, D's convictions for attempted promotion of human trafficking and criminal confinement did not violate double jeopardy because there was no reasonable probability that the same evidence was used to establish the essential elements of both offenses); Williams, App., 889 N.E.2d 1274 (no reasonable probability jury used same evidentiary facts to establish essential elements of both criminal confinement as a Class D felony and Class A misdemeanor battery against CW, where confinement was more extensive than necessary to commit battery); Bradley, 867 N.E.2d 1282 (D's convictions for both criminal confinement as a Class B felony & aggravated battery violated the "actual evidence" test for reviewing claims under the Double Jeopardy Clause of Indiana Constitution, because there is a reasonable probability that the facts used by the jury to establish essential elements of criminal confinement were also used to establish essential elements of aggravated battery).

TITLE: Reaves v. State
INDEX NO.: J.10.f.
CITE: (02/17/92), Ind., 586 N.E.2d 847
SUBJECT: Merger of offenses - felony murder & robbery with multiple victims
HOLDING: It was not error & violation of double jeopardy to convict & sentence D for both felony murder & robbery, because information charged one count of robbery against both victim who died & other victim. While it would be error to punish D twice for same robbery by imposing separate sentences for robbery & felony murder based on same offense, in cases where underlying offense was committed on 2 separate victims, either will be sufficient as predicate for greater offense while not merging with other. Hansford, 490 N.E.2d 1083. Here, Tr. Ct. specified robbery conviction was for robbery of victim who did not die, so robbery of dead victim was predicate for felony murder, distinguishing King, 517 N.E.2d 383, where court held same injuries to 2 victims could not support murder & attempted murder as well as elevation of burglary & robbery to Class A felonies. Held, conviction affirmed.

TITLE: Rexroat v. State
INDEX NO.: J.10.f.
CITE: (04-04-12), 855 N.E.2d 165 (Ind. Ct. App. 2012)
SUBJECT: Double jeopardy - identically-worded charges
HOLDING: Neither State nor federal prohibitions against double jeopardy were violated where the charging information contained two identically worded counts of child molesting. Complaining witness testified that D molested her the same way at two separate and distinct locations on different days. The federal Blockburger test does not apply in cases of multiple violations based on separate acts, especially on separate dates, under the same statute. Although the charges and jury instructions worded the two child molesting counts identically, the statutory elements test of Richardson v. State, 717 N.E.2d 32 (Ind. 1999) does not apply because the conduct charged in the two counts arose from separate incidents. Peckinpaugh v. State, 743 N.E.2d 1238 (Ind. Ct. App. 2001) (D may be charged with as many counts of an offense as there are separate acts). Moreover, Court concluded that evidence clearly showed two different incidents and therefore does not satisfy the actual evidence test. Multiple convictions do not violate Double Jeopardy if they logically could have been based on same facts, but in light of the evidence, the instructions, the charges, and the argument of counsel, there is no reasonable probability that the jury actually used exactly the same set of facts to establish both convictions. Pontius v. State, 930 N.E.2d 1212 (Ind. Ct. App. 2012). Held, judgment affirmed.

TITLE: Richardson v. State
INDEX NO.: J.10.f.
CITE: (10-1-99), 717 N.E.2d 32, (Ind.)
SUBJECT: Double jeopardy - separate Indiana constitutional analysis
HOLDING: Indiana Constitution provides broader protection against double jeopardy than U.S. Constitution. Whereas federal double jeopardy analysis only consists of same elements test.

Indiana double jeopardy analysis consists of both statutory elements test & actual evidence test. Based on review of constitutional text, history & circumstances surrounding its adoption, & early cases interpreting & applying provision, Ct. determined that Indiana's Double Jeopardy Clause was intended to prevent State from being able to proceed against person twice for same criminal transgression. Thus, two or more offenses are same offense in violation of Article I, Section 14 of Indiana Constitution, if, with respect to *either* statutory elements of challenged crimes *or* actual evidence used to convict, essential elements of one challenged offense also establish essential elements of another challenged offense.

First step in determining whether two offenses violate double jeopardy under Indiana Constitution is to apply "same elements" test. After identifying elements of each offense, Ct. must determine whether elements of one offense could, hypothetically, be established by evidence that does not also establish essential elements of other charged offense. Each offense must contain at least one element which is separate & distinct from other offense so that same evidence is not necessary to convict for both offenses. Even if consideration of statutory elements test does not disclose double jeopardy violation, actual evidence test may. Under actual evidence test, D must demonstrate reasonable possibility that evidentiary facts used by fact finder to establish essential elements of one offense may also have been used to establish essential elements of second challenged offense.

Here, D was convicted of Class A misdemeanor Battery & Class C felony Robbery. Because each offense contained at least one essential element that is separate & distinct from other offense, State could hypothetically prove separate offenses without using same evidence. However, under second component of Indiana double jeopardy analysis, both battery & force required to effectuate robbery were based on D beating victim. Although battery could have been based on D throwing victim over bridge while robbery was based on beating victim, actual proof at trial did not support finding that victim's serious bodily injury occurred due to being thrown over bridge but rather was due to being beat. Thus, D's convictions for Battery as Class A misdemeanor & Robbery as Class C felony violated Indiana's Double Jeopardy Clause, & Ct. vacated Class A misdemeanor. Held, transfer granted, opinion at 687 N.E.2d 241 vacated, judgment reversed; Sullivan, J., concurring setting forth five situations where double jeopardy violations occur; Boehm & Selby, J.J., concurring based on fact that evidence beyond elements of offenses must be considered; however, cases involving multiple punishment, such as instant case, should be resolved using common law & statutes, whereas, successive prosecution cases should be resolved using constitutional double jeopardy analysis.

NOTE: FN 36 provides list of Indiana cases which referred to Indiana Constitution's Double Jeopardy Clause while misapplying federal double jeopardy test. These cases are superseded by this decision.

RELATED CASES: Seal, 38 N.E.3d 717 (Ind. Ct. App. 2015) (even if they had occurred closer in

time, D's convictions for class A felony child molesting and class B felony sexual misconduct with a minor did not fall within the continuous crime doctrine because they were different crimes); Hines, 30 N.E.3d 1216 (Ind. 2015) (where State failed to specify the evidence support the different offenses in the charging information and jury instructions and arguments at trial were confusing, there was a reasonable possibly that the evidence used by the jury to support the battery charge was also among the evidence used to support D's confinement charge; held, double jeopardy violation) Garrett, 992 N.E.2d 710 (Ind. 2013) (actual evidence test applies to cases where jury acquits a D of one charge but cannot reach a verdict on a second charge, and where D is subsequently convicted of second charge on retrial; see full review, this section); Smith, 983 N.E.2d 226 (Ind. Ct. App. 2013) (where 2 deviate conduct charges were charged in the alternative to the 2 intercourse charges, not as separate offenses, convictions on all 4 charges violated Indiana double jeopardy prohibition); Vermillion, 978 N.E. 2d 459 (Ind. Ct. App. 2012) (even though D's acts of touching victim were part of continuing effort to fondle her, victim's testimony established distinct acts, so there was no double jeopardy violation under actual evidence test); Jones, 976 N.E.2d 1271 (Ind. Ct. App. 2012) (two of D's three convictions for battery had to be vacated because there is a reasonable probability the jury based the convictions on the same acts, although there were multiple instances D battered victim during altercation; State used same general language in each battery and its attempt during closing to differentiate the batteries was legally incorrect); Borum, 951 N.E.2d 619 (Ind. Ct. App. 2011) (in light of the fact that the information and the jury instructions alleged different substantial steps on the attempted robbery and attempted carjacking charges, there was not a reasonable possibility that the jury relied upon exactly the same facts in rendering convictions on each charge); Lee, 892 N.E.2d 1231 (a "reasonable possibility" that the jury used the same facts to reach two convictions requires substantially more than a logical possibility; although D's barging in a home logically could have supported the substantial step towards attempted armed robbery and burglary conviction, there is no reasonable possibility that the jury used only the barging into the home and ignored the extensive testimony of threats, etc. inside the home as the substantial steps towards taking property); Spivey, 761 N.E.2d 831 (Ind. DJ clause not violated when evidentiary facts establishing essential elements of one offense also establish only one or even several but not all of essential elements of second offense); Adams, App., 754 N.E.2d 1033 (charges for 2 battery counts & criminal recklessness count stated same act, i.e., striking victim with glass ashtray causing pain & unconsciousness, as basis for all three charges); George, 141 N.E.3d 68 (Ind. Ct. App. 2020); Hatchett, App., 740 N.E.2d 920 (unlawful possession of firearm by serious violent felon and carrying handgun without license violated Indiana DJ principles); but see Armstrong, App., 742 N.E.2d 972 (possession of unlicensed handgun & pointing firearm were based on difference evidence); Spears, 735 N.E.2d 1161 (Ct. noted that it has frequently treated "reasonable probability" analysis as matter of law for de novo review by appellate courts); Taylor, 717 N.E.2d 90 (Richardson is not available for retroactive application in post-conviction proceedings); Griffin, 717 N.E.2d 73 (conspiracy to commit robbery & robbery were not same offenses under Indiana analysis because each offense required proof of element other did not & there was no reasonable probability that evidence used to establish conspiracy was also used to establish robbery; robbery was not only overt act alleged); McIntire, 717 N.E.2d 96 (because D demonstrated that there was reasonable possibility that jury used same evidentiary facts -- victim's head injury caused by baseball bat -- to establish essential elements of both class A burglary & class D criminal recklessness, double jeopardy was violated; moreover, there was reasonable possibility that jury relied on fact that D pushed baseball bat to victim's chest in order to prove class B criminal confinement & class C intimidation); Collins, 717 N.E.2d 108 (because separate

evidentiary facts were clearly used to establish compelled oral sex & compelled anal sex, D's two convictions for criminal deviate conduct did not violate Indiana's Double Jeopardy Clause).

TITLE: Russell v. State
INDEX NO.: J.10.f.
CITE: (2nd Dist.; 6-23-99), Ind. App., 711 N.E.2d 545
SUBJECT: Double jeopardy - Ind. Const. provides for more protection than U.S. Const.
HOLDING: D's convictions for arson as Class A felony & reckless homicide violated double jeopardy prohibition under Article 1, Section 14 of Indiana Constitution. When considering whether double jeopardy clause of U.S. Constitution is violated, Ct. may only consider statutory elements of offenses. Games v. State, 684 N.E.2d 466 (Ind. 1997), *modified on other grounds by* 690 N.E.2d 211 (Ind. 1997). However, long before U.S. S. Ct.'s holding that federal double jeopardy clause was applicable to states through Fourteenth Amendment, Indiana had begun its distinct double jeopardy analysis. These cases & cases which followed held that D could not be convicted for two offenses based on same conduct. Indiana cases using Indiana Constitution provide traceable line documenting historical basis for proposition that Indiana does not need to adopt double jeopardy analysis separate & distinct from federal analysis because it has had distinct analysis that had been evolving since shortly after ratification of 1851 Indiana Constitution. Thus, Indiana Constitution prohibits convictions for two offenses based on same conduct.

Here, D & victim were arguing at gas station when D lit victim on fire. D was convicted of arson which was elevated to Class A felony because it resulted in serious bodily injury, death, to victim. D was also convicted of reckless homicide based on victim's death. Because two convictions were imposed for same injurious consequences to same victim, during single confrontation, D's convictions & sentences for Class A felony arson & reckless homicide violated Indiana Constitution prohibition against double jeopardy. Ct. vacated reckless homicide conviction. Held, judgment affirmed in part & reversed in part. Baker, J., dissenting on basis that Indiana Constitutional double jeopardy analysis is same as Richardson, 717 N.E.2d 32 (Indiana Constitution provides broader protection against double jeopardy than U.S. Constitution; see card, this section); D.B., App., 842 N.E.2d 399; Roberts, App., 712 N.E.2d 23 (although rape & child molesting convictions based on same act of sexual intercourse do not violate double jeopardy under U.S. Const., they do violate DJ under Ind. Const.).

TITLE: Sandefur v. State
INDEX NO.: J.10.f.
CITE: (1st Dist., 1-9-96), Ind. App., 662 N.E.2d 186
SUBJECT: Forfeiture & criminal prosecution - no double jeopardy violation
HOLDING: State's prosecution of forfeiture proceedings against D did not bar criminal prosecution for dealing marijuana & related offenses. Double jeopardy is implicated to extent that civil sanction may not fairly be characterized as remedial, but only as deterrent or retribution. United States v. Halper, 490 U.S. 444 (1989). Here, police officers seized $2,569.00 in cash & 1977 Chevrolet van from D upon his arrest. Approximately $1,400.00 of seized cash was "buy money" which State had provided confidential informant to purchase marijuana from D. State initiated forfeiture proceedings against cash & van seized from D. By agreement, van was transferred to lienholder, & after hearing, Tr. Ct. ordered $1,500 of cash to be forfeited & ordered $1069.00 balance to be returned to D. Under these circumstances, Tr. Ct. did not abuse discretion in determining that $1,500.00 forfeiture was remedial & not punishment. Forfeiture bore rational relation to goal of compensating State for its expenses. Nearly all of money ordered forfeited had been furnished by State for controlled buys, & over $1,000.00 in cash was returned to D. Held, judgment affirmed; Sullivan, J., concurred in result.

TITLE: Schrefler v. State

INDEX NO.: J.10.f.

CITE: (3rd Dist., 1-18-96), Ind. App., 660 N.E.2d 585

SUBJECT: DUI & administrative license suspension - no double jeopardy

HOLDING: Administrative suspension of driving privileges does not bar subsequent criminal prosecution for operating vehicle while intoxicated. *Citing* United States v. Halper (1989), 490 U.S. 435, D argued that administrative suspensions of his license pursuant to Ind. Code 9-30-6-9(b) constituted multiple punishments for same conduct at issue in his criminal prosecutions, thereby violating double jeopardy. Ct. held that administrative suspension of driving privileges upon finding of probable cause that D operated vehicle while intoxicated does not serve goals of punishment. Instead, administrative suspension scheme bears rational relationship to legitimate remedial governmental purpose of promoting highway safety. Ruge v. Kovach (1984), Ind., 467 N.E.2d 673. Because administrative suspensions of driving privileges serve legitimate, non-punitive governmental purpose, double jeopardy does not prohibit implementation of criminal proceedings based on same conduct. Held, denial of motion to dismiss affirmed.

RELATED CASES: Head, App., 683 N.E.2d 1336 (civil sanction imposed upon D in injunction resulting from failure to operate recycling center in accordance with Environmental Management Act did not constitute punishment for purposes of DJ).

TITLE: Shipley v. State
INDEX NO.: J.10.f.
CITE: (3rd Dist., 08-31-93), Ind. App., 620 N.E.2d 710
SUBJECT: Murder & Neglect of Dependent (ND) convictions violated double jeopardy (DJ)
HOLDING: D's convictions & sentences for both murder & ND were precluded by Ind. Constitution. Despite recent U.S. S. Ct. decision, U.S. v. Dixon (1993), 113 S. Ct. 2849, *overruling* Grady v. Corbin (1990), 110 S. Ct. 2084. Ct. was bound by Ind. S. Ct.'s interpretation of DJ in light of Ind. Constitution. D argued that same acts supporting ND charge formed basis for murder conviction. Although different statutory elements underlay two offenses, inquiry did not end there, as examination of factual bases alleged was also required, Tawney (1982), 439 N.E.2d 582.

Information against D for murder alleged that between September 15 & November 8, 1990, she knowingly or intentionally killed victim. Information for ND alleged that between same period she placed same victim in situation which may have endangered her life or health resulting in serious bodily injury. Both charges were based on same acts occurring over same time period, & convictions for both offenses were precluded by DJ considerations because "one offense was the instrument by which the other was committed." Acts causing death were combination of malnutrition, dehydration, & blunt force trauma over period of time, & acts of neglect were same acts resulting in victim's death. Ct. distinguished case from those where there was continual pattern of acts of neglect, independent from acts causing death, e.g., Bean, 460 N.E.2d 936; Gasaway, App., 547 N.E.2d 898, trans. denied, & instead relied on Strong, 538 N.E.2d 924; Hall, 493 N.E.2d 433; & Smith, App., 408 N.E.2d 613, Staton, J., dissenting.

RELATED CASES: Montgomery, 21 N.E.3d 846 (Ind. Ct. App. 2014) Strong, 870 N.E.2d 442 (reduction of class A felony neglect to class B or C felony failed to cure the double jeopardy violation, because injuries urged to support "serious bodily injury" necessary for class B neglect are the same injuries that resulted in the child's death & are the basis of the murder charge); Sanders, App., 734 N.E.2d 646 (convictions for both involuntary manslaughter & neglect of dependent resulting in death violated Double Jeopardy Clause of Indiana Constitution); Roby 742 N.E.2d 505; Mitchell, 726 N.E.2d 1228 (because evidence offered to prove serious bodily injury for class B felony neglect was same evidence offered to prove knowing killing for murder, there is reasonable probability that jury used same evidentiary facts to establish both convictions); Games, 684 N.E.2d 466 (Ct. noted that previous interpretation of federal DJ clause, which looked beyond statutory elements, does not comport with federal jurisprudence); Taylor, App., 644 N.E.2d 612 (acts of placing child's face in scalding water & subsequently failing to seek medical treatment were separate & distinct ND violations; neither of acts underlying convictions was means by which other act was accomplished).

TITLE: Shultz v. State
INDEX NO.: J.10.f.
CITE: (12/7/2018), 115 NE 3d 1280 (Ind. Ct. App. 2018)
SUBJECT: Two neglect convictions violated double jeopardy
HOLDING: D's convictions of Level 1 felony neglect of a dependent resulting in death and Level 3 felony neglect of a dependent resulting in serious bodily injury violated double jeopardy under Article I, Section 14 of the Indiana Constitution. Despite the State's argument that different evidence supported each conviction, Court held that because the prosecutor explicitly told the jury to rely on asphyxiation to support all of the counts, there was a reasonable probability under the "actual evidence test" that the jury relied on the same evidence to support both convictions. Indictments and jury instructions were vague and mentioned only the elements of the crime instead of alleging facts to distinguish the act of neglect underlying each charge. Held, judgment affirmed in part, reversed in part and remanded with instructions to vacate Level 3 conviction and resentence D.

TITLE: Sorgdrager v. State

INDEX NO.: J.10.f.

CITE: (4/13/2023), 208 N.E.3d 646 (Ind. Ct. App. 2023)

SUBJECT: Wadle double jeopardy rule applies retroactively to cases not yet final when Wadle was decided

HOLDING: Defendant was convicted of two counts of child molestation, Level 1 and Level 4 felonies, for offenses that occurred during one incident in 2018. He received consecutive sentences totaling 41 years and was designated a credit-restricted felon. Defendant argued on appeal that his convictions violated the double jeopardy clause in Article 1, Section 14 of the Indiana Constitution. The State argued that the new test announced in Wadle applied retroactively to Defendant's offenses even though, when he committed them, the Richardson test governed substantive double jeopardy issues. The retroactivity question has "continued to pester" the Court since Wadle was decided. "As such, we hold that the Wadle analysis is applicable to this case, which was far from final at the time the Court adopted the new analytical framework (and *overruled* Richardson) for substantive double jeopardy claims." The Court rejected the double jeopardy claim because Defendant could not establish that either of his offenses was inherently or factually included in the other under Wadle. A majority of the Court also rejected Defendant's request to exercise its authority to review and revise his sentence under Appellate Rule 7(B). The trial court imposed a slightly aggravated sentence of 35 years on Count I. For Count II, the Level 4 felony, the trial court imposed the advisory sentence of six years and made it consecutive to Count I. The Court found that the consecutive sentences were supported by the trial court's findings that Defendant had a position of trust over the victim and the victim had lasting trauma from the incident. Despite the fact that Defendant had no criminal history, a good work history, an outpouring of support from his family and friends, and was "low risk to reoffend," the Court concluded his "abuse of his position of trust – with a child he had known since she was an infant – and his brazenness in committing the offenses while his daughters and wife were in the home to be more telling of his character." Held: affirmed. Judge Brown dissented from the majority's ruling on the appropriateness of Defendant's sentence. Citing the Indiana Supreme Court's decision in Sanchez v. State, 938 N.E.2d 720 (Ind. 2010), Judge Brown would find that neither the crime's circumstances nor Defendant's character favored enhanced or consecutive sentences. "I would remand to the trial court with instructions to issue an amended sentencing order imposing concurrent advisory sentences with some time suspended."

TITLE: Stafford v. State

INDEX NO.: J.10.f.

CITE: (8/31/2017), 83 N.E.3d 721 (Ind. Ct. App. 2017)

SUBJECT: Double jeopardy - only one conviction for reckless driving in highway work zone causing multiple deaths

HOLDING: One act of reckless driving in a highway work zone cannot sustain two Class C felony convictions, even though it resulted in two deaths. One may not be convicted of and punished for a crime which consists of the very same act as another crime for which the D has been convicted and punished. Guyton v. State, 771 N.E.2d 1141 (Ind. 2002). As written, Ind. Code § 9-21-8-56 is a conduct-based, not result-based statute. Thus, in light of Indiana Supreme Court's holding in Kelly v. State, 539 N.E.2d 25 (Ind. 1989), Court was "compelled to conclude that [D] committed one crime here, albeit one crime with multiple, horrific results." Held, judgment reversed in part and remanded for resentencing.

TITLE: State v. Heemstra
INDEX NO.: J.10.f.
CITE: 721 N.W.2d 549 (Iowa 2006)
SUBJECT: Fatal assault merges, precluding felony-murder based on assault
HOLDING: The Iowa Supreme Court overruled 24 years of precedent to hold that an assault that caused a death cannot serve as the basis for a conviction of felony-murder. Approving a new interpretation of the state's felony-murder laws, the majority joined other jurisdictions that have adopted a rule that a fatal assault merges into the homicide in these circumstances.

In the present case, D was convicted of first-degree murder after his jury was given instructions that allowed it to find the D guilty on a felony-murder theory if it found that D pointed a gun at the victim in a threatening manner and the gun accidently discharged. Iowa's first-degree murder statute covers a killing by someone "participating in a forcible felony." "Forcible felony" is defined by statute in a way that includes an assault or other willful injury. Previously, Iowa courts had read these statutes broadly, holding that any willful injury qualifies as a "forcible felony." State v. Beeman, 315 N.W.2d 770 (Iowa 1982). This broader approach to the felony-murder rule taken by Iowa and some other jurisdictions permitted a felony-murder conviction to be based on the felony assault that led to the victim's death. In the present case, the majority noted that "the rationale of the felony-murder rule is that certain crimes are so inherently dangerous that proof of participating in these crimes may obviate the need for showing all of the elements normally required for first-degree murder." However, it added that its previous broad approach had been challenged in other states and in law review articles on the ground that allowing assault to be used as the underlying offense effectively converts every felonious assault resulting in death into first-degree murder, effectively eliminating other lesser forms of homicide such as manslaughter. Agreeing with other courts that have adopted the merger rule, the majority concluded that the its old rule extended the felony-murder doctrine beyond its justification.

TITLE: State v. Hurst
INDEX NO.: J.10.f.
CITE: (10-30-97), Ind., 688 N.E.2d 402, overruled on other grounds 810 N.E.2d 1064
SUBJECT: Double jeopardy claim - prosecution after conviction for infraction
HOLDING: Failure to yield right-of-way infraction judgment entered against D did not bar subsequent prosecution for reckless homicide. Proceedings for violation of failure to yield right- of-way statute are civil, & imposition of $7.00 fine for infraction did not constitute "punishment" under Double Jeopardy Clause. Therefore, D was not placed in jeopardy & subsequent criminal prosecution did not violate double jeopardy prohibition against second prosecution for same offense after conviction. However, because D was not brought to trail within one-year time period required by CR 4(C), he was entitled to discharge (see card at B.5.c.4). Held, transfer granted, Ct. App.'s decision at 674 N.E.2d 622 vacated; remanded to Tr. Ct. to discharge D.

TITLE: State v. Klein
INDEX NO.: J.10.f.
CITE: (2nd Dist., 12-10-98), Ind. App., 702 N.E.2d 771
SUBJECT: Double jeopardy (DJ) - criminal prosecution following in rem civil forfeiture
HOLDING: DJ principles prohibited criminal prosecution of D for attempted rape & criminal confinement following civil forfeiture of his car. Sole basis of forfeiture was that D drove his car to & from complaining witness's house on date he allegedly committed attempted rape and/or criminal confinement, which are two of enumerated offenses in Ind. Code 34-4-30.1-1. Statute warrants forfeiture of vehicle used in escape from such offenses. D provided clearest proof that despite civil nature of forfeiture statute, sanction in this case was so punitive that forfeiture transformed from civil to criminal. Because there was no purpose for forfeiture of D's car other than punishment, jeopardy attached upon forfeiture & subsequent criminal proceedings against D constituted multiple punishments for same offense in violation of DJ.

However, criminal prosecution for attempted criminal deviate conduct & criminal deviate conduct charges was not precluded by DJ because those offenses are not included in list of offenses warranting forfeiture under Ind. Code 34-4-30.1-1. Bryant, 660 N.E.2d 290. Held, Tr. Ct.'s dismissal with prejudice of attempted murder, attempted rape & criminal confinement charges affirmed; dismissal of attempted criminal deviate conduct & criminal deviate conduct charges reversed.

NOTE: See Klein, 719 N.E.2d 386, Sullivan, J. & Shepard, C.J., dissenting from denial of transfer.

RELATED CASES: Davis, App., 819 N.E.2d 863 (D failed to present "clearest proof" that forfeiture proceedings in this case were so punitive in form & effect as to render them criminal); Willis, App., 806 N.E.2d 817 (Tr. Ct. did not err in denying D's motion to dismiss operating while intoxicated (OWI) charge, following forfeiture of $1,300 found on D & seized by police at time of his arrest; DJ principles do not preclude use of same facts to support both a forfeiture proceeding for money confiscated by police & a subsequent criminal investigation); C.R.M., App., 799 N.E.2d 555 (no error in denying D's motion to dismiss State's delinquency petition alleging possession of marijuana, following State's forfeiture of $550 found in D's wallet; Klein erroneously compared expenditure of law enforcement resources with value of D's property); O'Connor, App., 789 N.E.2d 504 (Ct. App. questioned viability of Klein); Lewis, App., 755 N.E.2d 1116 (impoundment & holding of D's vehicle did not constitute "punishment;" unless & until Tr. Ct. entered judgment ordering D's car forfeited, D had not been punished as result of forfeiture proceedings).

TITLE: Stone v. State
INDEX NO.: J.10.f.
CITE: (10/10/2018), 112 N.E.3d 1153 (Ind. Ct. App. 2018)
SUBJECT: Two brands of Spice cannot support multiple dealing convictions
HOLDING: D's conviction on two counts of dealing in synthetic drug or synthetic lookalike substance based on his simultaneous possession of two packets of Spice violated double jeopardy under Indiana Constitution. As in Elvers v. State, 22 N.E.3d 824 (Ind. Ct. App. 2014), State charged D with two identical but separate counts of dealing Spice (XLR11), based only on the packets having different brand names. State cannot break D's simultaneous possession into multiple possessions based solely upon the fact that the packets containing the spice bore different brand names. Held, judgment reversed in part and remanded with instructions to vacate one of the convictions.

TITLE: Swaynie v. State
INDEX NO.: J.10.f.
CITE: (2-8-02), Ind., 762 N.E.2d 112
SUBJECT: Attempted murder & burglary convictions - double jeopardy claim
HOLDING: D's convictions & sentencing for attempted murder & burglary did not violate Indiana's double jeopardy clause. D argued that his double jeopardy rights were violated because there was reasonable possibility that evidence that D strangled husband was used by jury to establish both essential elements of attempted murder charge & intent-to-commit-murder element of burglary charge. Ct. noted that criminal transgression of burglary is committed by person intending to commit an underlying felony at moment building or structure is broken into & entered. D's culpability is established at point of entry regardless of whether underlying intended felony is ever completed. Thus, breaking into & entering victim's home with intent to kill husband was one criminal transgression & attempting to kill him was another. Because burglary & underlying intended felony (if committed) are separate criminal transgressions, Richardson v. State, 717 N.E.2d 32 (Ind. 1999) does not prohibit conviction & sentencing for both. Held, transfer granted, judgment of Tr. Ct. affirmed.

TITLE: Terry v. Potter
INDEX NO.: J.10.f.
CITE: 111 F.3d 454 (6th Cir. 1997)
SUBJECT: Double Jeopardy -- Termination of Jeopardy as to Alternative Forms of Single Offense
HOLDING: When accused is charged with two different forms of offense, described in two separate statutory subsections, jeopardy attaches and terminates separately as to each. When jury convicted D of wanton murder but was silent as to intentional murder, jeopardy terminated as to both. Appeal and reversal of conviction ordinarily removes double jeopardy bar to retrial, but here appellate court reversed wanton murder conviction because evidence instead supported finding of intentional murder. Thus, D cannot be retried for wanton murder. Because jeopardy terminated, even without conviction or acquittal, on intentional murder charge, neither can D be retried on that charge. Absence of verdict on intentional murder can also be interpreted as implied acquittal, which would also serve to bar retrial. Fact that state lacked bad motive does not alter outcome, particularly because in future it would be nearly impossible to determine motivation of state in such a case.

TITLE: Thompson v. State

INDEX NO.: J.10.f.

CITE: (9/8/2017), 82 N.E.3d 376 (Ind. Ct. App. 2017)

SUBJECT: Double jeopardy - only one battery conviction for single push resulting in injuries to two victims

HOLDING: Elevated battery convictions based on bodily or serious bodily injury "to any other person" or "to another person" do not require the person who is battered to be the same person who is injured as a result of the battery. Thus, D was properly charged with Level 5 felony battery when he pushed his ex-wife and as a result his ex-wife knocked her boyfriend's elderly grandmother to the ground, causing serious bodily injury. However, D's convictions for both Level 6 felony domestic battery and Level 5 felony battery based on grandmother's injuries violated double jeopardy and the "actual evidence test" because they relied on the same, single act of touching by D, who shoved his ex-wife only once. See McGaughey v. State, 419 N.E.2d 184 (Ind. Ct. App. 1981). Held, Level 6 felony conviction vacated and remanded for resentencing on only the Level 5 felony conviction.

RELATED CASES: Johnston, 126 N.E.3d 878 (Ind. Ct. App. 06-05-19) (D's convictions for disorderly conduct, criminal mischief, and domestic battery violated double jeopardy because neither the jury instructions nor the prosecutor's closing argument delineated the specific offensive conduct for each charged crime).

TITLE: Thurman v. State
INDEX NO.: J.10.f.
CITE: (10/7/2020), 158 N.E.3d 3068 (Ind. Ct. App.)
SUBJECT: Double jeopardy - pointing a firearm and criminal recklessness convictions vacated as lesser included offenses of attempted murder
HOLDING: Court of Appeals vacated Defendant's pointing a firearm and criminal recklessness convictions, finding them to be included offenses of his separate convictions for attempted murder. Defendant pulled a gun on two separate people outside a truck stop. He first pointed the gun at a customer's face as the customer was leaving the store, shooting twice, and hitting the customer with the second round. Defendant then unsuccessfully attempted to get a ride from a driver sleeping in his car, pointing the gun at the driver's face, and shooting the driver after he refused to give Defendant a ride. A jury found Defendant guilty of two counts of attempted murder, two counts of Level 6 felony pointing a firearm, and two counts of Level 6 felony criminal recklessness. The Court of Appeals affirmed in part and reversed in part, concluding that Defendant's actions related to the customer and the driver were so compressed in terms of time, place, singleness of purpose, and continuity of action, that they constitute one continuous transaction. Under the circumstances, Court concluded that the two Level 6 felony counts of pointing a firearm and two Level 6 felony criminal recklessness counts relating to the customer and driver are included offenses of the two attempted murder counts. Held, attempted murder convictions affirmed, convictions for pointing a firearm and criminal recklessness vacated, remanded for the trial court to enter a sentence consistent with this opinion.

RELATED CASES: Starks, 210 N.E.3d 818 (Ind. Ct. App. 2023) (Ct. vacated D's conviction for pointing a firearm because it was a factually lesser-included offense of criminal recklessness as charged and facts presented at trial established a single crime, not two separate and distinct acts).

TITLE: U.S. v. Ursery
INDEX NO.: J.10.f.
CITE: 518 U.S. 267, 116 S. Ct. 2135, 135 L.Ed.2d 549 (1996)
SUBJECT: Double Jeopardy -- In Rem Forfeitures Are Not Punishment
HOLDING: Federal in rem forfeitures of property involved in money laundering, of proceeds of drug trafficking, and of property that facilitated drug offense, are not punishment for purposes of 5th Amendment Double Jeopardy Clause, and government is not barred from bringing parallel in rem forfeiture actions & criminal prosecutions. Inquiry into whether in rem forfeiture constitutes punishment for double jeopardy purposes has two prongs: (1) Did Congress intend forfeiture to be criminal or civil; (2) Is scheme so punitive in purpose or effect as to negate contrary legislative intent? U.S. v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). Recent cases did not overrule this test; they either were not double jeopardy cases or involved civil penalties rather than civil forfeitures. Forfeitures here were intended by congress to be civil, since they are in rem rather than in persona. They are not so punitive in nature as to negate this intent. They serve non-punitive goals of encouraging property owners to take care to prevent use of property in criminal activity, as well as to ensure that criminals do not profit from their illegal acts. Although they also serve goal of deterrence and are tied to commission of criminal activity, those features are not enough to constitute "clearest proof" necessary to show that proceeding is criminal.

TITLE: Vandergriff v. State
INDEX NO.: J.10.f.
CITE: (5th Dist., 8-6-04), Ind. App., 812 N.E.2d 1084
SUBJECT: Double jeopardy claim - battery & neglect of dependent
HOLDING: D's convictions for neglect of dependent & battery of his infant son (CV) did not violate Indiana Double Jeopardy Clause. D challenged his conviction under actual evidence test, which prohibits multiple convictions if there is a reasonable possibility that evidentiary facts used by fact-finder to establish essential elements of one offense may also have been used to establish essential elements of second challenged offense. Davis v. State, 770 N.E.2d 319 (Ind. 2002). Here, even assuming jury relied on same incident to establish two offenses, additional evidentiary facts were required to prove each offense. D's act of touching CV establishes that he knowingly placed CV in situation that endangered his life or health, resulting in bodily injury, & that D knowingly touched CV in a rude, insolent or angry manner, resulting in bodily injury. Yet, to find D guilty of neglect, jury also had to find that CV was a dependent & that D had the care, custody, & control of CV. To find D guilty of Class D felony battery, jury was required to find that CV was less than fourteen years of age & D was at least eighteen years of age. While same evidence may have established that CV was a dependent & under fourteen years of age, clearly additional evidentiary facts were required to prove that D had the care, custody & control of CV & that D was at least eighteen years of age. Thus, there was no constitutional double jeopardy violation. Considering statutes, charging instruments, evidence & arguments of counsel, Ct. also held that two convictions did not violate common law rule prohibiting dual convictions for same act. Facts supporting these two crimes were separate & distinct, thus there was no common law double jeopardy violation. Held, judgment affirmed.

TITLE: Wadle v. State

INDEX NO.: J.10.f.

CITE: (8/18/2020), 151 N.E.3d 227 (Ind. 2020)

SUBJECT: Richardson actual evidence test expressly overruled in favor of a new analytical framework for substantive double jeopardy claims

HOLDING: In expressly overruling the constitutional tests formulated in Richardson, the Indiana Supreme Court set forth the following test: When multiple convictions for a single act or transaction implicate two or more statutes with common elements, a court first looks to the statutes themselves. If the language of either statute clearly permits multiple punishment, either expressly or by unmistakable implication, the court's inquiry comes to an end and there is no violation of substantive double jeopardy. But if the statutory language is not clear, then a court must apply Indiana's included offense statutes, I.C. 35-38-1-6 and 35-31.5-2-168 to determine whether the charged offenses are the same. If neither offense is included in the other (either inherently or as charged), there is no violation of double jeopardy. But if one offense is included in the other (either inherently or as charged), then the court must examine the facts underlying those offenses, as presented in the charging instrument and as adduced at trial. They key question of that examination is whether the defendant's actions were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." If the factual analysis reveals two separate and distinct crimes, there is no violation of substantive double jeopardy even if one statutory offense is included in the other. But if the analysis shows a single continuous crime with one statutory offense included in the other, then the prosecutor may charge these offenses only in the alternative, not cumulative sanctions. The State can rebut this presumption only by showing that the statute--either in express terms or by unmistakable implication, clearly permits multiple punishment. Finally, the court emphasized that supplemental Indiana constitutional provisions work in harmony with the substantive double-jeopardy protections discussed above to be multiple punishments in a single trial. Article 1, Section 16 of the Indiana Constitution requires that all penalties be "proportioned to the nature of the offense," the protections in Article 1, Section 13 entitle the defendant to clear notice of the charge or charges against him which operates to bar a conviction of a lesser included offense unless the charging instrument alleges all of the essential elements of that offense, and Article 7, sections 4 and 6, which through Ind. Appellate Rule 7(B), permit a criminal offender to challenge the trial court's sentence as "inappropriate in light of the nature of the offense and the character of the offender."

Here, Defendant was convicted of four offenses. The State conceded and the Court agreed that under the new framework, two of them--OWI endangering a person and OWI with a blood-alcohol concentration of 0.08 or more--violate double jeopardy. Neither statute clearly permits cumulative punishment, and the latter offense is an included offense of the former. The remaining two convictions were leaving the scene of an accident and OWI causing serious bodily injury. Neither statute clearly permits multiple punishments, either expressly or by unmistakable implication, so the Court proceeded to analyze the offenses charged under Indiana's included-offense statutes. The Court concluded that Level 5 felony OWI-SBI is included in the offense of Level 3 felony leaving the scene of an accident and found that because Defendant's actions were so compressed in terms of time, place, singleness of purpose, and continuity of action, they were one continuous transaction. As a result, the Court concluded that the separate statutory offenses present alternative (rather than cumulative) offenses and vacated the level 5 felony offense.

RELATED CASES: Vanderveer, 182 N.E.3d 893 (Ind. Ct. App. 2022) (convictions for both Level 5 felony using false information to obtain a handgun and Level 6 felony making a false statement on a criminal history information form violated double jeopardy); Carranza, 184 N.E.3d 712; Koziski, 172 N.E.3d 338 (Ind. Ct. App. 2021) (D's two acts of licking C.W.'s vagina and putting his finger inside her, done within 5 to 10 minutes, resulted in two Level 1 felony child molesting convictions; under Wadle analysis, Ct. found no double jeopardy violation even though two counts were charged under different parts of the same statute; neither offense is included in the other); Demby, 2021 Ind. App. LEXIS 44 (factual circumstances and charging information rendered aggravated battery a lesser-included offense of attempted murder, thus Ct. vacated aggravated battery conviction); Hendricks, 162 N.E.3d 1123 (Ind. Ct. App. 2021) (because D's robbery offense may be a lesser included of the felony murder offense as charged and the acts were so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction, the Court vacated D's conspiracy to commit robbery conviction); Madden, 162 N.E.3d 549 (Ind. Ct. App. 2021) (convictions for Level 2 kidnapping for ransom and Level 5 kidnapping based on one removal violate double jeopardy; also, convictions for both criminal confinement and kidnapping, both enhanced based on a demand for ransom, and are so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction," violate double jeopardy); Powell, E.11.b and J.10.f (affirming two aggravated battery convictions because D's two acts of throwing hot water on C.W. were not continuous and therefore, did not constitute a single transaction); Jones, 159 N.E.3d55 (Ind. Ct. App. 2020) (holding that Wadle and Powell "swallowed statutory and common law to create one unified framework for substantive double jeopardy claims—including the continuous crime doctrine." here, D's two battery convictions against same victim upheld under new double jeopardy test but kidnapping and confinement convictions vacated); Diaz, 158 N.E.3d 363 (Ind. Ct. App. 2020) (convictions for murder, and robbery of the same victim did not violate double jeopardy either under Wadle or old constitutional test, which Ct. addressed "only because there are outstanding questions about whether Wadle should be applied retroactively"); Rowland, 151 N.E.3d 637 (Ind. Ct. App. 2020) (09/08/2020) (D's convictions for possession of marijuana and paraphernalia did not violate double jeopardy, as neither offense is an included offense of the other either under statute or as charged; moreover, the two convictions did not violate the "very same act" rule in the common law because D's behavior of possessing marijuana was separate and distinct from his behavior of possessing paraphernalia).

TITLE: Watkins v. State
INDEX NO.: J.10.f.
CITE: (4-9-02), Ind. App., 766 N.E.2d 18
SUBJECT: Double jeopardy - murder & robbery; deadly weapon not relied on for both convictions
HOLDING: Convictions for murder & robbery as Class B felony did not violate double jeopardy under Indiana Constitution, where it was not reasonably possible that jury applied evidence of D's possession of knife to meet both element of "armed with deadly weapon" within Class B robbery, & any of essential elements of murder. In Chapman v. State, 719 N.E.2d 1232 (Ind. 1999), Supreme Ct. held that Class B felony robbery conviction was proper where robbery charge included allegation that Chapman was armed with handgun because use of deadly weapon is not element of murder charge. Here, analysis is different because D was convicted solely on circumstantial evidence, including possession of knife. Question remains whether it was reasonably possible that jury relied on D's possession of knife recovered from his apartment to support essential elements of murder charge & "armed with deadly weapon" element of robbery charge. Ct. concluded that while jury may have relied on recovered knife to establish that D was armed with deadly weapon, there was separate forensic evidence that established victim's death as knowing killing. Specifically, jury was presented with evidence that victim's throat was cut five times. Therefore, convictions did not violate double jeopardy. Held, judgment affirmed.

TITLE: Webster v. State
INDEX NO.: J.10.f.
CITE: (2nd Dist., 11-22-96), Ind. App., 673 N.E.2d 509
SUBJECT: Civil contempt sanction did not bar criminal charge
HOLDING: Civil sanction constitutes jeopardy for double jeopardy analysis when sanction serves goal of punishment. Bryant v. State, 660 N.E.2d 290 (Ind. 1995). Here, contempt sanction against D for violating restraining order did not constitute jeopardy because purpose of sanction was not to punish D, but to coerce him into complying with restraining order. Fact that D was sentenced to jail term, which was stayed pending compliance with terms of restraining order, did not automatically make contempt sanction punitive. Thus, subsequent criminal charge of invasion of privacy based on same conduct did not constitute double jeopardy. Tr. Ct. properly denied D's motion to dismiss criminal charge. Held, judgment affirmed.

RELATED CASES: Buford, 139 N.E.3d 1074 (Ind. Ct. App. 2019) (DJ prohibited contempt finding for violation of same No Contact Order serving as basis for invasion of privacy conviction in separate cause); Jones, App., 812 N.E.2d 820 (D's nonsupport conviction following prior contempt citation for violating Ct. order to pay child support did not violate double jeopardy clause of Indiana Constitution); Hunter, App., 802 N.E.2d 480 (despite indefinite nature of D's contempt sentence, contempt sanctions in this case were not punitive, but rather were used to coerce D into compliance with support orders. D had opportunity to purge himself of contempt by paying his arrearages, & Ct. rejected D's claim that contempt sentence was punitive due to the large amount of arrearage he had to pay to purge himself of support).

TITLE: Weddle v. State

INDEX NO.: J.10.f.

CITE: (10/18/2013), 997 N.E.2d 45 (Ind. Ct. App. 2013)

SUBJECT: Posession & manufacturing methamphetamine convictions did not violate Double Jeopardy

HOLDING: On rehearing from opinion at 989 N.E.2d 371, Court rejected D's argument that his convictions for both manufacturing methamphetamine and possession of methamphetamine violated Indiana's prohibition against double jeopardy. D was found in possession of methamphetamine, but police also found numerous accountrements in the residence that are used to manufacture additional methamphetamine. Convictions for manufacturing methamphetamine and possession of methamphetamine may be sustained, specifically with the finished product supporting the possession conviction and the unfinished product supporting the manufacturing conviction. Storey v. State, 875 N.E.2d 243 (Ind. Ct. App. 2007).

Here, jury could have reasonably concluded that D was in possession of methamphetamine and was in the process of manufacturing an additional amount of the drug. See Iddings v. State, 772 N.E.2d 1006 (Ind. Ct. App. 2002). Held, rehearing from opinion at 989 N.E.2d 371 granted, original opinion affirmed in all other respects.

TITLE: Wethington v. State
INDEX NO.: J.10.f.
CITE: (2nd Dist., 8-31-95), Ind. App., 655 N.E.2d 91
SUBJECT: Double jeopardy - attempted murder & robbery
HOLDING: Convictions for both robbery as Class A felony & attempted murder did not violate double jeopardy. D repeatedly bludgeoned, strangled & pushed victim from car over span of half hour. D argued that serious bodily injury used to elevate robbery to Class A felony resulted from same act underlying attempted murder, resulting in multiple punishments for same offense. Charging instruments revealed that striking about victim's head with deadly weapon constituted substantial step for attempted murder, while head laceration & broken hand was used to elevate robbery charge. In rejecting D's argument, Ct. held that: 1) under "identity of offenses" test, legislature intended to authorize separate punishment for two crimes; 2) as in Jackson v. State (1993), Ind., 625 N.E.2d 1219, multiple injuries inflicted on victim did not stem from "a single act"; & 3) same use of deadly weapon forming basis for both charges did not impermissibly elevate robbery charge, because robbery charge was elevated by resulting bodily injury, not by use of deadly weapon. However, Tr. Ct. erred in convicting & sentencing D for both auto theft & robbery because auto theft was lesser included offense of robbery. Held, robbery & attempted murder convictions affirmed, auto theft conviction ordered vacated.

RELATED CASES: Channell, App., 658 N.E.2d 925 (convictions for attempted murder & robbery constituted double jeopardy, where serious bodily injury element of robbery charge & attempted murder charge was based upon same confrontation with victim).

TITLE: Whitham v. State

INDEX NO.: J.10.f.

CITE: (12/30/2015), 49 N.E.3d 162 (Ind. Ct. App. 2015)

SUBJECT: *Sua sponte* correction of double jeopardy issue on appeal - factually included lesser offenses of attempted murder

HOLDING: In appeal of D's convictions for attempted murder, aggravated battery, criminal confinement, two counts of battery and strangulation, Court *sua sponte* reversed all but the attempted murder conviction because the remaining convictions are all factually lesser-included offenses of attempted murder. D did not object on double jeopardy grounds at trial or raise issue on appeal, but this issue implicates fundamental rights and may be raised by appellate court *sua sponte*. Smith v. State, 881 N.E.2d 1040 (Ind. Ct. App. 2008). Although D's 36-year sentence is not affected by the reversal as the terms were ordered to be served concurrently, "[c]oncurrent sentences do not cure double jeopardy violations." Held, judgment affirmed in part, reversed in part and remanded for trial court to vacate the five lesser-included offenses.

TITLE: Wilcox v. State

INDEX NO.: J.10.f.

CITE: (2nd Dist., 4-30-01), Ind. App., 748 N.E.2d 906

SUBJECT: Double jeopardy - use of same facts to support both bail revocation & subsequent criminal prosecution.

HOLDING: Double jeopardy did not preclude D's criminal prosecution for same conduct that supported revocation of her bail. D argued that her prosecution for battery & invasion of privacy were barred by Federal & State double jeopardy clauses because she was already subjected to jeopardy for same conduct that gave rise to her bond revocation proceedings. Applying analysis in Hudson v. United States, 522 U.S. 97 (1997), Ct. held that Tr. Ct.'s temporary revocation of D's bond was not criminal punishment & did not amount to jeopardy. There is no indication from face of bail revocation statute that General Assembly intended for revocation of D's bond to constitute criminal punishment. Rather, aim of Ind. Code 35-33-8-5(d) is to determine whether it is appropriate to permit D to remain free on bond. Terms of statute are aimed at civil goals of maintaining integrity of judicial process & authority of Cts. & protecting public from potentially dangerous persons. Statute does not impose traditional "beyond reasonable doubt" standard governing civil proceedings. There is no basis upon which to conclude that revocation of bail for reasons set forth in statute has historically been regarded as criminal punishment. Notwithstanding deterrent purpose of statute, legislature intended bail revocation to constitute civil sanction, & Ct. did not find "clearest proof" that sanction is so punitive in purpose or effect that sanction is in reality criminal punishment. Held, denial of motion to dismiss affirmed.

TITLE: Willette v. Fischer
INDEX NO.: J.10.f.
CITE: 508 F.3d 117 (2nd Cir. 2007)
SUBJECT: Double jeopardy; failure to notify for sex offender registry not continuing violation
HOLDING: Second Circuit Court of Appeals held that the requirement of the New York Sex Offender Registration Act that registrants notify law enforcement of a change of address is not a continuing violation and thus one registrant's multiple convictions based on his ongoing failure to report a single move violated constitutional double jeopardy principles. The registration statute required the offender to register any change of address within 10 days of moving. After he moved and failed to make the required notification, he was convicted in state court of four counts of failure to notify. In a federal habeas petition, he challenged the state's position that each day that passed with no notification constituted an additional unit of prosecution. Court decided the proper unit of prosecution under the registration law is the move and that the multiple convictions violated the Fifth Amendment's double jeopardy clause by imposing multiple punishments for the same offense. Court rejected the State's argument that the unit of prosecution for a change-of-address violation is each day that a sex offender fails to report a new address, pointing out that Petitioner would be subject to a 3,000 year sentence if that were so.

TITLE: Williams v. State
INDEX NO.: J.10.f.
CITE: (11/12/2013), 997 N.E.2d 1154 (Ind. Ct. App. 2013)
SUBJECT: Convictions for child molesting and incest do n't violate DJ prohibition
HOLDING: D's convictions for child molesting (8 counts) and incest (1 count) do not violate double jeopardy prohibition under the actual evidence test because while it is true that when a person has intercourse with their child they, as a matter of law, commit incest, there is no double jeopardy violation, where, as here, the State presented evidence that D had intercourse with his minor child many times over a two-year period, so there was not a reasonable possibility that the jury relied on the same evidence to convict D of both child molesting and incest. See Garrett v. State, 992 N.E.2d 710, 719-20 (Ind. 2013). Held, judgment affirmed.

TITLE: Wills v. State
INDEX NO.: J.10.f.
CITE: (07/02/92), Ind., 595 N.E.2d 242
SUBJECT: Double jeopardy - erroneous instruction
HOLDING: In prosecution for voluntary manslaughter & robbery resulting in serious bodily injury, it was error for Tr. Ct. to instruct jury that "It is proper for the State to charge & try D for both voluntary man- slaughter & robbery resulting in serious bodily injury based upon the same death." Instruction informed jury that victim's death could satisfy both the "death" requirement of voluntary manslaughter, & "serious bodily injury" element of Class A robbery. S. Ct. found that allowing both convictions stemming from same act was violation of double jeopardy, granting transfer & reversing Court of Appeals memorandum decision. While both convictions could have been obtained, it would have required jury to find that serious bodily injury inflicted was separate & distinct from injury that caused victim's death. Evidence in this case did reveal that D struck victim in head several times & attempted to suffocate him with pillow, while Victim was eventually shot to death by co-D. Because of way jury was instructed, however, they were led to convict D of Class A robbery based on act for which he had already been punished, voluntary manslaughter.

TITLE: Wilson v. State

INDEX NO.: J.10.f.

CITE: (5th Dist., 03-29-93), Ind. App., 611 N.E.2d 160

SUBJECT: Possession of explosive conviction precluded because was lesser included offense (LIO) of attempted murder

HOLDING: D, who was charged & convicted for attempted murder by attaching bomb to car in which intended victims were riding, could not also be convicted & sentenced for possession of explosive or inflammable device with knowledge it was to be used for unlawful purpose. Double jeopardy bars separate convictions for LIO when D is convicted & sentenced on greater offense. Even if LIO is not inherently included in greater offense, multiple convictions are precluded if offenses are charged in manner that makes LIO element of greater crime. Ct. found that while possession of explosive was not inherently LIO of attempted murder, it was LIO in this case because D was charged with attempt to commit murder by attaching bomb to car. Held, conviction & sentence for possession of explosive vacated, attempted murder convictions *affirmed*.

RELATED CASES: Ott, 648 N.E.2d 671 (convictions & sentences for attempted rape & battery violated DJ; examination of charging information revealed that repeated striking & choking of victim in battery charge was same conduct used to support charge that D attempted to rape victim).

TITLE: Woodcock v. State

INDEX NO.: J.10.f.

CITE: (01/28/2021), 163 N.E.3d 863 (Ind. Ct. App. 2021)

SUBJECT: Noting split, another panel holds common law principles of substantive double jeopardy no longer exist independently post-Wadle

HOLDING: Defendant was convicted of felony murder and Level 5 felony battery by means of a deadly weapon and sentenced to an aggregate of 62 years. While his appeal was being briefed, the Indiana Supreme Court "expressly overrule[d] the Richardson constitutional tests in resolving claims of substantive double jeopardy" and adopted an analytical framework that applies the statutory rules of double jeopardy where a defendant's "single criminal act or transaction violates multiple statutes with common elements and harms one or more victims." Wadle v. State, 151 N.E.3d 227, 235, 247 (Ind. 2020). The Court of Appeals noted a conflict among different panels of the court regarding whether the common law rules for analyzing substantive double jeopardy claims survived post-Wadle, but ultimately concluded that "the common law rules are incorporated into the Wadle analysis and no longer exist independently." The court declined to definitively decide whether the Wadle analysis is to be applied retroactively and concluded that under either the common law formulation or the Wadle analysis, there is no violation of principles of substantive double jeopardy.

There was sufficient evidence that Defendant committed battery by means of a deadly weapon when he fired a gun at close range that struck the decedent in the forehead and then struck the complaining witness in the arm. A reasonable trier of fact could have found that when shooting the victim at close range, Defendant was aware of a high probability that anyone close to her could be struck by the exiting bullet, especially a person standing behind her. Finally, the Court found the aggregate sentence was not inappropriate in light of the nature of his offenses or his character.

RELATED CASES: Rice, 199 N.E.3d 815 (Ind. Ct. App. 202) (Wadle cleared away the common law double jeopardy jurisprudence developed under Richardson).

TITLE: Whitham v. State

INDEX NO.: J.10.f.

CITE: (12/30/2015), 49 N.E.3d162 (Ind. Ct. App. 2015)

SUBJECT: *Sua sponte* correction of double jeopardy issue on appeal - factually included lesser offenses of attempted murder

HOLDING: In appeal of D's convictions for attempted murder, aggravated battery, criminal confinement, two counts of battery and strangulation, Court *sua sponte* reversed all but the attempted murder conviction because the remaining convictions are all factually lesser-included offenses of attempted murder. D did not object on double jeopardy grounds at trial or raise issue on appeal, but this issue implicates fundamental rights and may be raised by appellate court *sua sponte*. Smith v. State, 881 N.E.2d 1040 (Ind. Ct. App. 2008). Although D's 36-year sentence is not affected by the reversal as the terms were ordered to be served concurrently, "[c]oncurrent sentences do not cure double jeopardy violations." Held, judgment affirmed in part, reversed in part and remanded for trial court to vacate the five lesser-included offenses.

TITLE: Wright v. State
INDEX NO.: J.10.f.
CITE: (4th Dist. 04/22/92), Ind. App. 590 N.E.2d 650
SUBJECT: Double Jeopardy - child molest
HOLDING: D's multiple convictions for child molest & vicarious sexual gratification were not precluded by double jeopardy. D was convicted of Child Molesting as Class B felony, Child Molesting as Class C felony, & Vicarious Sexual Gratification. Evidence showed that on same day, D & his brother made child lay on top of his sister with his pants down, forced child to place his mouth on both of their penises, & placed their mouths on child's penis. Court looked to Bowling 560 N.E.2d 658, Stwalley 534 N.E.2d 229, & Kizer 488 N.E.2d 704, & found that convictions on 2 or more counts of criminal conduct arising from "single confrontation," "same short span of time," & "singular act," are precluded by double jeopardy. Court found, however, that span of time attacker & victim are together is not dispositive, Edwards 479 N.E.2d 541, & that issue is how many criminal offenses were perpetrated & did any 2 or more of them arise from same act or confrontation. Here each offense arose from separate confrontation. One confrontation occurred when child was forced to put lips on D's penis, another occurred when D performed fellatio on child, & yet another occurred when D forced child to lay on his sister. Each conviction was proximate result of different criminal encounters, & multiple convictions did not violate double jeopardy. Held, convictions affirmed, remanded on sentencing issue.

RELATED CASES: Heinzman, 970 N.E.2d 214 (Ind. Ct. App. 2012) (no double jeopardy violation when all three charges of Class C felony molest where identically charged, but evidence was that D molested child more than twice in bedroom and once on couch; even though jury asked question during deliberations if one of the molests has to be based on couch incident, there is no reasonable possibility that the same acts were the basis for more than one conviction).

TITLE: Zieman v. State

INDEX NO.: J.10.f.

CITE: (6/25/2013), 990 N.E.2d 53 (Ind. Ct. App. 2013)

SUBJECT: Common law Double Jeopardy - Class C felony resisting law enforcement & attempted murder

HOLDING: Trial and appellate counsel were ineffective in faiing to argue that same evidence supporting attempted murder conviction also supported serious bodily injury element that elevated resisting law enforcement conviction to a Class C felony, resulting in a double jeopardy violation. D fled from police and crashed his car into an officer's vehicle, causing serious bodily injury. He was found guilty but mentally ill of several charges, including attempted murder and Class C felony resisting law enforcement. The statutory elements test or actual evidence test under Richardson v. State, 717 N.E.2d 32 (Ind. 1999) were not violated in D's case. However, Court has long adhered to a series of rules of statutory construction and common law that are often described as double jeopardy, but are not governed by constitutional test set forth in Richardson. Guyton v. State, 771 N.E.2d 1141 (Ind. 2002). One of these rules prohibits conviction and punishment for an enhancement of a crime where the enhancement is imposed for the same behavior or harm as another crime for which the D has been convicted and punished.

Here, based on prosecutor's arguments to jury and lack of specificity in the charging information and jury instructions, Court concluded that there is a reasonable probability that the jury used the evidence of D crashing his vehicle into officer's vehicle and injuring him to establish both the substantial step element of attempted murder and the resulting serious bodily injury element of class C felony resisting law enforcement, resulting in a violation of double jeopardy principles. Held, denial of post-conviction relief reversed and remanded with instructions to reduce resisting law enforcement conviction to a Class D felony with advisory 18-month sentence to be served consecutively to attempted murder sentence for total executed sentence of 33.5 years.

TITLE: Zehr v. State
INDEX NO.: J.10.f.
CITE: (5th Dist., 3-18-96), Ind. App., 662 N.E.2d 668
SUBJECT: Double jeopardy - felony conviction after plea to lesser-included misdemeanor
HOLDING: Tr. Ct. did not violate double jeopardy principles by convicting D of felony DUI offense after D had already pleaded guilty to misdemeanor DUI. After arrest, D filed notice of intent to plead guilty & motion to participate in Alcohol Abuse Deterrent Program ("AAD program"). At guilty plea hearing, D admitted to two prior DUI convictions & pleaded guilty to DUI as class A misdemeanor. Thereafter, Tr. Ct. granted D's motion to participate in AAD program, pursuant to predecessors to Ind. Code 9-30-9-2 & 3. In accordance with statutes, Tr. Ct. did not accept D's guilty plea for misdemeanor DUI, but instead deferred proceedings for four years on condition that D successfully complete AAD program. Jeopardy attaches once Ct. accepts D's guilty plea. State v. Keith, 482 N.E.2d 751 (Ind. Ct. App. 1985). Here, because Tr. Ct. did not accept D's guilty plea, jeopardy did not attach & later conviction of felony DUI was not.

J. CONSTITUTIONAL LAW

J.11. Cruel and Unusual Punishment (8th Amend.)

J.11.a Conditions of confinement/treatment

TITLE: Hope v. Pelzer

INDEX NO.: J.11.a.

CITE: 536 U.S. 730, 122 S. Ct. 2508, 153 L.Ed.2d 666 (2002)

SUBJECT: Conditions of confinement, cruel and unusual punishment, Eighth Amendment, qualified immunity

HOLDING: Hope, a prison inmate, as punishment for being uncooperative during a work detail and having an altercation with a guard, was handcuffed to a 'hitching post' for seven hours in the sun with no shirt, and was denied drinking water and bathroom breaks. The Eleventh Circuit found that the use of the hitching post violated the Eight Amendment prohibition against 'cruel and unusual punishment' but that the guards were entitled to summary judgment based on qualified immunity. The U.S. Supreme Court reversed, holding (1) that Hope's allegations, if true, established an "obvious" Eighth Amendment violation, (2) that the state of the law in 1995, at the time of the events at issue, gave the guards fair warning that their alleged treatment of Hope was unconstitutional. In this case the hitching post was used as a punishment which lasted all day, and not as a coercive measure to compel Hope to return to his work detail.

TITLE: Humphrey v. Wilson

INDEX NO.: J.11.

CITE: 282 Ga. 520, 652 S.E.2d 501 (Ga. 2007)

SUBJECT: Sentence for teen sex disproportionate, cruel and unusual due to statutory change

HOLDING: Georgia Supreme Court held a sentence of 10 years' imprisonment without parole imposed on a D who engaged in consensual oral sex at age 17 with a 15-year-old amounted to cruel and unusual punishment in violation of the Eighth Amendment. Court decided that the state legislature's decision following D's conviction to subject conduct like his to much lighter penalties evidenced a sea change in the Georgia citizenry's attitudes about oral sex between consenting teenagers. At the time of D's conviction, the statutory minimum sentence for the crime was 10 years in prison with no possibility of probation or parole, with a requirement of registration as a sex offender upon release. The Georgia legislature amended the statute so that the crime is a misdemeanor and no longer triggers registration requirements when applied to consensual acts between teenagers who differ in age by no more than four years, with the legislation expressly providing that the new provisions were not to have retroactive effect. Court held that D was entitled to relief from his sentence because the amendment to the law demonstrates that the citizens of Georgia no longer believe that consensual sex between teenagers is so serious as to mandate a minimum of 10 years in prison. That change in attitude means that D's sentence is grossly disproportionate in violation of the Eighth Amendment. Court based its proportionality analysis on Justice Kennedy's concurrence in Harmelin v. Michigan, 501 U.S. 957 (1991) which was further developed in Ewing v. California, 538 U.S. 11 (2003).

J. CONSTITUTIONAL LAW

J.11. Cruel and Unusual Punishment (8th Amend.)

J.11.d Death Penalty

TITLE: Atkins v. Virginia
INDEX NO.: J.11.d.
CITE: 536 U.S. 304; 122 S. Ct. 2242; 153 L. Ed. 2d 335 (2002)
SUBJECT: Death penalty, mental retardation, cruel and unusual punishment
HOLDING: The execution of mentally retarded persons violates the Eight Amendment's prohibition against cruel and unusual punishment. Although the current version of Indiana's capital punishment statute, Ind. Code 35-50-2-9, provides that mentally retarded persons may not be sentenced to death, the Indiana Supreme Court has held that mentally retarded persons convicted and sentenced to death under an older version of the statute could still be executed. Rondon v. State, 711 N.E.2d 506 (Ind. 1999). Under Atkins, the execution of any mentally retarded person is unconstitutional, no matter when the sentencing took place.

RELATED CASES: Moore v. Texas, 137 S. Ct. 1039 (2017) (Texas Court of Criminal Appeals applied wrong standards regarding intellectual disability in upholding death penalty), Brumfield v. Cain, 135 S. Ct. 2269 (2015) (state court decision to deny D a hearing on his claim that 8th Amendment precluded his execution because of his mental disabilities was "based on an unreasonable determination of the facts in light of the evidence." 28 U. S. C. §2254(d)(2)); Schriro v. Smith, 126 S. Ct. 7 (2005) (states allowed to establish procedures to adjudicate the issue of mental retardation in capital cases; 9th Circuit erred by preemptively ordering Arizona to conduct a jury trial on D's mental retardation claim without allowing the state a chance to apply its chosen procedures first).

TITLE: Baze v. Rees
INDEX NO.: J.11.d.
CITE: (4/16/2008), U.S., 553 U.S. 35; 07-5439
SUBJECT: State's method of implementing lethal injection upheld
HOLDING: A deeply fractured Court upheld Kentucky's method of implementing lethal injection for capital punishment purposes. Plurality held that an execution method must present "substantial" or "objectively intolerable" risk of serious harm to constitute cruel and unusual punishment and that a State's refusal to adopt proffered alternative procedures may violate the Eighth Amendment only where the alternative procedure is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain. Thomas, J., and Scalia, J., each filed concurrences in which the other joined. Stevens, J., and Breyer, J., filed separate concurrences in the judgment; Ginsburg, J., filed a dissent, in which Souter, J., joined.

TITLE: Kennedy v. Louisiana

INDEX NO.: J.11.d.

CITE: 554 U.S. 945, 128 S. Ct. 1, 171 L.Ed.2d 932 (2008)

SUBJECT: Eighth Amendment bars death penalty for child rape

HOLDING: In 5-4 decision, Majority held the Eighth Amendment bars States from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death. The Amendment's Cruel and Unusual Punishment Clause "draws its meaning from the evolving standards of decency that mark the progress of a maturing society." The standard for extreme cruelty "itself remains the same, but its applicability must change as the basic mores of society change." Furman v. Georgia, 408 U.S. 238 (1972). Under the precept of justice that punishment is to be graduated and proportioned to the crime, informed by evolving standards, capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" Roper v. Simmons, 543 U.S. 551 (2005). A review of the authorities informed by contemporary norms, including the history of the death penalty for this and other non-homicide crimes, current state statutes and new enactments, and the number of executions since 1964, demonstrates a national consensus against capital punishment for the crime of child rape. Alito, J., dissented, with Roberts, C.J., and Scalia and Thomas, JJ, joining.

TITLE: Moore v. Texas
INDEX NO.: J.11.d.
CITE: (3/28/2017), 137 S. Ct. 1039 (2017)
SUBJECT: Texas court applied wrong intellectual standard to capital defendant
HOLDING: The Texas Court of Criminal Appeals ("CCA") applied the wrong standards regarding intellectual disability in upholding Defendant's death penalty.

As a young child, Defendant failed first grade twice and, at age 13, still failed to grasp basic principles like telling time. He also suffered a debilitating childhood injury when he was hit in the head with a chain and a brick. At age 20, Defendant fatally shot a store clerk in a botched robbery. He was found guilty and sentenced to death, but a state habeas court determined that under Atkins v. Virginia, 536 U. S. 304 (2002) and Hall v. Florida, 134 S. Ct. 1986 (2014), Defendant was intellectually disabled, and his death sentence violated the Eighth Amendment. The habeas court recommended relief. The CCA, however, rejected the recommendation, improperly focusing on Defendant's IQ (74) without taking into account the standard error of measurement for IQ tests. Also, the CCA's review of Defendant's adaptive functioning deviated from prevailing clinical standards. For instance, the CCA overemphasized Defendant's perceived adaptive strengths – living on the streets, mowing lawns, and playing pool for money – when the medical community focuses on adaptive deficits. While states have some flexibility in enforcing Atkins, that flexibility does not allow states to base decisions on out-of-date standards. Held, cert. granted, opinion at 470 S.W.3d 481, vacated, and matter remanded. Ginsburg, J., joined by Kennedy, Breyer, Sotomayor, and Kagan, J.J.; Roberts, C.J., dissenting, joined by Thomas and Alito, J.J.

RELATED CASES: Brumfield v. Cain, 135 S. Ct. 2269 (2015) (state court decision to deny D a hearing on his claim that 8th Amendment precluded his execution because of his mental disabilities was "based on an unreasonable determination of the facts in light of the evidence." 28 U. S. C. §2254(d)(2)); Schriro v. Smith, 126 S. Ct. 7 (2005) (states allowed to establish procedures to adjudicate the issue of mental retardation in capital cases; 9th Circuit erred by preemptively ordering Arizona to conduct a jury trial on D's mental retardation claim without allowing the state a chance to apply its chosen procedures first).

TITLE: Roper v. Simmons,
INDEX NO.: J.11.d.
CITE: 543 U.S. 551; 125 S. Ct. 1183; 161 L.Ed.2d 1 (2005)
SUBJECT: Death Penalty, Juvenile Offenders, Cruel and Unusual Punishment
HOLDING: The 8th Amendment's prohibition of cruel and unusual punishment, made applicable to the states by the 14th Amendment, bars imposition of the death penalty for offenders who were younger than 18 at the time of their crimes.

RELATED CASES: Atkins v. Virginia, 536 U.S. 304, (8th Amendment bars execution of mentally retarded offenders).

TITLE: Tennard v. Dretke
INDEX NO.: J.11.d.
CITE: 542 U.S. 274, 124 S. Ct. 2562, 159 L.Ed.2d 384 (2004)
SUBJECT: Mental retardation & capital punishment
HOLDING: Mental impairment is a mitigating circumstance, and mental retardation bars execution of a D, whether or not the D demonstrates a "nexus" between the impairment and the crime. The 5th Circuit erred in holding otherwise, and in refusing to issue a certificate of appealability.

J. CONSTITUTIONAL LAW

J.12. Separation of Powers

TITLE: Cleer v. State
INDEX NO.: J.12.
CITE: (06-21-10), 929 N.E.2d 218 (Ind. Ct. App. 2010)
SUBJECT: Sobriety checkpoints do not violate separation of powers
HOLDING: Operation of sobriety checkpoint did not violate state constitution's provision on separation of powers. Indiana Code 34-28-5-3 allows an officer to detain a person whom the officer believes in good faith has committed an infraction or ordinance violation. Even if this statute is the legislative authorization to detain a person suspected of committing an infraction or ordinance violation, there is no indication the General Assembly has barred law enforcement from detaining a person suspected of committing a misdemeanor or a felony. Further, D cites no authority for proposition that General Assembly is required to specifically authorize detention in all criminal investigations. Held, conviction for Class C misdemeanor operating with a BAC between .08 and .15 affirmed.

TITLE: Lemon v. Harris

INDEX NO.: J.12.

CITE: (06-28-2011), 949 N.E.2d 803 (Ind. 2011)

SUBJECT: 2007 amendment to sexually violent predator statute doesn't violate separation of powers

HOLDING: Even though the 2007 amendment to Ind. Code § 35-38-1-7.5(b) changed D's status from "sex offender" to "sexually violent predator" by operation of law, the amendment does not violate separation of powers principles because it does not allow the department of correction ("DOC"), an executive branch agency, to reopen final judgments and exercise a function reserved to the judiciary.

Ind. Const. Art. III, § 1 recognizes "that each branch of the government has specific duties and powers that may not by usurped or infringed upon by the other branches of government. State v. Monfort, 723 N.E.2d 407, 411 (Ind. 2000). Although the Legislature has the authority to provide which acts shall be crimes in our society and to provide [for their] penalties. State v. Palmer, 270 Ind. 493, 497, 386 N.E.2d 946, 949 (1979), the Judiciary possesses the authority to "fix the penalty of and sentence a person convicted of an offense." Ind. Code 35-50-1-1 (2008). It is well-settled under the doctrine of separation of powers that the Legislature cannot interfere with the discharge of judicial duties or set aside a final judgment of a court. Monfort, 723 N.E.2d at 411 (collecting cases); Thorpe v. King, 248 Ind. 283, 286-87, 227 N.E.2d 169, 171 (1967).

Here, in 1999, D pleaded guilty to B felony child molesting. He was required to register as a sex offender for ten years following his release from incarceration. Around the time D was released, the DOC notified D that he was an SVP under Ind. Code § 35-38-1-7.5(b) (2007) and that he must register as a sex offender for life.

The sentencing court did not determine that D was a sex offender; the Indiana Code did. Ind. Code § 5-2-12-4 (Supp. 1997). Likewise, the "by operation of law" clause in the 2007 amendment to Ind. Code § 35-38-1-7.5(b) did not change a judicial determination that D was formerly a sex offender but now is an SVP.

DOC has no authority under the statute to classify or reclassify. SVP status under Ind. Code § 35-38-1-7.5(b) is determined by the statute itself. Thus, changing D's status from sex offender to sexually violent predator by operation of law does not violate constitutional principles of separation of powers. Held, transfer granted, Court of Appeals' opinion at 926 N.E.2d 1110 vacated, judgment affirmed; Dickson, J., dissenting.

TITLE: Levy v. State
INDEX NO.: J.12.
CITE: (2nd Dist., 11-26-03), Ind. App., 799 N.E.2d 71
SUBJECT: Separation of powers - unauthorized practice of law
HOLDING: D challenged denial of his motion to dismiss by Tr. Ct. through interlocutory appeal. Ct. rejected his arguments that 1) Indiana S. Ct. has exclusive jurisdiction over all matters relating to the unauthorized practice of law; & 2) that Ind. Code 33-1-5-1 (making it a Class B misdemeanor to hold oneself out as an attorney without admission by S. Ct.) violates the separation of powers doctrine. Ct. found that while Article 7, Section 4 of Indiana Constitution gave S. Ct. "original jurisdiction" as to the unauthorized practice of the law, that did not necessarily mean that "exclusive jurisdiction" was conferred on that Ct. While the Ct. cited several S. Ct. cases noting the Ct.'s exclusive jurisdiction as to the disbarment or discipline of attorneys & the regulation of professional legal activity, the S. Ct. recognized a difference between original & exclusive jurisdiction. The Ct. took guidance from Ind. App. Rule 4(B), effective January 1, 2001, that gave the S. Ct. "exclusive jurisdiction" over "the unauthorized practice of law (other than criminal prosecutions therefor)." The Ct. also relied on Ind. Code 33-2-3-1, which gives the S. Ct. exclusive jurisdiction to issue restraining orders & injunctions against the unauthorized practice of law. Based on this review, the Ct. found that while the Constitution did give the S. Ct. the power to entertain & decide all cases involving unauthorized practice, it did not do this to the exclusion of other Ct.s. The Ct. noted that the S. Ct. has cited the potential constitutional problems if it were to determine criminal liability, in that Ds would lose their rights to a public trial by an impartial jury & the right to appeal. State ex rel. Indianapolis Bar Ass'n v. Fletcher Trust Co., 211 Ind. 27, 5 N.E.2d 538 (1937). Ct. found no basis for D's separation of powers argument as Ind. Code 33-1-5-1 provides "the sole means to punish an individual's criminal act when that person is not a member of the Bar ..." Held, judgment affirmed.

TITLE: Medellin v. Texas

INDEX NO.: J.12.

CITE: 552 U.S. 491, 128 S. Ct. 1346 (2008)

SUBJECT: State courts not bound by ruling of International Court of Justice

HOLDING: Court held that U.S. states are not bound by a ruling of the International Court of Justice in *Case Concerning Avena and Other Mexican Nationals (*Mexico v. United States*)*, 2004 Ind. Code J. 12 (March 31), that 51 Mexican nationals sentenced to death in state court are entitled to review and reconsideration of their convictions and sentences on the basis of their claims that their consular-notification rights under the Vienna Convention were violated. Court also held that President Bush exceeded his authority in issuing a memorandum directing state courts to give effect to the ICJ decision without regard to their rules regarding procedural default. Case concerned the state habeas corpus petition of one of the Mexican nationals whose rights under the Vienna Convention were adjudicated in Avena. The ICJ held in Avena that the Vienna Convention provides arrested foreign nationals with individual rights, ordering state courts in the United States to review these convictions to determine whether there was any prejudice arising from the treaty violations and specified that regardless of the review process the states chose to employ the usual rules of procedural default were not to apply. Court held that the Avena decision is not directly enforceable as domestic law in a state court in the United States and this is consistent with the enforcement structure established by Article 94(1) of the U.N. Charter, which provides that "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party." Majority relied on its decision in Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) where it noted "nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts." Majority further distinguished between "self-executing" treaties that have automatic domestic effect as federal law and non-self-executing treaties that have domestic effect only insofar as Congress has enacted implementing legislation.

Majority also held that the president's memorandum did not alter its conclusion, noting "the President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress." Stevens, J., filed a concurrence; Breyer, J., joined by Souter, J. and Ginsburg, J., filed a lengthy and detailed dissent, finding the court's jurisprudence in this area makes clear that the relevant treaties are seldom executing and, therefore the judgment of the ICJ is binding on domestic courts. The implementation of that binding legal obligation is left to domestic law.

TITLE: Reed v. State
INDEX NO.: J.12.
CITE: (5th Dist., 9-30-03), Ind. App., 796 N.E.2d 771
SUBJECT: Sentence modification - separation of powers
HOLDING: Tr. Ct. did not err in denying D's challenge to Ind. Code 35-38-1-17(b), which requires prosecutorial approval to sentence modification after 365 days. Ct. rejected D's contention that statute violates separation of powers provisions under Indiana constitution. Ct. noted prior decisions rejecting this argument, e.g., Beanblossom v. State, 637 N.E.2d 1345 (Ind. Ct. App. 1994), & rejected D's reliance on concurring opinion in Schweitzer v. State, 700 N.E.2d 488 (Ind. Ct. App. 1998), which suggested that statute seems to violate Art. 3, Sec. 1 of Indiana Constitution. D's claims of constitutional violations based on prosecutor's "blanket policy" to reject all modification requests was not supported by evidence. Held, judgment affirmed.

TITLE: Tiplick v. State
INDEX NO.: J.12.
CITE: (10/7/2015), 43 N.E.3d 1259 (Ind. 2015)
SUBJECT: Indiana's synthetic/look-alike drug statutes are not unconstitutionally vague
HOLDING: Addressing a matter of first impression, Court held that the legislature's decision to delegate to the Indiana Pharmacy Board the authority to add, via emergency rule, new synthetic drugs to the list of prohibited substances under Ind. Code § 35-31.5-2-321 is not an unconstitutional delegation of the legislature's authority. In so holding, the Court sought guidance from other state courts and Touby v. United States, 500 U.S. 160 (1991); see also Burk v. State, 257 Ind. 407, 275 N.E.2d 1 (1971) (Pharmacy Board's authority to determine whether additional substances met the definition of a "narcotic drug" under the state's Uniform Narcotic Drug Act was appropriate even though criminal penalties would result).

Finally, Court held that the counts of the information related to one of the alleged substances (XLR11) should have been dismissed for failure to specifically reference the emergency rule naming that particular substance to be a synthetic drug. The State remains free to re-file an amended information with proper reference to the emergency rule. Held, transfer granted, Court of Appeals' opinion at 25 N.E.3d 190 vacated, denial of motion to dismiss affirmed in part, reversed in part and remanded for further proceedings.

HOLDING: Armes, 191 N.E.3d 942 (Ind. Ct. App. 2022) (The emergency rule promulgated by the Indiana Board of Pharmacy purporting to add MDMB to Schedule I, fails to provide adequate information for a person of ordinary intelligence to determine whether he or she is dealing a substance that contains MDMB, and therefore, it is unconstitutionally vague).

J. CONSTITUTIONAL LAW

J.13. Right to Bear Arms

TITLE: Class v. United States
INDEX NO.: J.13.
CITE: (2/21/2018), 138 S. Ct. 798 (U.S. Supreme Court 2017)
SUBJECT: Guilty plea doesn't automatically waive all constitutional claims
HOLDING: A guilty plea does not automatically waive a challenge to the constitutionality of a statute a D was charged under, if the challenge questions the State's very right to bring the charge.

D was charged with possessing firearms in his Jeep because it was parked on the grounds of the U.S. Capitol building. See U.S.C. § 5104(e)(1). D filed a motion to dismiss, claiming the statute violated his 2nd Amendment right to bear arms. The Tr. Ct. denied the motion. D later pled guilty. The waiver of rights form did not list the right to challenge the constitutionality of the statute as one of the rights D was waiving.

A guilty plea bars appeal of many constitutional claims, such as the right against compulsory self-incrimination, the right to jury trial, and the right to confront one's accusers. Blackledge v. Perry, 417 U. S. 21, 30 (1974); see also Haynes v. United States, 390 U.S. 85, 87 n.2 (1968). However, where, as here, the constitutional claim implicates the very power of the State to prosecute a D, a guilty plea does not waive such a claim absent an explicit waiver of that right. Blackledge, 417 U.S. at 30–31; see Menna v. New York, 423 U.S. 61, 63, n.2 (1975) ("a plea of guilty to a charge does not waive a claim that – judged on its face – the charge is one which the State may not constitutionally prosecute."); United States v. Broce, 488 U.S. 563,569 (1989) (guilty plea does not bar claim on appeal "where on the face of the record the court ha[s] no power to enter the conviction or impose the sentence."). Because D did not explicitly waive his claim about the statute, he may raise it on direct appeal. Held, cert. granted, opinion of D.C. Circuit Court of Appeals reversed, and remanded.

Note: Because the opinion sometimes refers to "federal" Ds and other times just "Ds," the scope of the decision is not clear. However, the opinion cites both state and federal cases and the logic of its analysis would seem to make the decision apply to state court proceedings as well. Breyer, J., joined by Roberts, C.J., Ginsburg, Sotomayor, Kagan, and Gorsuch, JJ.; Alito, J., dissenting, joined by Kennedy and Thomas, JJ., writing, "There is no justification for the muddle left by today's decision," adding, "I fear that today's decision will bedevil the lower courts."

TITLE: New York State Rifle and Pistol Association v. Bruen
INDEX NO.: J.13.
CITE: (6/23/2022), 142 S.Ct. 2111 (SCOTUS 2013)
SUBJECT: U.S. Supreme Court states nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms, and the definition of "bear" naturally encompasses public carry.
HOLDING: New York's proper-cause requirement violates the Fourteenth Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms in public for self-defense.

To determine whether a firearm regulation is consistent with the Second Amendment, Heller and McDonald point toward at least two relevant metrics: first, whether modern and historical regulations impose a comparable burden on the right of armed self-defense, and second, whether that regulatory burden is comparably justified. Because "individual self-defense is 'the central component' of the Second Amendment right," these two metrics are 'central' considerations when engaging in an analogical inquiry. McDonald, 561 U. S., at 767 (*quoting* Heller, 554 U. S., at 599).

To be clear, even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster. For example, courts can use analogies to "longstanding" "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" to determine whether modern regulations are constitutionally permissible. That said, respondents' attempt to characterize New York's proper-cause requirement as a "sensitive-place" law lacks merit because there is no historical basis for New York to effectively declare the island of Manhattan a "sensitive place" simply because it is crowded and protected generally by the New York City Police Department.

It is undisputed that petitioners—two ordinary, law-abiding, adult citizens—are part of "the people" whom the Second Amendment protects. See Heller, 554 U. S., at 580. And no party disputes that handguns are weapons "in common use" today for self-defense. See id., at 627. The plain text of the Second Amendment protects petitioner's proposed course of conduct—carrying handguns publicly for self-defense. Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms, and the definition of "bear" naturally encompasses public carry. Moreover, the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation," id., at 592, and confrontation can surely take place outside the home.

TITLE: Redington v. State

INDEX NO.: J.13.

CITE: (8/6/2013), 992 N.E.2d 823 (Ind. Ct. App. 2013)

SUBJECT: Issue of 1st impression: statute for seizing and retaining weapons does not violate Indiana Constitution

HOLDING: As applied to D, Indiana statutes allowing seizure and retention of weapons from dangerous persons, see Ind. Code § 35-47-14-1 et seq. ("the Act"), does not violate various provisions of Indiana Constitution.

D exhibited bizarre behavior, including staking out one of the places that missing IU student Lauren Spierer was last seen, a Bloomington bar, and telling police he saw sprits. Police seized 48 guns from D's residence and enough ammunition to "fill up the back of a pickup truck." A doctor testified D suffered from a personality disorder called "schizotypal," and possibly paranoia or delusional disorder. After a hearing, the Tr. Ct. directed Bloomington police to keep all the guns they seized from D.

First, the Act does not violate the right-to-bear-arms provision of the Indiana Constitution, Ind. Const. Art. I, § 32, because it does not materially burden D's core right to defend himself.
Second, the Act does not violate the takings clause of either the State or federal constitution, Ind. Const. Art. I, § 21 and the 5th Amendment to the United States Constitution, because seizing D's weapons was a valid exercise of the State's police power for public welfare. While courts should harmonize these rights, on occasion one right may need to yield to the other. State ex rel. Mavity v. Tyndall, 74 N.E.2d 914 (Ind. 1947) (superseded on other grounds). Thus, where the State properly exercises its police power, it may "destroy private property without rendering compensation." Cincinnati Ry. Co. v. City of Connersville, 83 N.E. 503 (Ind. 1908).

Third, the Act is not void for vagueness because it adequately informs a person of normal intelligence of the proscribed conduct. State v. Lombardo, 738 N.E.2d 653, 656 (Ind. 2000). One of the definitions of a dangerous person in the Act - one who might "present a risk of personal injury to the person or another individual" - does not allow a finding of dangerousness based "exclusively upon speculation and conjecture." This subsection also requires the State to prove that: 1) a D suffers from mental illness and 2) documented evidence supports a reasonable belief that a D is prone to violence or emotionally unstable conduct.

The Court also found the State presented sufficient evidence to prove D was dangerous under both subsections of the Act's that define "dangerous." Held, judgment affirmed. Bradford, J., concurs with written opinion, reiterating that while he has "utmost respect for the constitutionally protected right to bear arms, . . . the State . . . prove[ed] that [D] was 'dangerous.'" Riley, J., dissenting, arguing the State failed to meet its burden to prove D was dangerous.

TITLE: Wilder v. State
INDEX NO.: J.13.
CITE: (1/9/2018), 91/1016 (Ind. Ct. App. 2018)
SUBJECT: Probation condition prohibiting possession of handgun
HOLDING: A condition of probation prohibiting D from possessing firearms was proper because he was convicted of battery resulting in bodily injury, a crime of violence, and the purpose of the condition is to keep dangerous weapons out of the hands of "those who have shown a propensity for violence."

Ind. Code § 35-38-2-2.3(a)(9), which seems to allow a categorical ban on firearm possession by any probationer, is constitutional as applied to D who committed a violent crime. The condition is a more "modest burden" on D's right to bear arms, applying only during the 365-day probation period. Because the curtailment of D's right to bear arms is related to the State's role of keeping dangerous weapons out of the hands of probationers, his rights under the Second Amendment to the U.S. Constitution were not violated. Likewise, because there was a rational basis for the firearm restriction, the condition does not impose a material burden on his right to bear arms under Article 1, Section 32 of the Indiana Constitution and it fulfills a significant and legitimate law enforcement need. Held, judgment affirmed.