

**CASELAW UPDATE**  
**SPRING CONFERENCE**  
**2013**

**SEARCH & SEIZURE**

**DOG SNIFF CASES**

*Florida v. Jardines*, \_\_\_\_\_ *U.S.* \_\_\_\_\_ (2013)

Decided: March 26, 2013

The Miami-Dade County Police Department received an anonymous Crime Stoppers tip that marijuana was being grown at the residence of the defendant, Joelis Jardines. Approximately one month later, a number of police officers went to the defendant's residence, including Detective Pedraja, Detective Bartelt, and Detective Bartelt's canine, Franky.

Police watched the defendant's home for about fifteen minutes. There were no vehicles in the driveway, the blinds were closed, and the police observed no activity around the residence. A detective also observed that the air conditioning unit for the defendant's residence was running continuously during this period of surveillance. Detectives believed that this might have been caused by the heat generated from the high intensity lamps of a marijuana grow operation.

Detective Bartelt took Franky to the front porch of the defendant's residence. Franky bracketed a scent and alerted at the base of the front door of the residence, indicating that such was the place of the strongest scent. Detective Bartelt took Franky away from the defendant's residence and advised Detective Pedraja that Franky had given a positive alert for the presence of controlled substances. Detective Pedraja then went to the front door of the defendant's residence and was able to smell marijuana coming from the residence.

Based upon the above, the police applied for and obtained a search warrant to search the defendant's residence. Upon execution of that search warrant, police discovered and seized a marijuana grow operation and arrested the defendant.

The defendant, Joelis Jardines, was charged with growing marijuana. Prior to trial, the defendant moved to suppress all of the evidence seized by police from his residence. After an evidentiary hearing, the Florida trial court granted the defendant's motion to suppress evidence.

The State of Florida appealed. The Florida Court of Appeals reversed the trial court, upholding the validity of the search warrant and the search of the defendant's

residence. See, *State v. Jardines*, 9 So.3d 1 (Fla. App. Ct. 2008). However, on April 14, 2011, the Florida Supreme Court reversed the Florida Court of Appeals and upheld the trial court's order suppressing the evidence seized from the defendant's residence. See, *Jardines v. State*, 73 So.3d 34 (Fla. 2011).

The State of Florida appealed to the United States Supreme Court. On January 6, 2011, the United States Supreme Court granted certiorari.

In a 5-4 decision, the United States Supreme Court held that the dog sniff on the front porch of the defendant's residence was constitutionally impermissible and upheld the order of the Florida trial court, suppressing the evidence seized by police from the defendant's residence.

The majority opinion of the United States Supreme Court examined this issue from a property rights perspective. That is, the majority held that the police and the trained canine went upon the curtilage of the defendant's residence, which area had the same constitutional protections as the inside of the residence.

The majority noted that a police officer without a search warrant may approach the residence of a citizen and knock on the front door. After all, this is nothing more than a private citizen might be expected to do at another's private residence. However, the real problem, according to the majority of the United States Supreme Court, was bringing the trained canine onto the curtilage of the residence with the hope of developing incriminating evidence. The majority ruled that for homeowners, there is no customary implied invitation to do that.

In short, the majority opinion of the United States Supreme Court held that bringing a trained canine onto the curtilage of a residence is a search within the meaning of the 4<sup>th</sup> Amendment. Therefore, the police needed to have a search warrant to have the trained canine come onto the curtilage of the defendant's residence and sniff the outside areas of the residence from that curtilage.

### Analysis

In some ways, this decision by the United States Supreme Court is limited and, in some ways, it is not.

In its simplest form, the instruction coming from the United States Supreme Court is that police may not bring a trained canine onto the curtilage of a residence, without a search warrant, and have that trained canine sniff around for evidence.

However, it seems clear that this case does not mean that police cannot conduct "knock and talk" investigations. But, in doing their knock and talk investigations, the police should not have a trained canine on the porch with them, at least at the beginning of the investigation. Circumstances may develop during the course of the investigation

(such as consent of the occupant of the residence) that would allow the use of a trained canine on the curtilage of the residence.

It also seems clear that the decision in this case will not prohibit canine sniffs during traffic stops, at rented storage building, or on luggage or packages. It also seems reasonably clear that this decision by the United States Supreme Court will not prohibit dog sniffs on the areas immediately surrounding non-residential buildings, such as business buildings or, perhaps, outbuildings in open fields. It is a much closer call with respect to a dog sniffing the door of an apartment from a common hallway or the door of a hotel room from the outside or from a common hallway. It is not certain how far the curtilage of an apartment or a hotel room extends into the common hallway.

In addition to the above, it is possible that the United States Supreme Court and other courts may take a dim view of police going upon the curtilage of a residence and using any device or tool to enhance their senses. This *might* even include the use of a flashlight. We shall see as this line of cases develops.

One of the troubling aspects of the majority opinion by the United States Supreme Court was that the majority did not address the fact, in the case at bar, that Detective Pedraja went up to the front porch of the defendant's residence (after Franky had alerted) and could, without any artificial aid, smell marijuana. An argument could certainly be made that if Franky had never been taken to the front porch of the defendant's residence and the detective could plainly smell marijuana coming from the residence, that information in the search warrant affidavit would have allowed the search warrant to be properly issued.

***Perez v. State, 981 N.E.2d 1242 (Ind. App. 2013)***

Decided: February 5, 2013

Defendant filed Petition for Transfer on March 5, 2013

No decision on Petition for Transfer as of May 3, 2013

In August 2009, an undercover officer with the Elkhart Police Department was purchasing cocaine and marijuana from an individual named Concepcion Avalos-Cortez. After a few transactions, it appeared that Avalos-Cortez might be obtaining his cocaine for these transactions from the defendant, Ignacio Perez.

In early September 2009, the police ordered one and one-half ounces of cocaine from Avalos-Cortez and then initiated a traffic stop on Avalos-Cortez as he was driving to the meet location for the cocaine transaction. At that time, police seized a quantity of cocaine from Avalos-Cortez and arrested him.

Police officers then went to the residence of the defendant, Ignacio Perez. The officers went to the front door of the defendant's residence and observed two surveillance cameras mounted on the front of the residence. Police knocked on the defendant's front door. The defendant came to the front door, stepped out onto the front porch and closed

and locked the front door behind him. The police asked the defendant why cocaine had been previously delivered to them in a truck that was owned by the defendant. The defendant lied and denied that he owned such a truck.

During the conversation on the front porch, the defendant was nervous and agitated, breathing heavily and was pacing back and forth on the front porch. Then the defendant walked off the front porch, past the police officers, to a nearby patio.

Shortly thereafter, the defendant's wife opened the front door of the residence. The defendant screamed something at her, in Spanish, and began trying to get past the police officers back to the front door. The police told the defendant to stop, but the defendant did not do so and tried to physically force his way past the officers to the front door.

At this point, Indiana State Police Trooper Dockery attempted to handcuff the defendant. The defendant refused to be handcuffed, physically resisted, and eventually grabbed at Trooper Dockery's gun. After a short struggle, the defendant lost the fight, was handcuffed, and arrested for Resisting Law Enforcement. The police then searched the defendant, incident to the arrest. To no one's surprise, the police found \$1,000 in cash in the defendant's pocket, including \$260.00 of buy money.

The police then took a trained canine to the front door of the defendant's residence. After sniffing the front door, the dog told the police that they should definitely look inside the defendant's residence for illegal drugs.

Police then applied for and obtained a search warrant authorizing the search of the residence of the defendant, Ignacio Perez. During the execution of that search warrant, police discovered and seized over 80 grams of cocaine, a handgun, two digital scales and \$2,400 in cash.

On September 9, 2009, the State charged the defendant, Ignacio Perez, with Dealing in Cocaine (a Class A felony) and Resisting Law Enforcement (a Class A misdemeanor). Defense counsel filed a motion to suppress evidence, requesting that the trial court suppress all of the evidence seized by the police from the defendant and from the defendant's residence. The trial court denied the defendant's motion to suppress evidence.

The defendant then pursued an interlocutory appeal.

On appeal, the defendant raised several constitutional issues regarding his detention, his arrest, and the search of his residence. One of the defendant's claims was that it was improper for the police to bring a trained canine onto his front porch and sniff the front door of his residence.

The Indiana Court of Appeals noted that the canine was not taken anywhere on the defendant's property except those places (i.e., front walk, porch and door) where

members of the public may appear at any time and where the defendant has no expectation of privacy. Therefore, according to the Indiana Court of Appeals, having a trained canine sniff the closed front door of the defendant's residence raised no 4<sup>th</sup> Amendment issues.

With respect to the Indiana Constitution, the Indiana Court of Appeals noted that in *Hoop v. State*, 909 N.E.2d 463 (Ind. App. 2009), the Court of Appeals held that, under Article I, Section 11 of the Indiana Constitution, a police officer needs reasonable suspicion to conduct a dog sniff at the front door of a private residence. Given the facts and circumstances of the case at bar, the Court of Appeals held that the police had reasonable suspicion to have the trained canine take a sniff at the front door of the defendant's residence.

### Analysis

Given the decision of the United States Supreme Court in *Florida v. Jardines*, it would seem likely that the Indiana Supreme Court will grant transfer in this case to, at the very least, address the canine sniff issue. The Indiana Supreme Court may also address the other search and seizure issues raised by the defendant in this case.

In addition, it appears clear that the Indiana constitutional standard of reasonable suspicion for canine sniffs at the front door of a residence, established in *Hoop v. State*, is no longer valid. Interestingly, this appears to be a circumstance where the United States Constitution provides greater protections than does the virtually identical provisions of the Indiana Constitution.

### ***Florida v. Harris*, \_\_\_\_\_ U.S. \_\_\_\_\_ (2013)**

Decided: February 19, 2013

On June 24, 2006, the defendant, Clayton Harris, was driving his truck in Liberty County, Florida with an expired license plate. Liberty County Sheriff's Department Deputy William Wheatley (a K-9 Officer) conducted a traffic stop. During that traffic stop, Deputy Wheatley noticed that the defendant was extremely nervous and had an open can of beer in his truck.

Deputy Wheatley asked for the defendant to consent to a search of his truck, but the defendant refused. Deputy Wheatley then got his canine, Aldo, and ran the dog around the defendant's truck. The canine alerted on the driver's side door handle of the truck.

Deputy Wheatley then searched the defendant's truck. Although Deputy Wheatley did not locate any controlled substances inside the truck, Deputy Wheatley did discover and seize 200 loose pseudoephedrine pills, 8,000 matches, a bottle of hydrochloric acid, two containers of antifreeze and a coffee filter full of iodine crystals.

After being Mirandized, the defendant admitted that he regularly cooked methamphetamine at his residence.

The State of Florida charged the defendant, Clayton Harris, with possession of pseudoephedrine with the intent to manufacture methamphetamine. After making bail, the defendant was out driving his truck when Deputy Wheatley pulled the defendant over for a broken brake light. Aldo again sniffed the defendant's truck and again alerted on the driver's side door handle. The defendant's truck was searched, but the police found nothing of interest.

Prior to trial, the defense moved to suppress all of the evidence seized from the defendant's truck during the first traffic stop, alleging that the canine alert on the driver's side door handle did not provide probable cause to conduct a search of the defendant's truck. During the suppression hearing, the State provided evidence concerning the canine's training, certification and performance ratings. On cross-examination, Deputy Wheatley admitted that he did not keep complete records of Aldo's performance during traffic stops or other field work. Instead, Deputy Wheatley maintained only records of canine alerts resulting in arrest.

The trial court denied the defendant's motion to suppress evidence. Thereafter, the defendant entered a no-contest plea to the charges, while reserving his right to appeal the trial court's suppression ruling.

On September 4, 2008, in a non-published decision, the Florida Court of Appeals affirmed the trial court's suppression ruling. However, on April 21, 2011, the Florida Supreme Court reversed the suppression ruling by the trial court, holding that there was insufficient evidence presented regarding the reliability of the canine to provide probable cause to search the defendant's truck. See, *Harris v. State*, 71 So.3d 756 (Fla. 2011).

The Florida Supreme Court held that in dog sniff cases where the positive alert by the canine established probable cause to search, the State would be required to produce a wide range of evidence concerning the training and performance of the canine, including the following:

1. The canine's training and certification records;
2. An explanation of the meaning of the training and certification records;
3. Field performance records, including any unverified alerts;
4. Evidence concerning the training and experience of the canine handler; and
5. Any other objective evidence known to the canine handler about the reliability of the canine.

The Florida Supreme Court ruled that, without such extensive records and evidence, the reliability of the canine could not be adequately proven in Court. In 2012, the United States Supreme Court granted certiorari.

In a unanimous decision, the United States Supreme Court reversed the decision by the Florida Supreme Court, holding that probable cause is to be determined on a case-by-case basis and not be the formal checklist approach established by the Florida Supreme Court.

The United States Supreme Court noted that evidence of a canine's satisfactory performance in a training or certification program may, by itself, provide sufficient reason to trust the dog's alert. However, the United States Supreme Court also stated that a defendant must have an opportunity to challenge the evidence regarding the reliability of the canine.

The United States Supreme Court then summarized the manner in which a Court should proceed regarding a challenge to probable cause based upon a dog sniff. The Supreme Court stated:

“In short, a probable-cause hearing focusing on a dog's alert should proceed much like any other. The court should allow the parties to make their best case, consistent with the usual rules of criminal procedure. And the court should then evaluate the proffered evidence to decide what all the circumstances demonstrate. If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause. If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence.”

The United States Supreme Court ruled in this case that the State presented sufficient evidence regarding Aldo's training and reliability and that such evidence supported the trial court's determination that the search of the defendant's truck was supported by probable cause.

## **TRAFFIC STOPS**

***Robinson v. State, \_\_\_\_\_ N.E.2d \_\_\_\_\_ (Ind. App. 2013)***

Decided: April 23, 2013

Crossing the Fog Line

On October 15, 2011, at approximately 1:00 a.m., a deputy with the Elkhart County Sheriff's Department began following a PT Cruiser on County Road 4. The PT Cruiser was being driven by the defendant, Joanna Robinson. The deputy made a video recording from his squad car of the defendant's driving and the traffic stop.

The deputy observed the defendant twice drive her vehicle across the fog line on the right side of the roadway and initiated a traffic stop for “unsafe lane movement.” Once the defendant had been stopped, the deputy observed that the defendant had bloodshot eyes, slurred speech, and the odor of an alcoholic beverage on her breath. Although the defendant claimed that she only drank one beer, she failed three field sobriety tests. The defendant also, without any prompting, admitted to the deputy that she had marijuana in her bra and shook the marijuana from her bra out onto the roadway. The defendant took a breath test, which indicated a blood alcohol content of .09.

The State charged the defendant, Joanna Robinson, with Operating While Intoxicated (a Class A misdemeanor), Possession of Marijuana (a Class A misdemeanor), Driving While Suspended (a Class A misdemeanor) and Operating With a .08 BAC (a Class C misdemeanor). The defense filed a motion to suppress evidence, seeking to suppress all evidence gathered by police after the traffic stop. In the motion to suppress evidence, the defendant alleged that the deputy lacked reasonable suspicion to initiate a traffic stop because the squad car video showed that the defendant stayed in her lane and only twice touched the fog line.

On July 6, 2012, a combined bench trial and hearing on the defendant’s motion to suppress evidence was held. The trial court issued a written order denying the defendant’s motion to suppress evidence. The trial court noted in its written order that it had viewed the squad car video several times and concluded that the defendant did twice drive onto the white fog line on the right side of the roadway, but the her vehicle never actually left the roadway.

The trial court convicted the defendant of Operating While Intoxicated (a Class A misdemeanor) and Possession of Marijuana (a Class A misdemeanor). The defendant appealed.

On appeal, the defendant alleged that the trial court erred in denying her motion to suppress evidence and that the traffic stop was initiated without reasonable suspicion. The Court of Appeals noted that the defendant’s argument was made only under the 4<sup>th</sup> Amendment and that no argument was made under the Indiana Constitution.

In its opinion in this case, the Indiana Court of Appeals discussed the prior case of *Barrett v. State*, 837 N.E.2d 1022 (Ind. App. 2005). In that case, the police received a tip from a Meijer employee that two people had purchased several boxes of cold medication, which could be used to manufacture methamphetamine, and had left in a Chevrolet Geo Tracker. Police located and followed the Geo Tracker. An officer observed the Geo Tracker drive onto the fog line on the right side of the roadway for 30 to 50 yards. Suspecting this to be a sign of impaired driving, the officer initiated a traffic stop on the Geo Tracker.

After the traffic stop in *Barrett*, things went downhill quickly for the two occupants of the Geo Tracker, as the police discovered several items in the vehicle that

were typically used to manufacture methamphetamine. The defendant, Barrett, was charged with and convicted of several drug-related offenses.

On appeal, Barrett claimed that the police lacked reasonable suspicion for the initial traffic stop and that all evidence gathered by the police after that traffic stop should have been suppressed. In a 2-1 decision in *Barrett*, the majority of the Indiana Court of Appeals held that driving on the fog line was a sign of impaired driving and, combined with the tip from the Meijer employee, provided reasonable suspicion for a traffic stop.

In the case at bar, the Indiana Court of Appeals distinguished *Barrett*, noting that in *Barrett* the analysis of the driver swerving onto the fog line was intertwined with the analysis of the tip from the Meijer employee concerning possible drug activity. The Indiana Court of Appeals then went even further with its analysis of the *Barrett* decision, stating:

“Nevertheless, to the extent that Barrett may be read to stand for the proposition that briefly driving onto the fog line is necessarily sufficient to establish reasonable suspicion of impaired driving, we acknowledge that it likely goes too far.”

NOTE: Judge Crone wrote the majority opinion in *Barrett* and also wrote the opinion of the Indiana Court of Appeals in the case at bar.

In the case at bar, the Indiana Court of Appeals explained the manner in which swerving within a lane or driving onto a fog line contributes to the determination of whether a traffic stop is proper. The Court of Appeals stated:

“Thus, swerving within a lane or onto the fog line may or may not give rise to reasonable suspicion. Factors to be considered may include whether there is repeated swerving, whether there is swerving over an extended distance or period of time, whether the driver narrowly avoids hitting an object or causing an accident, whether road or weather conditions might explain the driver’s conduct, and whether the driver overcorrects when returning to the proper lane of travel.”

The Indiana Court of Appeals then applied this framework to the facts and circumstances in the case at bar and stated, in relevant part:

“In this case, Robinson was driving late at night on a road with some curves. On two occasions, she briefly touched the fog line and then immediately returned to her lane. There was no indication that she

swerved sharply or overcorrected....Given the fact that it was dark, the road had some curves, and that Robinson made only brief contact with the fog line, we conclude that the State failed to establish that the traffic stop was supported by reasonable suspicion that Robinson was impaired.”

Based upon the above, the Indiana Court of Appeals held that the traffic stop of the defendant was improper and that all evidence obtained by the police after the traffic stop should have been suppressed. Therefore, the Court of Appeals reversed the defendant’s convictions for Operating While Intoxicated (a Class A misdemeanor) and Possession of Marijuana (a Class A misdemeanor).

*State v. Keck*, \_\_\_\_\_ *N.E.2d* \_\_\_\_\_ (*Ind. App. 2013*)

Decided: April 24, 2013

Left of Center on a County Road

On February 12, 2012, the defendant, Darrell Keck, was driving westbound on Highway 36 in Putnam County. A deputy with the Putnam County Sheriff’s Department was following the defendant. The defendant turned onto County Road 100 East, with the deputy trailing behind. County Road 100 in Putnam County is a typical country road in Indiana. The surface is “chip and seal” in parts and gravel in other parts. The road is probably 12 to 16 feet wide and has no centerline. In the late winter and spring, County Road 100 is full of potholes.

The defendant drove in the center portion of County Road 100 for one-quarter to three-quarters of a mile. There was no traffic approaching from the other direction. The defendant was not driving erratically, but was driving slower than the posted speed limit. The deputy sheriff conducted a traffic stop on the defendant for driving left of center. Things did not go well for the defendant after the traffic stop and the defendant ended up being charged with Operating While Intoxicated and Operating With a .08 BAC.

Prior to trial, the defense filed a motion to suppress evidence, requesting that the trial court suppress all evidence gathered by the police after the traffic stop. The defense argued that there was no reasonable suspicion justifying a traffic stop.

The trial court GRANTED the defendant’s motion to suppress evidence. In a written ruling granting the defendant’s motion to suppress evidence, the trial court stated that it would be:

“ . . . wholly unreasonable to expect motorists in Putnam County to take a perfectly straight course, on the far right of the roadway, riddled with potholes in the absence of oncoming traffic. . . .[D]riving left of center has become a necessity with the current conditions of our county roads.”

The State appealed.

On appeal, the defendant contended that he did not commit a traffic violation because he drove left of center on a county road, simply to avoid potholes. On the other hand, the State argued that this was a simple matter in that the deputy initiated a proper traffic stop on the defendant because the defendant drove left of center, in violation of IC 9-21-8-2.

IC 9-21-8-2 states:

“(a) Upon all roadways of sufficient width, a vehicle shall be driven on the right half of the roadway except as follows:

(1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing overtaking and passing.

(2) When the right half of the roadway is closed to traffic under construction or repair.

(3) Upon a roadway divided into three (3) marked lanes for traffic under the rules applicable to a roadway divided into three (3) marked lanes.

(4) Upon a roadway designated and signposted for one-way traffic.

(b) Upon all roadways, a vehicle proceeding at less than the normal speed of traffic at the time and place under conditions then existing shall be driven:

(1) In the right-hand lane then available for traffic; or

(2) As close as practicable to the right-hand curb or edge of the roadway;

except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway.”

After examining this statute and a couple of prior cases concerning traffic stops, the Indiana Court of Appeals held that the trial court heard evidence that could support the conclusion that the defendant’s compliance with IC 9-21-8-2 was not possible under the circumstances. The Court of Appeals summarized its ruling by stating:

“As the trial court heard sufficient evidence to support its conclusion Keck was in compliance with Ind. Code 9-21-8-2(b) and could not have complied with subsection (a), we cannot say the trial court erred to the extent it found the stop improper. We therefore affirm.”

***Sanders v. State, 981 N.E.2d 616 (Ind. App. 2013)***

Decided: January 22, 2013

Transfer GRANTED: April 15, 2013

Tinted Window

On January 28, 2011, at 4:30 p.m., Indianapolis Metropolitan Police Department Officer Keith Minch pulled over the defendant, Erving Sanders, because Officer Minch saw that the rear window of the vehicle being driven by the defendant was tinted so dark that the window would not allow Office Minch to clearly identify or recognize the occupants inside of that vehicle.

As Officer Minch was speaking to the defendant, Officer Minch smelled burnt marijuana coming from the vehicle. The defendant admitted that he had just smoked a joint. Officer Minch then searched the defendant's vehicle and discovered and seized a quantity of cocaine.

On January 28, 2011, the State charged the defendant, Erving Sanders, with Possession of Cocaine, a Class D felony. On May 4, 2011, the defense filed a motion to suppress evidence, claiming that the defendant was improperly stopped by Officer Minch and that the trial court should suppress the cocaine seized by Officer Minch.

Hearings on the defendant's motion to suppress evidence were held on May 4, 2011, June 1, 2011 and November 16, 2011. At one of those suppression hearings, Officer Minch testified that the tint on the back window of the defendant's vehicle "did not allow [him] to clearly recognize or identify the occupants inside. Officer Minch also testified that, "the three steps that I use is if I can identify approximate age, the ethnicity and the gender of the individual inside."

Pictures of the vehicle being driven by the defendant were taken by an evidence technician approximately one hour after the traffic stop. The pictures of the vehicle were also introduced into evidence at one of the suppression hearings.

During one of the suppression hearings, the defense presented the testimony of Robert Rady, an expert in the area of window tinting. Robert Rady measured the tint on the side windows and the rear window of the defendant's vehicle and determined that the tint was 38%, which complied with Indiana law. Robert Rady also testified that he had looked through the rear window of the defendant's vehicle and could clearly see inside the vehicle.

Ultimately, the trial court denied the defendant's motion to suppress evidence, holding that the traffic stop was based upon reasonable suspicion. The trial court stated that Office Minch believed in good faith that the rear window of the defendant's vehicle was tinted so darkly that the officer could not see the occupants inside.

The defendant then pursued an interlocutory appeal.

IC 9-19-19-4(c) sets forth the restrictions on tinting the windows of a vehicle. That statute states:

“(c) A person may not drive a motor vehicle that has a:

- (1) windshield;
- (2) side wing;
- (3) side window that is part of a front door; or
- (4) rear back window;

that is covered by or treated with sunscreening material or is tinted to the extent or manufactured in a way that the occupants of the vehicle cannot be easily identified or recognized through that window from outside the vehicle. However, it is a defense if the suncreening material applied to those windows has a total solar reflectance of visible light of not more than twenty-five percent (25%) as measured on the nonfilm side and light transmittance of at least thirty percent (30%) in the visible light range.”

A violation of IC 9-19-19-4 is a Class C infraction. See, IC 9-19-19-7.

On appeal, the State argued that the ruling by the trial court was correct in that IC 9-19-19-4 does not require a police officer to conclusively determine that a vehicle window has a light transmittance of less than 30% before that officer may stop a vehicle for an alleged violation of this statute. The State contended that the testimony by Officer Minch that he could not easily identify or recognize the occupant of the vehicle through the rear window of the vehicle was sufficient reasonable suspicion to justify a traffic stop.

The Indiana Court of Appeals was not impressed by this argument by the State. The Court of Appeals held that the evidence presented at the suppression hearings showed that the windows of the vehicle driven by the defendant were not in violation of IC 9-19-19-4(c) and that Officer Minch mistakenly believed that the defendant’s vehicle was in violation of the statute. The Court of Appeals also reviewed the pictures that were taken of the defendant’s vehicle by the evidence technician about an hour after the traffic stop. The Court of Appeals stated that the pictures showed that one could see inside the defendant’s vehicle through the rear window.

Ultimately, the Indiana Court of Appeals held that, based upon the evidence presented at the suppression hearings, Officer Minch did not have an objectively justifiable reason to stop the defendant’s vehicle. Therefore, the Court of Appeals reversed the trial court’s denial of the defendant’s motion to suppress evidence.

***Porter v. State, 985 N.E.2d 348 (Ind. App. 2013)***

Decided: April 4, 2013

No further appeal as of May 10, 2013

License plate light

On May 12, 2011, Indianapolis Metropolitan Police Department Officer John Montgomery observed the defendant, Thomas Porter, driving a vehicle after dark. Officer Montgomery could not see the license plate on the vehicle from fifty (50) feet away and initiated a traffic stop. Officer Montgomery quickly discovered that the defendant's driver's license had been forfeited for life and arrested the defendant.

The State charged the defendant, Thomas Porter, with Operating a Motor Vehicle After License Forfeited for Life (a Class C felony). Prior to trial, the defense filed a motion to suppress evidence, challenging the traffic stop conducted by Officer Montgomery.

During the hearing on the defendant's motion to suppress evidence and again during the bench trial in this case, the defense argued that the license plate light on the vehicle that had been driven by the defendant was fully operational and further alleged that the license plate on that vehicle complied with the requirements imposed on the automobile manufacturer by 49 CFR 571.108. Therefore, the defense contended that the traffic stop by Officer Montgomery was improper.

At the hearing on the defendant's motion to suppress evidence, photographs of the vehicle were also admitted into evidence. The trial court denied the defendant's motion to suppress evidence, holding that the photographs of the vehicle showed that there was some kind of equipment problem that supported a justifiable reason for the traffic stop.

The case proceeded to bench trial and the trial court found the defendant guilty of the charge of Operating a Motor Vehicle After License Forfeited for Life (a Class C felony). The trial court sentenced the defendant to an executed term of imprisonment of 4 years and the defendant appealed.

On appeal, the Indiana Court of Appeals examined IC 9-19-6-4(e). That statute states:

“(e) Either a tail lamp or a separate lamp must be placed and constructed so as to illuminate the rear registration plate with a white light and make the plate clearly legible from a distance of fifty (50) feet to the rear. A tail lamp or tail lamps, together with a separate lamp for illuminating the rear registration plate, must be wired so as to be lighted whenever the headlamps or auxiliary driving lamps are lighted.”

The State argued on appeal that the traffic stop by Officer Montgomery was proper because the testimony of the officer was clear that the officer could not see the rear license plate of the vehicle being driven by the defendant from a distance of 50 feet. The State also noted that the pictures of the vehicle supported the testimony by Officer Montgomery.

The defendant contended that the license plate on the vehicle was illuminated by a white lamp that met the federal manufacturing standards and that such white light was operational at the time of the traffic stop. The defendant also pointed to the provisions of IC 9-19-6-24(a). That statute states:

“(a) This section does not apply to a person who owns or operates a vehicle or combination of vehicles that:

- (1) Contains parts and accessories; and
- (2) Is equipped;

as required by regulations of the United States Department of Transportation.”

The Indiana Court of Appeals ruled that the traffic stop was proper. Specifically, the Court of Appeals held that Officer Montgomery had a reasonable and objectively justifiable basis for making the traffic stop.

The Indiana Court of Appeals explained that even if the vehicle driven by the defendant met the applicable federal regulations, that fact does not necessarily indicate that Officer Montgomery could not make a valid traffic stop if the officer could not see the rear license plate from 50 feet away. An actual traffic violation is not a condition precedent to a proper traffic stop. The pertinent issue is whether the police officer reasonably believed that a traffic violation had been committed. See, e.g., *Potter v. State*, 912 N.E.2d 905 (Ind. App. 2009); *Houston v. State*, 898 N.E.2d 358 (Ind. App. 2008).

***Bowers v. State, 980 N.E.2d 911 (Ind. App. 2012)***

Decided: December 31, 2012

No further appeal

Opinion certified: February 14, 2013

Reasonable suspicion – drunk driving

Horn violation

On October 9, 2011, at about 3:00 a.m., Mooresville police officers observed a van operated by the defendant, Damon Bowers, stop in the roadway. At that time, the defendant’s ex-wife, April, got out of the van and the happy couple began shouting at each other. The defendant then honked his horn and drove away.

The police approached April, who was upset and intoxicated. April advised the police that she and the defendant had been trying to work on their relationship and had been drinking together all day. While the police were talking to April, the defendant returned to the scene, but upon seeing the police there, drove away again.

The police followed the defendant and pulled him over. The defendant was drunk and was arrested by the police. The State charged the defendant, Damon Bowers, with Operating While Intoxicated (a Class D felony) and Operating With a .15 BAC (a Class D felony).

Prior to trial, the defense filed a motion to suppress evidence, requesting that the trial court suppress all evidence gathered by the police after the traffic stop. The defense claimed that the traffic stop was not supported by reasonable suspicion. After a hearing, the trial court denied the defendant's motion to suppress evidence.

The defendant then pursued an interlocutory appeal.

The Indiana Court of Appeals upheld the trial court's denial of the defendant's motion to suppress evidence, finding that the traffic stop was proper. Specifically, the Indiana Court of Appeals stated:

“Considering April's state of intoxication, her statement she and Bowers had been drinking together, the fact that the incident happened at 3:00 a.m., and Bowers' brief return to the scene after the police arrived, it was reasonable to suspect Bowers was driving while intoxicated.”

Interestingly, the Indiana Court of Appeals noted that there was another reason why the police had the authority to conduct a traffic stop on the defendant. Specifically, the Court of Appeals cited IC 9-19-5-2. That statute states:

“The driver of a motor vehicle shall, when reasonably necessary to ensure safe operation, give audible warning with the horn on the motor vehicle but may not otherwise use the horn when upon a highway.”

The Indiana Court of Appeals stated that the evidence presented during the suppression hearing indicated that the defendant used his horn in violation of IC 9-19-5-2 and, therefore, could have been stopped by the police for that traffic violation.

## **PACKAGE INTERDICTION**

*State v. Lagrone, 985 N.E.2d 66 (Ind. App. 2013)*

Decided: March 26, 2013

No further appeal as of May 10, 2013

Package Interdiction

On December 31, 2010, employees of UPS alerted the Indianapolis Metropolitan Police Department that a package that had been sent through UPS had been damaged during shipping and the employees believed that the package contained marijuana. The police went to that location and found that the package contained three heat-sealed plastic bags of marijuana.

The package was addressed to “Michael Davis” at the address of the Wingate Hotel, located near West 71<sup>st</sup> Street and I-465 in Indianapolis. Police went to the Wingate Hotel and were advised that there was no one named Michael Davis registered at the hotel. However, the desk clerk advised police that someone had called to say that he was expecting a package to be delivered to the hotel and asked to be called when the package arrived.

The police took the package from UPS and repacked the marijuana, using the original shipping label. The police also put a GPS tracking device into the package, as well as an electronic parcel wire that would transmit a tone to law enforcement officers when the package was opened. No warrant was obtained authorizing these actions by the police.

An undercover police officer, acting as an employee of the Wingate Hotel, called the defendant, Gregory Lagrone, and advised the defendant that his package had arrived. The defendant drove to the Wingate Hotel (in his Jaguar), arriving a few minutes after he was called. The defendant picked up the package of marijuana, put it in his car, and drove away.

The defendant then drove, at a high rate of speed, to his residence. The drive from the hotel to the defendant’s residence took about 10 minutes. Police officers were following the defendant and were also monitoring the position of the package, using the GPS tracking device that had previously been placed inside of the package.

A few minutes after the defendant arrived at his residence, the electronic parcel wire that had previously been placed into the package alerted the police that the package had been opened. At that point, police officers went to the door of the defendant’s residence and knocked and announced themselves as police. No one answered the door.

The police became concerned that the defendant might be disposing of the marijuana because the presence of the electronic parcel wire in the package would have alerted the defendant to the fact that a law enforcement investigation was underway. Due

to this concern, the police made forced entry into the defendant's residence and conducted a protective sweep of the residence for people and weapons. During that protective sweep, the police found the defendant, his three children, and the opened parcel of marijuana. The police then applied for and obtained a search warrant, authorizing the police to search the defendant's residence.

The State charged the defendant, Gregory Lagrone, with Dealing in Marijuana (a Class D felony) and Possession of Marijuana (a Class D felony). Prior to trial, the defense filed a motion to suppress evidence, requesting that the marijuana seized from the defendant's residence be suppressed. After a hearing, the trial court granted the defendant's motion to suppress evidence.

The State appealed.

The first issue considered by the Indiana Court of Appeals was the placement of the GPS tracking device inside the package of marijuana. The Indiana Court of Appeals noted that in *United States v. Jones*, \_\_\_\_\_ U.S. \_\_\_\_\_, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), the United States Supreme Court had ruled that placing a GPS tracking device on a suspect's automobile for 28 days constituted a search without a warrant.

However, the Indiana Court of Appeals did not find *United States v. Jones* to be controlling. Instead, the Court of Appeals relied on *Illinois v. Andreas*, 463 U.S. 765, 103 S.Ct. 3319, 77 L.Ed.2d 1003 (1983), where the United States Supreme Court held that once government officials had properly opened a package for delivery and discovered that the contents of the package were contraband, a person had no privacy interest in that contraband. Therefore, the act of resealing the package for delivery and placing the GPS tracking device inside did not violate the 4<sup>th</sup> Amendment. See also, *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984).

The Indiana Court of Appeals also held that obtaining information from the GPS tracking device was not constitutionally impermissible. The GPS tracking device was used in conjunction with visual surveillance, as the police followed the defendant on public roadways. In addition, there was no evidence that the police obtained any information from the GPS tracking device once that GPS tracking device was inside of the defendant's residence. See, *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984); *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983).

The Indiana Court of Appeals next considered the issue of whether using an electronic parcel wire in such a manner that it was activated inside of the defendant's residence constituted a search under the 4<sup>th</sup> Amendment. The Court of Appeals concluded that such activity was protected by the 4<sup>th</sup> Amendment, stating:

“Here, after Lagrone picked up the package, law enforcement officers monitored the parcel's wire receiver for the signal indicating that the

package had been opened. A few minutes after Lagrone entered his home, the receiver was activated by the signal, indicating that someone had opened the package. At that point, Lagrone was inside his home and, therefore, had a reasonable expectation of privacy. See *U.S. Const. amend. IV*. Whether someone had opened the package was information that could not have been observed from outside the home. Under *Karo*, the monitoring of the parcel wire to determine when the package was opened constitutes a search of Lagrone's home. *Karo*, 468 U.S. at 717."

Finally, the Indiana Court of Appeals considered whether exigent circumstances existed to allow police to enter the defendant's residence without a search warrant. The Court of Appeals ruled that the police officers created the exigent circumstances by the manner in which they conducted the investigation. By waiting to interdict the defendant until he was inside his residence, where the package presumably would be opened, the police set up the chain of events that created the exigent circumstances. See, *Kentucky v. King*, \_\_\_\_ U.S. \_\_\_\_, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011).

In sum, the Indiana Court of Appeals ruled as follows:

1. There was no 4<sup>th</sup> Amendment violation when the police repackaged the marijuana and placed a GPS tracking device and an electronic parcel wire inside the package.
2. There was no 4<sup>th</sup> Amendment violation when the police used the GPS tracking device inside the package in conjunction with the visual surveillance and the defendant proceeded from the hotel to his residence.
3. The use of the electronic parcel wire inside the defendant's residence, to alert police that the package had been opened was a search within the meaning of the 4<sup>th</sup> Amendment and was subject to the warrant requirement.
4. The police did not have exigent circumstances to enter into the defendant's residence without a warrant, because the exigent circumstances were actually created by the police.

Based upon the above, the Indiana Court of Appeals affirmed the order of the trial court granting the defendant's motion to suppress evidence.

## **TESTING OF CLOTHING AFTER ARREST**

*Guilmette v. State*, \_\_\_\_\_ *N.E.2d* \_\_\_\_\_ (*Ind. App. 2013*)

Decided: April 22, 2013

No further appeal as of May 10, 2013

Testing of clothing after arrest

On September 16, 2010, the defendant, Douglas Guilmette, was arrested for Theft for shoplifting at Walmart and Meijer. At that time, the defendant was a suspect in the brutal beating murder of Greg Piechocki.

At the time of the defendant's arrest for Theft, a detective collected all of the defendant's clothing, including the defendant's shoes, and took them to an in-house lab area for visual inspection. The detective saw what he believed to be spots of blood on the defendant's shoes.

The detective then sent the defendant's shoes and some other articles of the defendant's clothing to the Indiana State Police Lab for blood and DNA analysis. A red stain on one of the shoelaces tested presumptively for blood. DNA testing on the red stain gave a mixture from which the victim, Greg Piechocki, and the defendant could not be excluded. The sample was so small that no confirmatory tests could be done.

On December 21, 2010, the State charged the defendant, Douglas Guilmette, with Murder, two counts of Theft, and the habitual offender sentence enhancement. Prior to trial, the defense filed a motion to suppress evidence, requesting suppression of the DNA results, alleging that it was improper for the police to take and test the defendant's shoes without a warrant. The trial court denied the defendant's motion to suppress evidence.

The case proceeded to jury trial and the jury found the defendant guilty as charged and also found that the defendant was a habitual offender. The trial court sentenced the defendant to an aggregate executed term of imprisonment of 92 years. The defendant appealed.

On appeal, the defendant alleged that under Article I, Section 11 of the Indiana Constitution, it was improper for the police to take his shoes upon arrest and to send them off for DNA testing, without a warrant.

The Indiana Court of Appeals agreed, stating:

“At the time the police took Guilmette's shoes, they knew that he was with Piechocki at home the night of the murder, there was some level of animosity between them, and Guilmette lied about taking Piechocki's keys, money, and car until confronted with surveillance videos. The police thus had a high degree of suspicion that Guilmette might have been

involved in the murder. In addition, any intrusion on Guilmette's ordinary activities when his shoes were taken incident to his theft arrest was slight, given that his shoes would have been taken shortly thereafter when he was booked into jail.

Nonetheless, the absence of any exigent law enforcement need tips the scale in Guilmette's favor. We take no issue with the police taking his shoe at the time of his arrest. Nor was it any violation for the police to look at his shoe and discover in plain view spots that appeared to be blood. At that point, it was altogether reasonable that the police, in the course of the murder investigation, would want to subject the shoe to blood and DNA analysis. However, as Guilmette was initially arrested for the unrelated crimes of theft and not murder, the police should have obtained a warrant to do so. After all, Guilmette was already in custody, the police had the shoe in their possession, and there was thus little chance of contamination or destruction of evidence."

The Indiana Court of Appeals held that it was error for the trial court to allow into evidence, at the defendant's jury trial, the DNA test results relating to the defendant's shoe. However, given the fact that the State presented evidence from four witnesses who testified that the defendant had confessed to the murder, the Court of Appeals held that the admission of the DNA evidence was harmless.

### **OTHER SEARCH & SEIZURE CASES**

#### ***Fuqua v. State, 984 N.E.2d 709 (Ind. App. 2013)***

Decided: March 27, 2013

Defendant filed Petition for Transfer: April 26, 2013

No decision yet on Petition for Transfer as of May 10, 2013

The Indiana Court of Appeals upheld the trash pull conducted by police at the defendant's residence, finding that the police had reasonable suspicion to conduct such trash pull. The Court of Appeals further upheld the search warrant issued authorizing the search of the defendant's residence.

#### ***State v. Shipman, \_\_\_\_\_ N.E.2d \_\_\_\_\_ (Ind. App. 2013)***

Decided: April 19, 2013

No further appeal as of May 10, 2013

In this case, the Indiana Court of Appeals reversed the trial court's order granting the defendant's motion to suppress evidence. The Court of Appeals held that there was probable cause to support the issuance of the search warrant. The Court

of Appeals also ruled that, even if there had not been probable cause to support the issuance of the search warrant, the good faith exception to the exclusionary rule would have operated to allow the search.

***Hines v. State, 981 N.E.2d 150 (Ind. App. 2013)***

Decided: January 18, 2013

No further appeal

Opinion certified: February 27, 2013

The Indiana Court of Appeals upheld the initial investigatory stop of the defendant. The Court of Appeals also upheld the seizure of the gun thrown by the defendant during a pursuit, holding that the defendant abandoned the property.

***Billingsley v. State, 980 N.E.2d 402 (Ind. App. 2012)***

Decided: December 7, 2012

Transfer GRANTED: March 7, 2013

In a 2-1 decision, the Indiana Court of Appeals upheld the initial investigatory stop of the defendant by the police. The Court of Appeals was divided on the issue of whether there was reasonable suspicion to justify the investigatory stop.

***Walker v. State, \_\_\_\_\_ N.E.2d \_\_\_\_\_ (Ind. App. 2013)***

Decided: April 18, 2013

No further appeal as of May 10, 2013

The Indiana Court of Appeals upheld the consent given by the defendant's mother for police to search the defendant's residence (that he shared with his mother). The defendant alleged, but failed to prove, that his mother was not competent to give such consent. The Court of Appeals also upheld the consent to search given by the defendant's wife, holding that the defendant was present and did not refuse consent at the time that it was given by his wife.

***Fox v. State, 983 N.E.2d 1165 (Ind. App. 2013)***

Decided: January 31, 2013

Ordered Published: March 1, 2013

No further appeal

Opinion certified: March 18, 2013

In this case, the Indiana Court of Appeals held that the defendant had no standing to object to a search of a hotel room where the defendant was staying. The defendant was not a registered guest at the hotel, but was improperly staying in the room, without paying, due to a secret agreement with the hotel shift manager.

## SUFFICIENCY OF THE EVIDENCE

### RESISTING LAW ENFORCEMENT

*K.W. v. State, 984 N.E.2d 610 (Ind. 2013)*

Decided: February 22, 2013

No further appeal

Opinion certified: April 4, 2013

Resisting Law Enforcement – Evidence Insufficient

K.W. was a student at Ben Davis High School in Indianapolis. He was about to fight another student at the high school when a teacher intervened. Indianapolis Metropolitan Police Department Officer Eugene Smith was at Ben Davis High School at that time, serving as a private “Liaison Officer” for the high school.

Officer Smith attempted to handcuff K.W., “for K.W.’s safety” and because this was Officer Smith’s “normal procedure.” At that time, it appears that K.W. did not want to be handcuffed. According to the testimony of Officer Smith, K.W. “began to resist and pull away” and did turn and pull away. This did not end well for K.W., as Officer Smith employed a “straight arm-bar takedown” and then completed the handcuffing process.

The State filed a Petition Alleging Delinquency, alleging that K.W. had committed Resisting Law Enforcement, which would be a crime if committed by an adult. The case proceeded to a fact-finding hearing and the trial court adjudicated K.W. a delinquent child. However, the trial court did not impose any probation or any other consequences as a result of finding K.W. to be a delinquent child. In spite of that, K.W. appealed.

The Indiana Court of Appeals reversed the trial court’s adjudication of K.W. as a delinquent child. Specifically, the Indiana Court of Appeals held that Officer Smith was acting in his capacity as a school liaison officer and not as a law enforcement officer. See, *K.W. v. State*, 976 N.E.2d 61 (Ind. App. 2012).

The State then filed a Petition for Transfer. On January 10, 2013, the Indiana Supreme Court granted transfer, thereby vacating the opinion of the Indiana Court of Appeals.

The Indiana Supreme Court reversed the trial court’s adjudication of K.W. as a delinquent child, but for an entirely different reason than that articulated by the Indiana Court of Appeals. The Indiana Supreme Court held that the State did not present sufficient evidence at the fact-finding hearing that K.W. “forcibly” resisted Officer Smith.

The Indiana Supreme Court noted that in order to “forcibly” resist a law enforcement officer, a person must use strong, powerful and violent means to evade the law enforcement officer. See, *Spangler v. State*, 607 N.E.2d 720 (Ind. 1993). The level of force required does not need to rise to the level of mayhem. *Graham v. State*, 903 N.E.2d 963 (Ind. 2009). However, the force used to resist a law enforcement officer must be more than “leaning away from an officer’s grasp,” *A.C. v. State*, 929 N.E.2d 907 (Ind. App. 2010), or “twisting and turning a little bit” against the officer’s actions. *Ajabu v. State*, 704 N.E.2d 494 (Ind. App. 1998).

In the case at bar, the Indiana Supreme Court reviewed the testimony presented by Officer Smith, as well as the surveillance video of the incident, and held that the evidence presented to the trial court was insufficient to prove that K.W. forcibly resisted Officer Smith. The Supreme Court ruled that the evidence that K.W. “began to resist and pull away” was not really any different from the evidence that the defendant “leaned away” from the officer (*A.C. v. State*) or evidence that the defendant “twisted and turned a little bit” (*Ajabu v. State*).

In addition to making its ruling on the sufficiency of the evidence, the Indiana Supreme Court discussed the issue raised by the Indiana Court of Appeals. That issue is whether an off-duty law enforcement officer, privately employed by a school corporation as a “liaison officer” or “resource officer,” is a law enforcement officer for purposes of the statute defining the offense of Resisting Law Enforcement.

The Indiana Supreme Court noted that, for purposes of 4<sup>th</sup> Amendment analysis, the Indiana Appellate Courts have distinguished between law enforcement officers acting within the scope and course of their employment and off-duty law enforcement officers acting in a private capacity for a school corporation as liaison officers or resource officers. This distinction has been made because the school setting requires some easing of the constitutional restrictions to which searches by law enforcement officers are normally subject. See, e.g., *T.S. v. State*, 863 N.E.2d 362 (Ind. App. 2007); *C.S. v. State*, 735 N.E.2d 273 (Ind. App. 2000); *D.B. v. State*, 728 N.E.2d 179 (Ind. App. 2000).

The Indiana Supreme Court noted the problem with the resisting law enforcement statute applying to liaison officers by stating:

“We recognize that it is somewhat anomalous that two uniformed law-enforcement officers responding to the same school incident could be treated differently for purposes of resisting law enforcement, if one was purely an “outside” officer while the other was a school-resource officer. School-resource officers serve a vitally important role in maintaining school safety and order against a growing range of discipline problems and threats, and we in no way diminish the value of their work. Yet we are also reluctant to risk blurring the already-fine Fourth Amendment line between school-discipline and law-enforcement duties by allowing the

same officer to invisibly “switch hats” – taking a disciplinary role to conduct a warrantless search in one moment, then in the next taking a law-enforcement role to make an arrest based on the fruits of that search.”

The Indiana Supreme Court suggested that the Indiana General Assembly might wish to consider amending the statute defining the offense of Resisting Law Enforcement to include resisting a privately employed school liaison officer or resource officer. In that way, such a change to the definition of the crime would be less likely to cause unintended 4<sup>th</sup> Amendment consequences.

***Walker v. State*, \_\_\_\_\_ *N.E.2d* \_\_\_\_\_ (Ind. App. 2013)**

Decided: January 30, 2013

Order Published: March 4, 2013

Defendant filed Petition for Transfer: February 28, 2013

No decision yet on Petition for Transfer as of May 10, 2013

Resisting Law Enforcement – Evidence Sufficient

On March 25, 2012, at approximately 12:25 a.m., Indianapolis Metropolitan Police Department Officer Jason Ehret was dispatched to a fight in progress. When Officer Ehret arrived at the dispatched location, he encountered Cory Finch and the defendant, Demetrius Walker, fighting in the intersection of two streets.

Officer Ehret told the two men to quit fighting and lay flat on the ground. The two men ignored the commands and continued fighting. Finally, Officer Ehret gave them one final warning, telling the two men that if they refused to comply, they would be tased.

Cory Finch dropped to the ground with his arms out flat. The defendant, however, chose foolishly. The defendant walked towards Officer Ehret with his fists clenched and in an aggressive manner. Officer Ehret kept telling the defendant to stop and get down on the ground. When the defendant got 3 to 4 feet from Officer Ehret, the officer tased the defendant. The defendant immediately fell to the ground and was handcuffed without further problems.

The State charged the defendant, Demetrius Walker, with Resisting Law Enforcement (a Class A misdemeanor) and Disorderly Conduct (a Class B misdemeanor). The case proceeded to bench trial and the trial court found the defendant not guilty of Disorderly Conduct and guilty of Resisting Law Enforcement. The trial court sentenced the defendant to serve 90 days in the Marion County Jail and the defendant appealed.

On appeal, the defendant claimed that the State presented insufficient evidence to support the conviction for Resisting Law Enforcement. The defendant contended that the State failed to present any evidence that the defendant “forcibly” resisted Officer Ehret,

and that the evidence showed that the defendant merely refused to comply with the officer's commands.

The Indiana Court of Appeals examined a number of cases defining the force necessary to support a conviction for Resisting Law Enforcement. In *Spangler v. State*, 607 N.E.2d 720 (Ind. 1993), the Indiana Supreme Court held that one forcibly resists law enforcement when strong, powerful and violent means are used to resist a law enforcement officer. However, in *Graham v. State*, 903 N.E.2d 963 (Ind. 2009), the Indiana Supreme Court explained that the force involved need not rise to the level of mayhem and that a modest level of resistance may suffice.

In the case at bar, the Indiana Court of Appeals relied on its recent decision in *Pogue v. State*, 937 N.E.2d 1253 (Ind. App. 2010). In that case, the police ordered the defendant to drop a box cutter that he was holding. When the defendant attempted to move the box cutter into his pocket, the police officer tackled the defendant. In *Pogue*, the Indiana Court of Appeals upheld the defendant's conviction for forcibly resisting a police officer because the defendant displayed "strength and a threat of violence."

The Indiana Court of Appeals noted that, in the case at bar, despite the commands of Officer Ehret, the defendant clenched his fists and walked towards the officer in an aggressive manner. The Court of Appeals ruled that the defendant displayed "strength and a threat of violence" and that such evidence was sufficient to uphold a conviction for Resisting Law Enforcement by force.

***Vanzyll v. State, 978 N.E.2d 511 (Ind. App. 2012)***

Decided: December 4, 2012

No further appeal

Opinion certified: March 18, 2013

Resisting Law Enforcement – Evidence Insufficient

In August 2010, the defendant, Jerry Vanzyll, was manufacturing and selling methamphetamine from his residence in Kokomo. On August 24, 2010, police were conducting surveillance on the defendant's residence and believed that they had enough information to obtain a search warrant authorizing law enforcement officers to search the defendant's residence.

The police wanted to secure the defendant's residence prior to obtaining the search warrant. Police went to the front door and back door of the residence, knocked loudly on the door and yelled "Kokomo Police Department." Police officers could see inside the residence and observed the defendant running around like a rat in a maze. Although the officers continued to verbally order the defendant to exit the residence, the defendant did not do so.

Eventually, the defendant came to the back door of the residence, holding up his hands. The defendant refused to comply with the commands by the police to come

outside and get down on the ground. Finally, the police yanked the defendant outside, forced him to the ground, and handcuffed him.

The State charged the defendant, Jerry Vanzyll, with a number of drug offenses and with Resisting Law Enforcement (a Class A misdemeanor). The charging Information alleged that the defendant fled from a law enforcement officer after the law enforcement officer had identified himself by visible or audible means and ordered the defendant to stop.

The case proceeded to jury trial. The jury found the defendant guilty of all charges, including the charge of Resisting Law Enforcement (a Class A misdemeanor). The trial court sentenced the defendant to an aggregate term of imprisonment of 18 years, with 6 years of that aggregate term of imprisonment suspended. The defendant appealed.

One of the issues raised by the defendant on appeal was the sufficiency of the evidence supporting the conviction for Resisting Law Enforcement. The defendant contended that the evidence was insufficient because he had no legal obligation to answer the door when the police knocked and that he was never ordered to stop by the police.

The Indiana Court of Appeals held that there was NOT sufficient evidence supporting the defendant's conviction for Resisting Law Enforcement, stating:

“Conversely, in this case, Vanzyll did not leave his residence, and he had no obligation to do so when Officer Reed knocked on the front door. Vanzyll was never given a command to stop. Vanzyll was not given any command by Officer Reed until after he shut the back door and returned to the interior of the residence. After Vanzyll returned to the interior of the residence, Officer Reed ordered him to return to the back door and exit the residence. Although Vanzyll did not immediately comply with Officer Reed's order, he did exit peaceably after a short period of time had elapsed.”

## **BURGLARY**

*Meehan v. State*, \_\_\_\_\_ *N.E.2d* \_\_\_\_\_ (*Ind. App. 2013*)

Decided: April 25, 2013

No further appeal as of May 13, 2013

Burglary – Evidence Insufficient

O.J.S. Building Services is a business located in South Bend. The shop foreman, Scott Floyd, was responsible for closing the business and locking up at the end of the day and then opening the business at the beginning of the next day. On May 2, 2011, Scott Floyd locked up the business at the end of the day and everything was in order. The

following morning, when he arrived at work to open-up, Scott Floyd discovered that a panel to an overhead door to the business had been damaged and removed. When Scott Floyd went inside, he found that two interior doors have been kicked open. The police were called.

The police and employees of O.J.S. Building Services discovered that a number of items were missing from the business, including laptop computers, computer bags, a jacket and some money. A glove was found inside the building near the overhead door where the burglar had gained access to the building. In addition, a screwdriver was found in one of the offices, which screwdriver did not belong to any of the employees of the business.

The glove and the screwdriver were sent to the Indiana State Police Lab. Testing on the glove revealed a single DNA profile for an unknown male. That DNA profile was entered into a database and the DNA profile matched the DNA profile of the defendant, Martin Meehan.

The police arrested the defendant on December 7, 2011. When interviewed by the police, the defendant denied any involvement in the burglary of O.J.S. Building Services. The police obtained a buccal swab from the defendant, which matched the DNA found on the glove. It does not appear that any of the items stolen from O.J.S. Building Services were ever recovered.

The State charged the defendant, Martin Meehan, with Burglary (a Class C felony) and also filed the habitual offender sentence enhancement. The case proceeded to jury trial and the jury found the defendant guilty of Burglary. Thereafter, the defendant waived jury and the trial court found that the defendant was a habitual offender.

The trial court sentenced the defendant to a total executed term of imprisonment of 13 years. The defendant appealed.

On appeal, one of the issues raised by the defendant was his claim that the State failed to present sufficient evidence at trial to support the Burglary conviction. The Indiana Court of Appeals found this issue to be dispositive and did not address the other issues raised by the defendant.

The Indiana Court of Appeals began its analysis of the sufficiency of the evidence issue by setting forth the standard of review for a sufficiency of the evidence claim. Citing *Stewart v. State*, 866 N.E.2d 858 (Ind. App. 2007), the Indiana Court of Appeals stated the following:

“When reviewing the sufficiency of evidence supporting a conviction, we will not reweigh the evidence or judge the credibility of the witnesses. We must look to the evidence most favorable to the conviction together with all reasonable inferences to be drawn from that evidence. We will affirm a

conviction if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.”

The issue that was considered by the jury and again on appeal was whether or not the defendant’s DNA on the glove found inside the burglarized building was sufficient to identify the defendant as the burglar. The jury believed that such evidence proved the identity, beyond a reasonable doubt. The Indiana Court of Appeals disagreed, stating:

“In many cases, DNA is compelling evidence of identity. In this case, however, there was no evidence that would support an inference that Meehan’s DNA was found on the glove because he handled it during the burglary, as opposed to some other time. Therefore, the guilty verdict was based upon speculation and must be reversed.”

It seems that the Indiana Court of Appeals was concerned that DNA evidence like the evidence in the case at bar could be used by criminals to frame innocent citizens for certain crimes. In that regard, the Indiana Court of Appeals stated:

“Were we to affirm, we would be creating a precedent that would make it relatively easy for criminals to frame other individuals; all they would need to do is obtain an object with someone else’s DNA and leave it at the crime scene. We reverse Meehan’s conviction for burglary and the resulting habitual offender enhancement.”

***Holloway v. State, 983 N.E.2d 1175 (Ind. App. 2013)***

Decided: February 27, 2013

No further appeal

Opinion certified: April 9, 2013

Burglary – Evidence Sufficient

The victim in this case, Valerie Suggs, had the misfortune to live in a townhouse next door to the defendant, career thug Lamont Holloway.

On October 26, 2011, at approximately 2:00 p.m., Valerie Suggs left her townhouse to go to work. As Valerie Suggs left, she locked the door and turned off the lights. At approximately 4:30 p.m., Valerie Suggs’s daughter returned to the townhouse from school. The daughter noticed that a window in the back of the residence had been broken and some items in the residence appeared to be missing.

Valerie Suggs was called and returned home from work. It was clear that the townhouse had been burglarized and that many items inside had been stolen. Valerie Suggs was able to provide police with serial numbers of a television set and a gaming system that had been stolen from her residence that afternoon.

Using the serial numbers provided by Valerie Suggs, Indianapolis Metropolitan Police Department Detective Jerry Salluom discovered that the defendant, Lamont Holloway, had sold the television set and the gaming system to a pawn shop. In fact, those items were sold by the defendant to the pawn shop at 4:41 p.m. on the very day that the items were stolen from the residence of Valerie Suggs. The pawn shop was about a 15 minute drive from the victim's residence.

On November 10, 2011, the State charged the defendant, Lamont Holloway, with Burglary (a Class B felony) and Theft (a Class D felony). The State also filed the habitual offender sentence enhancement.

The case proceeded to bench trial. At the conclusion of the bench trial, the trial court found the defendant guilty as charged and also found that the defendant was a habitual offender. The trial court sentenced the defendant to an aggregate term of imprisonment of 20 years.

The defendant appealed.

On appeal, the defendant claimed that the evidence presented by the State was insufficient to support the Burglary conviction. Specifically, the defendant alleged that the evidence failed to show that he was the person who actually broke into and entered the Suggs residence and stole property from inside that residence.

The Indiana Court of Appeal began its sufficiency of the evidence analysis by setting forth the standard of review for sufficiency claims. The Court of Appeals stated:

“When reviewing the sufficiency of the evidence to support a conviction, we must consider only probative evidence and reasonable inferences supporting the conviction. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence. *Id.* We consider conflicting evidence most favorably to the trial court's ruling. *Id.* We affirm the conviction unless “no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” *Id.* (quoting *Jenkins v. State*, 726 N.E.2d 268, 270 (Ind. 2000)). It is not necessary that the evidence overcome every reasonable hypothesis of innocence. *Id.* at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the conviction. *Id.*”

NOTE: Compare this statement of the review standard for a sufficiency of the evidence claim to the statement of the same standard in *Meehan v. State* (above), where the Indiana Court of Appeals stated that “We will affirm a conviction if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.”

The defendant whined that the evidence supporting the Burglary conviction was insufficient because the mere unexplained possession of property shortly after it was stolen does not, standing alone, support a determination that the defendant was the person who burglarized the residence from which the property was stolen. The Indiana Court of Appeals did not buy that argument, holding:

“In this case, as Suggs’s immediate neighbor who was at home a short time before Suggs left for work, Holloway was in a position to know when Suggs’s townhome was unoccupied and had the opportunity to commit the burglary and theft. The evidence shows that Holloway lived in a townhome directly adjacent to Suggs’s townhome and that the townhomes shared a common wall. Further, Suggs testified that she saw Holloway frequently and had seen him at about 1:00 p.m. on the day of October 26, 2011. In addition, the evidence shows that Suggs left her townhome for work at approximately 2:00 p.m. and that her daughter returned to the home from school at 4:30 p.m. to discover the broken kitchen window and that property was missing. In addition, the evidence reveals that Holloway possessed and pawned the property taken from the Suggs’s home a very short time after the items had been taken from the home. Specifically, the evidence shows that Holloway sold the television and gaming system to the pawn shop at 4:41 p.m. on the day the items were taken and that the drive from the townhomes to the pawn shop was approximately fifteen minutes. A reasonable inference from the evidence is that Holloway was the person who entered Suggs’s home and took the property. While the trial court could have made different inferences from the evidence, we cannot say that the inferences made by the court here were unreasonable.”

Based upon the above, the Indiana Court of Appeals upheld the defendant’s conviction for Burglary, a Class C felony.

## **CHILD EXPLOITATION**

### ***Delagrang v. State, 981 N.E.2d 1277 (Ind. App. 2013)***

Decided: January 25, 2013

TRANSFER GRANTED: April 18, 2013

Attempted Child Exploitation – Evidence Insufficient

The defendant, David “Upskirt” Delagrang, loved photography. He attached a camera to one of his shoes, with the camera connected to a digital recording device that stored the camera’s images. The defendant fashioned a fishing line inside his pants to allow him to activate his shoe camera.

On February 27, 2010, Upskirt Delagrang went to the Castleton Square Mall in Indianapolis. While at the mall, the defendant approached several women who were wearing skirts and managed to take pictures up their skirts using his shoe camera. Four of the females who were given the full shoe-cam treatment by the defendant were under the age of 18.

The defendant’s behavior at the mall brought him to the attention of a store manager. The store manager contacted an off-duty police officer, who approached the defendant. As the officer approached the defendant, the defendant attempted to flee. However, the defendant found it difficult to run with a camera in his shoe and fishing line up his pants. The defendant was immobilized with a taser and arrested. Incident to that arrest, the police discovered and seized the defendant’s shoe camera and the digital images taken by the defendant that day.

The State charged the defendant, Upskirt Delagrang, with four (4) counts of Attempted Child Exploitation (a Class C felony), ten (10) counts of Voyeurism (a Class D felony) and one count of Resisting Law Enforcement (a Class A misdemeanor).

Prior to trial, counsel for the defendant filed a motion to dismiss the charges of Attempted Child Exploitation and Voyeurism. The trial court dismissed the Voyeurism charges, but refused to dismiss the four (4) counts of Attempted Child Exploitation. The defendant then pursued an interlocutory appeal.

On July 25, 2011, the Indiana Court of Appeals issued a decision in *Delagrang v. State*, 951 N.E.2d 593 (Ind. App. 2011), affirming the trial court’s denial of the defendant’s motion to dismiss the four (4) counts of Attempted Child Exploitation. On October 13, 2011, the Indiana Supreme Court denied transfer.

The case proceeded to jury trial on the four (4) counts of Attempted Child Exploitation and one count of Resisting Law Enforcement. At the conclusion of the State’s case-in-chief, the defendant moved for a directed verdict of acquittal. The trial court denied that motion.

The jury found the defendant guilty of all four (4) counts of Attempted Child Exploitation (a Class C felony) and the one (1) count of Resisting Law Enforcement (a Class A misdemeanor). The trial court sentenced the defendant to a total term of imprisonment of 4 years, with 3 years suspended and a term of probation.

The defendant appealed.

On appeal, the defendant, Upskirt Delagrang, contended that the trial court erred in refusing to grant the defendant's motion for a directed verdict of acquittal at the conclusion of the State's case-in-chief. The defendant's argument was that his conduct in taking shoe-cam photos of the four victims was not in violation of the Child Exploitation statute.

The Indiana Court of Appeals first examined the Child Exploitation statute. IC 35-42-4-4(b)(2) states:

“(b) A person who knowingly or intentionally:

(2) disseminates, exhibits to another person, offers to disseminate or exhibit to another person, or sends or brings into Indiana for dissemination or exhibition matter that depicts or describes sexual conduct by a child under eighteen (18) years of age:

commits child exploitation, a Class C felony.”

The term “sexual conduct” is defined in the Child Exploitation statute. IC 35-42-4-4(a)(4) states:

“(4) “Sexual conduct” means sexual intercourse, deviate sexual conduct, exhibition of the uncovered genitals intended to satisfy or arouse the sexual desires of any person, sadomasochistic abuse, sexual intercourse or deviate sexual conduct with an animal, any fondling or touching of a child by another person or of another person by a child intended to arouse or satisfy the sexual desires of either the child or the other person.”

In a 2-1 decision, the majority of the Indiana Court of Appeals then interpreted the above provisions of IC 35-42-4-4 as follows:

1. That IC 35-42-4-4(b)(2) requires that the person disseminating the pictures (shoe camera or not) must be disseminating pictures that depict “sexual conduct” by a child;

2. That “sexual conduct,” as defined in IC 35-42-4-4(a)(4) means that the *child* must be exhibiting the child’s uncovered genitals with the intent to arouse or satisfy someone’s sexual desires.

Therefore, the majority of the Indiana Court of Appeals ruled that, in the case at bar, the State was required to prove that the four (4) child victims had to be exhibiting their uncovered genitals and that the four (4) child victims had to act with the intent to arouse or satisfy someone’s sexual desires. Since the State presented no evidence at trial that the four (4) child victims either voluntarily exhibited their genitals or acted with the intent to arouse or satisfy sexual desires, the Court of Appeals reversed the convictions for Attempted Child Exploitation, due to insufficient evidence.

Judge Najam dissented. Judge Najam wrote, in his dissent, that the law of the case doctrine precluded the defendant from re-litigating this issue.

More importantly, Judge Najam took issue with the majority opinion regarding the interpretation of the Child Exploitation statute. Judge Najam wrote:

“First, again, I would hold that the law of the case doctrine precludes such a reconsideration of the relevant statutory language. But, second, the child exploitation statute cannot be interpreted to require that a child be an active participant in the exhibition of her genitals or that the child have the intent to satisfy sexual desires. Such an interpretation improperly focuses the elements of the crime on the actions of the child and undermines the very foundation of the statute, which is designed to protect children. Indeed, the statute protects the very young, including infants and toddlers, who have no awareness of what sexual desires are, as well as children of all ages who are drugged or otherwise unwittingly manipulated by the perpetrator. So I cannot agree that “sexual conduct by a child” mandates any active participation whatsoever by a child. To the contrary, and as we have already held, only the perpetrator need “show or display” the uncovered genitals of a minor child for the sexual desires of any person. See Delagrang I, 951 N.E.2d at 595.”

## **CRIMINAL TRESPASS**

*Willis v. State, 983 N.E.2d 670 (Ind. App. 2013)*

Decided: March 7, 2013

No further appeal

Opinion certified: April 30, 2013

Criminal Trespass – Evidence Insufficient

On December 12, 2011, Marion County Sheriff's Department Deputy Talisha Harper was working off-duty as a security officer at the Keystone North Apartments in Indianapolis. While on the grounds of the Keystone North Apartments, Deputy Harper came into contact with the defendant, Marcus Willis. Deputy Harper asked the defendant if he lived at the Keystone North Apartments and the defendant admitted that he did not.

Deputy Harper then checked her No Trespass List, which had been compiled by the property owner management and which was carried by all security guards. Deputy Harper discovered that the defendant's name and identifiers were on this No Trespass List and arrested the defendant.

The State charged the defendant, Marcus Willis, with Criminal Trespass (a Class A misdemeanor) and the case proceeded to bench trial. During that bench trial, Deputy Harper was called to testify about the No Trespass List that she carried. Deputy Harper testified:

“The Trespass List is a document, it's a booklet if you will, of everyone that has been on the property that has been trespassed either by a security officer, any police officer that has decided to trespass anyone for any reason; and in addition to management. On this Trespass notification it has the person's full name, their date of birth, their sex, race, their social security number, the reason why they were trespassed; and then it's filed by the property and then placed on this list for us to carry.”

At the conclusion of the bench trial, the trial court found the defendant guilty of Criminal Trespass and sentenced the defendant to 10 days to serve. The defendant appealed.

On appeal, the defendant claimed that the State presented insufficient evidence at the bench trial to support the conviction for Criminal Trespass. The Indiana Court of Appeals agreed.

The Indiana Court of Appeals noted that the defendant, Marcus Willis, was charged with Criminal Trespass under IC 35-43-2-2(a)(1). That statute states, in relevant part:

“(a) A person who:  
(1) not having a contractual interest in the property, knowingly or intentionally enters the real property of another person after having been denied entry by the other person or that person’s agent:  
  
commits criminal trespass, a Class A misdemeanor.”

The Indiana Court of Appeals ruled that there was a complete lack of evidence at the bench trial proving that the defendant was aware that he was on the No Trespass List or that he had otherwise been denied entry to the apartment complex, as required by the statute defining the offense of Criminal Trespass. As a result, the Indiana Court of Appeals reversed the defendant’s conviction for Criminal Trespass.

*Analysis*

Proving the offense of Criminal Trespass is sometimes more difficult than it would first appear. In cases such as this, it is not likely that the State will be able to produce evidence from the individual who actually denied entry to the defendant, advised the defendant of the denial and placed the defendant on the No Trespass List. Instead, it would seem that the State would need to produce evidence from a witness (probably the owners or management of an apartment complex, for example) regarding the procedure that was required to be followed by security personnel in denying entry, advising the subject of the denial, and placing the subject on the No Trespass List. It might also be helpful if the No Trespass List (which would likely be a business record) included an entry with each name on the list, which entry provided some information about the denial of entry being communicated to the person on the list.

It is also important to remember that in cases such as the case at bar, there must be proof that the person who denied entry to the defendant was, in fact, acting as an agent for the owner of the property. The testimony of a security guard that he or she was acting as an agent for the owner of the property, standing alone, *might not* be sufficient to prove the agency relationship. See, e.g., *Glispie v. State*, 955 N.E.2d 819 (Ind. App. 2011); *Cusak v. State*, 961 N.E.2d 70 (Ind. App. 2012).

**CRIMINAL GANG ACTIVITY**

*G.H. v. State*, \_\_\_\_\_ *N.E.2d* \_\_\_\_\_ (Ind. App. 2013)  
Decided: May 9, 2013  
No further appeal as of May 13, 2013  
Criminal Gang Activity – Evidence Insufficient

On December 20, 2010, there was a party at the residence of the Respondent, G.H. Approximately 20 teenagers were attending this party.

At some point, one of the juveniles attending this party revealed that he had a sawed-off shotgun under his coat. One of the attendees of the party, V.A., decided to leave shortly after seeing the shotgun. A group of juveniles followed V.A. as he walked away from the party. This group of individual included the Respondent, G. H. The group of individuals was taunting V.A., who refused to fight G.H. Someone in the group wacked V.A. on the head with a glass bottle and the group pounced on V.A. and gave him a beat-down. Eventually, the bleeding V.A. escaped the mob and ran away.

While running away, V.A. met up with his 16 year old brother, J.A. Despite being bloody and bruised from the mob beating, V.A. and J.A. decided to go to another party. G.H. and his teenage posse also appeared at that party, but there were no further incidents at that location.

At about 1:00 a.m., V.A. and his brother, J.A., left the party and started walking home. As they walked home, the brothers heard shouts of “skoo-woo” and “Drop ‘Em Squad.”

V.A. knew that Drop ‘Em Squad was an Indianapolis gang, because he had previously been a member of that gang. As V.A. and J.A. walked down an alley, G.H., A.M. (who originally had the sawed-off shotgun) and some other juvenile thugs blocked the alley and challenged V.A. and J.A. to a fight. J.A. said that he did not want to fight and the two brothers ran away.

When V.A. and J.A made it safely home, their mother noticed that V.A. had blood on his clothes, a footprint on his back and a bump on his head. The mother also noticed a crowd of boys outside her residence and called the police.

In February 2012, the State filed a Petition Alleging Delinquency against G.H., alleging that G.H. had committed the following offenses that would be crimes if committed by an adult:

1. Criminal Gang Intimidation (Class C felony);
2. Stalking (Class C felony);
3. Intimidation (Class C felony);
4. Criminal Gang Activity (Class D felony);
5. Battery (Class A misdemeanor).

The case proceeded to a fact-finding hearing. At the conclusion of the fact-finding hearing, the trial court issued a true finding on the charges of Criminal Gang Activity and Battery and a not true finding on the remaining charges. As a result of the true finding, the trial court placed G.H. on probation.

G.H. appealed the true finding relating to the offense of Criminal Gang Activity.

On appeal, G.H. argued that there was insufficient evidence to support the trial court's true finding that G.H. committed Criminal Gang Activity. Specifically, G.H. contended that the State failed to prove that G.H. was an active member of a criminal gang, that he knew anything about the gang's criminal activities, and that the battery that he committed had anything to do with a criminal gang.

The Indiana Court of Appeals examined the statute defining the offense of Criminal Gang Activity. IC 35-45-9-3 states:

“A person who knowingly or intentionally participates in a criminal gang commits criminal gang activity, a Class D felony.”

A “criminal gang” is defined in IC 35-45-9-1. That statute states:

“As used in this chapter, “criminal gang” means a group with at least three (3) members that specifically:

(1) Either:

(A) promotes, sponsors, or assists in; or

(B) participates in; or

(2) requires as a condition of membership or continued membership; the commission of a felony or an act that would be a felony if committed by an adult or the offense of battery.”

The Court of Appeals noted that, in order to convict a person of the offense of Criminal Gang Activity, the State must prove that the person:

1. Was an active member of a criminal gang;
2. Had knowledge of the gang's criminal advocacy; and
3. Committed a crime with a specific intent to further the gang's criminal goals.

The specific intent element requires proof of a nexus between the alleged crime (i.e., battery) and furthering the goals of the criminal gang. See, *Robles v. State*, 758 N.E.2d 581 (Ind. App. 2001).

The Indiana Court of Appeals held that, in the case at bar, there was certainly proof that Drop ‘Em Squad was a criminal gang. In fact, Indianapolis Metropolitan Police Department Detective Roa testified that Drop ‘Em Squad was a confirmed eastside gang.

However, the Indiana Court of Appeals held that there was only “negligible” evidence that the Respondent, G.H. was an active member of Drop ‘Em Squad. More

importantly, even if the evidence presented at the fact-finding hearing proved that G.H. was an active member of Drop ‘Em Squad, there was no evidence showing that by battering V.A., G.H. was furthering the criminal goals of Drop ‘Em Squad.

The Indiana Court of Appeals stated:

“This evidence does not show a nexus between V.A.’s battery and Drop ‘Em Squad’s criminal goals. There was no mention of the gang at the time of the battery and no claim that the purpose of the battery was retribution by Drop ‘Em Squad, initiation into Drop ‘Em Squad, or to fulfill any other criminal goal of the gang. The only mention of Drop ‘Em Squad came later in the evening, in the alley confrontation, and no allegations against G.H. arose from that incident.”

As a result, the Indiana Court of Appeals reversed the trial court’s judgment of a true finding against G.H. on the charge of Criminal Gang Activity.

### **DOMESTIC BATTERY – PRESENCE OF A CHILD**

*Young v. State, 980 N.E.2d 412 (Ind. App. 2012)*

Decided: December 11, 2012

No further appeal

Opinion certified: January 24, 2013

Domestic Battery – Presence of a Child – Evidence Insufficient

On May 28, 2011, the defendant, James Young, committed domestic battery against his wife, Blanco Medrano. The battery took place inside the apartment shared by the couple. After committing the battery, the defendant left the apartment with one of the couple’s two children.

A short time after the battery, Blanco Medrano walked across the street from the apartment to Station 5 of the Elkhart Fire Department. At that time, Blanco Medrano spoke with two firemen about what had happened to her. Specifically, Blanco Medrano told the two firemen that her husband had beat her “at the apartment across the street” about “15 minutes ago.” The police were called.

A police officer arrived at Station 5 approximately 45 minutes after Blanco Medrano first came to the fire station. At that time, Blanco Medrano told the responding officer that her husband had strangled her until she could not breathe.

A short time later, the defendant returned to the couple’s apartment. The police officer went across the street and spoke with the defendant. The defendant told the police

officer that he and his wife had gotten into a verbal argument because she had taken \$1,000 from him and was trying to move away and take the children with her. The police officer arrested the defendant.

The State charged the defendant, James Young, with Strangulation (a Class D felony) and Domestic Battery (a Class D felony). The charge of Domestic Battery was charged as a Class D felony due to the alleged presence of children.

The case proceeded to jury trial. Not surprisingly, the victim, Blanco Medrano, did not appear for trial and here whereabouts were unknown. The trial court allowed the two firemen and the one police officer to testify regarding what Blanco Medrano had told them about the domestic battery incident. The trial court ruled that the statements made by Blanco Medrano to the two firemen and the one police officer were admissible as an excited utterance.

The jury found the defendant guilty of Strangulation (a Class D felony) and Domestic Battery (a Class D felony). The trial court sentenced the defendant to an aggregate executed term of imprisonment of 3 years and the defendant appealed.

On appeal, the Indiana Court of Appeals held that the trial court properly allowed into evidence the testimony of the two firemen, as an excited utterance. However, the Court of Appeals held that it was error to allow the police officer to testify about what Blanco Medrano had told him, as such statement by Blanco Medrano was not an excited utterance. The Indiana Court of Appeals reversed the defendant's conviction for Strangulation and remanded that case to the trial court for a new trial.

With respect to the conviction for Domestic Battery, the defendant argued on appeal that the evidence presented at the jury trial (which included the testimony by the two firemen about what Blanco Medrano had stated to them) was insufficient to prove that the defendant "committed the offense in the physical presence of a child less than sixteen (16) years of age, knowing that the child was present and might be able to see or hear the offense." See, IC 35-42-2-1.3(b)(2).

The Indiana Court of Appeals noted that the testimony from the two firemen was such that it was clear that the domestic battery incident occurred at the couple's apartment, across the street from the fire station. However, the testimony from the two firemen did not establish precisely where, in the apartment, the incident took place, nor did the evidence establish where the children were during the incident.

The Indiana Court of Appeals concluded that there was insufficient evidence presented at trial to prove that the defendant committed the domestic battery in the physical presence of a child, knowing that the child was present and might be able to see or hear the offense. However, the Indiana Court of Appeals ruled that the testimony by the two firemen was sufficient to uphold the defendant's conviction for Domestic Battery, as a Class A misdemeanor.

The Court of Appeals remanded the case to the trial court with instructions to enter judgment of conviction as a Class A misdemeanor and to resentence accordingly.

### **OTHER SUFFICIENCY CASES**

***Harris v. State, 981 N.E.2d 610 (Ind. App. 2013)***

Decided: January 18, 2013

Petition for Transfer Denied: April 15, 2013

1,000 Foot Protected Zone – Evidence Sufficient

The evidence presented by the State that over 100 children lived in the family housing complex where the defendant possessed the cocaine was sufficient to support the defendant's conviction for Possession of Cocaine (a Class B felony).

***Smith v. State, 982 N.E.2d 348 (Ind. App. 2013)***

Decided: January 30, 2013

Petition for Transfer GRANTED: April 29, 2013

Failure to Report Child Abuse – Evidence Insufficient

The Indiana Court of Appeals held that the evidence was insufficient to support a conviction for Failure to Report Child Abuse. This case involves the alleged failure of school personnel to report the rape of a student on campus.

***Keller v. State, \_\_\_\_\_ N.E.2d \_\_\_\_\_ (Ind. App. 2013)***

Decided: April 4, 2013

State Filed Petition for Rehearing: May 6, 2013

No decision yet on Petition for Rehearing

Failure to Report a Dead Body – Evidence Insufficient

One of the issues addressed by the Indiana Court of Appeals in this case was the issue of whether there was sufficient evidence to support the defendant's conviction for Failure to Report a Dead Body. The Court of Appeals ruled that there was NOT sufficient evidence to support the conviction because of the lack of evidence that the defendant knew that the victim died by violence, as charged in the Information.

***State v. Cruz, 980 N.E.2d 915 (Ind. App. 2012)***

Decided: December 31, 2012

No further appeal

Opinion certified: February 14, 2013

Operating a Motor Vehicle After Being Adjudged a Habitual Traffic Violator – Evidence Insufficient

The defendant's conviction for Operating a Motor Vehicle After Being Adjudged a Habitual Traffic Violator (a Class D felony) was overturned on appeal, due to insufficient evidence. The Indiana Bureau of Motor Vehicles sent written notice to the defendant of his status as a habitual traffic violator at an address that never had any connection to the defendant.

***Pillow v. State, \_\_\_\_\_ N.E.2d \_\_\_\_\_ (Ind. App. 2013)***

Decided: April 24, 2013

No further appeal as of May 14, 2013

Operating a Motor Vehicle After License Forfeited for Life – Evidence Sufficient

The Indiana Court of Appeals held that there was sufficient evidence to support the defendant's conviction for Operating a Motor Vehicle After License Forfeited for Life (a Class C felony), even though the trial court had, apparently, not sent notice to the BMV of the defendant's prior conviction for Operating a Motor Vehicle After Being Adjudged a Habitual Traffic Violator (a Class D felony), and even though the records of the BMV did not indicate that the defendant's driver's license had been forfeited for life.

***Cornelius v. State, \_\_\_\_\_ N.E.2d \_\_\_\_\_ (Ind. App. 2013)***

Decided: April 9, 2013

Defendant Filed Petition for Transfer: May 6, 2013

No decision on Petition for Transfer as of May 14, 2013

Aggravated Battery – Evidence Sufficient

In this case, the defendant stabbed the victim in the face, which caused a cut on the defendant's face almost 12 inches long and almost one inch deep and which left a permanent scar on the defendant's face. The Indiana Court of Appeals held that such injury was sufficient to support a conviction for Aggravated Battery (a Class B felony), as the stabbing resulted in serious permanent disfigurement.

## SENTENCING ISSUES

### SVF AND THE HABITUAL OFFENDER ENHANCEMENT

*Dye v. State*, 972 N.E.2d 853 (Ind. 2012)

Original Decision: July 31, 2013

Rehearing Opinion: 984 N.E.2d 625 (Ind. 2013)

Rehearing Opinion Issued: March 21, 2013

Opinion certified: March 21, 2013

On May 1, 2007, the State charged the defendant, Anthony Dye, with the offense of Possession of a Firearm by a Serious Violent Felon (a Class B felony). The State also alleged that the defendant was a habitual offender, pursuant to the provisions of IC 35-50-2-8.

In order to prove that the defendant, Anthony Dye, was a serious violent felon, the State was prepared to present evidence of the defendant's 1998 conviction for Attempted Battery, with a deadly weapon (a Class C felony). In order to prove that the defendant was a habitual offender, the State had evidence of the defendant's 1998 conviction for Carrying a Handgun Without a License, within 1,000 feet of school property (a Class C felony) and the defendant's 1993 conviction for Forgery (a Class C felony).

The defendant, Anthony Dye, entered a plea of guilty to the charge of Possession of a Firearm by a Serious Violent Felon (a Class B felony). At the same time, the defense filed a motion to dismiss the State's charging Information alleging that the defendant was a habitual offender, as defined in IC 35-50-2-8. The trial court denied the defendant's motion to dismiss the habitual offender sentence enhancement allegation.

The habitual offender sentence allegation then proceeded to jury trial and the jury found that the defendant was a habitual offender, as defined by IC 35-50-2-8. The trial court sentenced the defendant to the maximum term of imprisonment of 50 years, but suspended 15 years of that term of imprisonment.

The defendant appealed alleging, among other things, that the habitual offender sentence enhancement was an improper "double enhancement" not specifically authorized by Indiana statute. In a 2-1 decision, the Indiana Court of Appeals affirmed the defendant's sentence, with the majority holding that the use of the general habitual offender sentence enhancement with a conviction for the offense of Possession of a Firearm by a Serious Violent Felon was not a prohibited "double enhancement." See, *Dye v. State*, 956 N.E.2d 1165 (Ind. App. 2011). The Indiana Supreme Court thereafter granted transfer, thereby vacating this decision by the Indiana Court of Appeals.

On July 31, 2012, the Indiana Supreme Court issued its original opinion in this case. *Dye v. State*, 972 N.E.2d 853 (Ind. 2012). In its opinion, the majority of the

Indiana Supreme Court (it was a 4-1 decision, with Justice Massa dissenting) noted that certain criminal statutes in Indiana were designated as “progressive penalty statutes.” The Supreme Court explained that a progressive penalty statute was a statute that elevated the level of an offense (with a corresponding elevated penalty) because the defendant had previously been convicted of a particular offense. There are many such progressive penalty statutes throughout the Indiana Criminal Code.

The majority of the Indiana Supreme Court further noted that the long-standing rule is that, *absent explicit legislative direction*, a sentence imposed following conviction under a progressive penalty statute may not be increased further by either the general habitual offender statute or a specialized habitual offender statute. See, *Beldon v. State*, 928 N.E.2d 480 (Ind. 2010); *Breaston v. State*, 907 N.E.2d 922 (Ind. 2009); *Mills v. State*, 868 N.E.2d 446 (Ind. 2007); *State v. Downey*, 770 N.E.2d 794 (Ind. 2002); *Ross v. State*, 729 N.E.2d 113 (Ind. 2000).

In the original *Dye* case, the majority of the Indiana Supreme Court held, for the first time, that the offense of Possession of a Firearm by a Serious Violent Felon was a progressive penalty statute. Therefore, absent explicit legislative direction, the general habitual offender sentence enhancement could not be applied to the sentence for such an offense. The majority of the Indiana Supreme Court reduced the defendant’s sentence to an executed term of imprisonment of 20 years.

The State filed a Petition for Rehearing in this case. The State’s argument in its Petition for Rehearing was that the original opinion of the Indiana Supreme Court was a departure from the precedent established by the Indiana Supreme Court in *Mills v. State*, 868 N.E.2d 446 (Ind. 2007). It appears that the State’s argument was that in *Mills*, the Indiana Supreme Court had ruled that the habitual offender sentence enhancement could be used to enhance the sentence for the offense of Possession of a Firearm by a Serious Violent Felon, so long as the same prior felony conviction used to prove the offense of Possession of a Firearm by a Serious Violent Felon was not also used as a prior unrelated felony conviction for purposes of proving the habitual offender sentence enhancement.

In an unusual move, the Indiana Supreme Court granted the State’s Petition for Rehearing to address this contention. The Indiana Supreme Court issued its Rehearing Opinion in this case on March 21, 2013. See, *Dye v. State*, 984 N.E.2d 625 (Ind. 2013).

The Indiana Supreme Court began its analysis in its rehearing opinion by examining the basis of the decision in *Mills v. State*. In *Mills*, the defendant was charged with the following:

1. Carrying a Handgun Without a License (a Class C felony);
2. Possession of a Firearm by a Serious Violent Felon (a Class B felony);
3. The habitual offender sentence enhancement (IC 35-50-2-8).

The defendant was a serious violent felon, due to a 1995 conviction for Voluntary Manslaughter. The defendant was a habitual offender, according to the charging

Information, due to that same 1995 conviction for Voluntary Manslaughter and a 1989 conviction for Robbery.

The State and the defendant in *Mills* entered into a plea agreement whereby the defendant pled guilty to the charge of Possession of a Firearm by a Serious Violent Felon and admitted to the habitual offender sentence enhancement. The State agreed to dismiss the charge of Carrying a Handgun Without a License (a Class C felony) and also agreed to a cap on the term of imprisonment of 20 years. The trial court sentenced the defendant to an executed term of imprisonment of 10 years, enhanced by an additional executed term of imprisonment of 10 years, due to the habitual offender sentence enhancement.

The defendant attacked the sentence imposed in *Mills* via a Petition for Post-Conviction Relief, alleging that his defense lawyer assured the defendant that the State could charge both the offense of Possession of a Serious Violent Felon and the habitual offender sentence enhancement using the same prior felony conviction to support each. In fact, this was bad advice by the defense attorney, as the Indiana Court of Appeals had already reached the opposite conclusion.

The trial court denied the Petition for Post-Conviction Relief filed by defendant Mills and the Indiana Court of Appeals affirmed. The Indiana Supreme Court granted transfer in *Mills* and ultimately held that “a person convicted of unlawful possession of a firearm may not have his or her sentence enhanced under the general habitual offender statute by proof of the same felony used to establish that the person was a serious violent felon.” 868 N.E.2d at 447. However, the Indiana Supreme Court in *Mills* affirmed the trial court’s denial of the defendant’s Petition for Post-Conviction Relief because the defendant failed to contest on direct appeal the trial court’s denial of the defendant’s motion to withdraw his guilty plea and, by doing so, the defendant was precluded from raising the issue in a post-conviction relief proceeding.

In its rehearing opinion in *Dye*, the Indiana Supreme Court applied the ruling in *Mills* to the facts in the *Dye* case. The Indiana Supreme Court stated:

“Although the habitual offender adjudication was not based on the same felony used to establish that Dye was a serious violent felon, it was based on a felony that was a part of the same *res gestae*.”

In its rehearing opinion, the Indiana Supreme Court went on to explain how a common law evidence term applies to the habitual offender sentence enhancement under IC 35-50-2-8. The Supreme Court stated:

“Although *res gestae* is a term regularly used in Indiana’s common law of evidence to denote facts that are part of the story of a particular crime, it also includes acts that are part of an “uninterrupted transaction.” Swanson

v. State, 666 N.E.2d 397, 398 (Ind. 1996). And “[a] crime that is continuous in its purpose and objective is deemed to be a single uninterrupted transaction.” Eddy v. State, 496 N.E.2d 24, 28 (Ind. 1986).”

The Indiana Supreme Court then applied this *res gestae* analysis to the facts in the *Dye* case. The Indiana Supreme Court noted that in 1997 the defendant, Anthony Dye, was charged with the following offenses in Cause Number: 20C01-9703-CF-00018:

1. Attempted Murder (a Class A felony);
2. Carrying a Handgun Without a License (a Class C felony – due to a prior felony conviction);
3. Carrying a Handgun Without a License (a Class C felony – due to being within 1,000 feet of school property);
4. Attempted Battery (a Class C felony – while armed with a deadly weapon).

All of these charges arose out of one incident.

The parties reached an agreement in Cause Number: 20C01-9703-CF-00018 whereby the defendant pled guilty to Count 2 through Count 4 above and the State would dismiss Count 1. The trial court sentenced the defendant to a total term of imprisonment of 8 years.

In its rehearing opinion, the majority of the Indiana Supreme Court went on to hold that the State could not use the defendant’s 1998 conviction for Attempted Battery (a Class C felony) as the underlying prior conviction supporting the charge of Possession of a Firearm by a Serious Violent Felon and then use the 1998 conviction, from the same cause, of Carrying a Handgun Without a License (a Class C felony) to support the habitual offender sentence enhancement. The Indiana Supreme Court ruled that both of those felony convictions were part of an “uninterrupted transaction.” Allowing such a procedure would, in effect, violate the rule set forth in *Mills*.

At the end of the majority opinion on rehearing in *Dye*, the Indiana Supreme Court stated:

“In sum, the State is not permitted to support Dye’s habitual offender finding with a conviction that arose out of the same *res gestae* that was the source of the conviction used to prove that Dye was a serious violent felon.”

Then, the majority of the Indiana Supreme Court states its conclusion, as follows:

“We grant rehearing and again affirm that a person convicted of unlawful possession of a firearm by a serious violent felon may not have his or her sentence enhanced under the general habitual offender statute by proof of the same felony used to establish that the person was a serious violent felon. In all other respects, we reaffirm our original opinion.”

### *Analysis*

In *Mills*, the Indiana Supreme Court established a clear rule that the State could not use a particular prior felony conviction to prove the charge of Possession of a Firearm by a Serious Violent Felon and then use that same prior felony conviction to prove the habitual offender sentence enhancement.

In its original opinion in *Dye*, the majority of the Indiana Supreme Court seemed to clearly state that the offense of Possession of a Firearm by a Serious Violent Felon is a progressive penalty offense and, being such an offense, the State cannot further enhance the penalty for that offense by use of the habitual offender sentence enhancement of IC 35-50-2-8. No time. No way. Now how.

In fact, in its original opinion in *Dye*, the majority of the Indiana Supreme Court suggested that the use of the same felony conviction analysis of *Mills* was not necessary. In footnote #2 of the original *Dye* opinion, the majority of the Indiana Supreme Court stated:

“2. While *Mills* analyzes in some detail the predicate offenses supporting the defendant’s statuses as an SVF and a habitual offender, 868 *N.E.2d* at 450, 452, that analysis was unnecessary. The holdings in *Mills* that the general rule against double enhancements remains intact, *id* at 452, and that a sentence under the SVF statute (a progressive-penalty statute) could not be further enhanced under the general habitual offender statute, *id.* at 449-450, 452, were sufficient to dispose of the claims in that case.”

It would seem, therefore, that after the original majority opinion in *Dye*, the *Mills* analysis has no validity. It does not matter whether the State uses the same prior felony conviction to support both the charge of Possession of a Firearm by a Serious Violent Felon and the habitual offender sentence enhancement or uses entirely different unrelated prior felony convictions. You simply cannot enhance the sentence for the offense of Possession of a Firearm by a Serious Violent Felon using the habitual offender sentence enhancement. No time. No way. No how.

Yet, in its rehearing opinion, the majority of the Indiana Supreme Court breathes new life into the *Mills* analysis by actually expanding it to include not only the “same felony conviction” analysis, but also the “same felony conviction or any felony

conviction that was part of the same *res gestae*” analysis. At the same time, the majority opinion upon rehearing did not state that it was undoing the “No time. No way. No how.” Analysis of the original opinion in favor of the “same felony plus *res gestae*” analysis.

At this point, it is not clear what the *Dye* case (original opinion + rehearing opinion) stands for. To further complicate matters, the Indiana Court of Appeals has weighed-in with its own interpretation of the rehearing opinion in *Dye* (see case below).

***Shepherd v. State, 985 N.E.2d 362 (Ind. App. 2013)***

Rehearing Opinion Issued: April 8, 2013

Defendant filed Petition for Transfer: May 8, 2013

No decision on Petition for Transfer as of May 14, 2013

The defendant, Darryl Shepherd, is a violent career criminal. Here are a few highlights:

1. On December 11, 1991, the defendant was convicted of two (2) counts of Battery (Class C felony) and sentenced to 6 years to serve at the Indiana Department of Correction.
2. On August 30, 1993, the defendant was convicted of Dealing in Cocaine (a Class B felony) and sentenced to 10 years to serve at the Indiana Department of Correction.
3. On March 6, 2008, the defendant was convicted of Intimidation (a Class D felony) and was, again, sentenced to serve time at the Indiana Department of Correction.

In 2009, the defendant owned an auto body shop in Indianapolis and rented space at that shop to Gary Couch. On November 25, 2009, the defendant asked Gary Couch about an overdue rent payment. Couch responded with racial slurs and by threatening to kill the defendant. At this point, the verbal attacks boiled over into a full-fledged brouhaha.

After some verbal sparring, the defendant pulled out a handgun and shot Gary Couch in the leg. Couch responded by kicking the rear door of the defendant’s car, with his leg that did not have a bullet in it. The defendant then ran over Gary Couch with his car, knocking Couch to the ground.

Being shot and run over by a car did nothing to discourage Gary Couch. He got up and tried to yank open the door of the defendant’s car. At the same time, Couch’s son kicked in the rear window of the defendant’s car, on the driver’s side. The defendant then put an end to the fracas by shooting Gary Couch three more times, killing him. For good measure, the defendant shot Couch’s son once and then left the body shop.

The defendant turned himself in the next day. After waiving his Miranda rights, the defendant admitted that he, in fact, owned the gun that he had used to shoot and kill Gary Couch.

The State charged the defendant, Darryl Shepherd, with the offenses of Murder, Battery (a Class C felony) and Possession of a Firearm by a Serious Violent Felon (a Class B felony). The State also filed the habitual offender sentence enhancement.

The case proceeded to bench trial. At the conclusion of the State's case-in-chief, the trial court granted the defendant's motion for a directed verdict of acquittal on the charges of Murder and Battery, on the grounds of self-defense. However, the trial court refused to grant that motion with respect to the charge of Possession of a Firearm by a Serious Violent Felon, finding that the defendant had possessed the handgun before he arrived at the body shop.

At the conclusion of the bench trial, the trial court found the defendant guilty of the charge of Possession of a Firearm by a Serious Violent Felon (a Class B felony) and also found that the defendant was a habitual offender. The trial court sentenced the defendant to an executed term of imprisonment of 15 years, enhanced by an additional executed term of imprisonment of 10 years, due to the habitual offender sentence enhancement. The defendant appealed.

On appeal, the defendant claimed that the evidence was insufficient, that the trial court used an improper aggravating circumstance during sentencing, and that the defendant's sentence was not appropriate. On July 3, 2012, in a Memorandum Decision, the Indiana Court of Appeals affirmed the defendant's conviction and sentence.

Less than a month later, on July 31, 2012, the Indiana Supreme Court issued its original majority opinion in *Dye v. State*, 972 N.E.2d 853 (Ind. 2012). On August 2, 2012, the defendant filed a Petition for Rehearing in this case, claiming that the *Dye* decision should be applied retroactively to him. On August 17, 2012, the State requested that the Indiana Court of Appeals hold off on a decision in the case at bar, while the State sought rehearing in *Dye*.

On March 21, 2013, the Indiana Supreme Court issued its rehearing opinion in *Dye v. State*.

After the rehearing opinion by the Indiana Supreme Court in *Dye v. State*, the Indiana Court of Appeals issued a published rehearing opinion in the case at bar. In its published rehearing opinion, the Indiana Court of Appeals summarized the decision of the Indiana Supreme Court in its rehearing opinion in *Dye*, stating:

“On March 21, 2013, the Indiana Supreme Court issued its opinion on rehearing in *Dye*. In its opinion on rehearing, the court clarified that its earlier holding was not intended to break new ground but, rather, was simply an application of the law announced in *Mills v. State*, 868 N.E.2d 446 (Ind. 2007). *Dye v. State*, \_\_\_\_\_ N.E.2d \_\_\_\_\_, slip op. at 3-4 (Ind. Mar. 21, 2013) (opinion on rehearing). Specifically, the court clarified that an SVF conviction enhanced by an habitual offender adjudication is impermissible only when the same underlying offense, or an underlying offense within the *res gestae* of another underlying offense, is used to establish both the SVF status and the habitual offender status. *Id.* at 5-6.”

Based upon this interpretation of the *Dye* rehearing opinion, the Indiana Court of Appeals held that *Mills v. State* was the established law at the time that the defendant began his direct appeal in the case at bar and that the defendant could have pursued the issue on direct appeal. Since the defendant did not pursue this issue on direct appeal, he could not raise the issue for the first time in a Petition for Rehearing. The Court of Appeals also noted that the defendant’s prior convictions used to support the conviction for the offense of Possession of a Firearm by a Serious Violent Felon and for the habitual offender sentence enhancement did not appear to be related to each other.

The Indiana Court of Appeals therefore affirmed its prior decision in the case at bar.

### Analysis

If one were to interpret the *Dye* case (original opinion + rehearing opinion) to establish the rule that the State cannot enhance the sentence for the offense of Possession of a Firearm by a Serious Violent Felon with the habitual offender sentence enhancement (No way. No time. No how.), the analysis of the Indiana Court of Appeals falls apart.

Under the “No way. No time. No how.” analysis of *Dye*, the enhancement of the defendant’s sentence for the offense of Possession of a Firearm by a Serious Violent Felon by the use of the habitual offender sentence enhancement is improper because the offense of Possession of a Firearm by a Serious Violent Felon is a progressive penalty offense. Therefore, in the *Shepherd* case, the sentence would be improper.

The only thing that is clear about the *Dye* rehearing opinion and the *Shepherd* rehearing opinion is that more decisions on this issue will be coming soon to a Caselaw Update in your neighborhood.

## MAXIMUM SENTENCE – MISDEMEANOR OFFENSES

### *Jennings v. State, 982 N.E.2d 1003 (Ind. 2003)*

Decided: February 20, 2013

No further appeal

Opinion certified: April 4, 2013

The defendant, Joey Jennings, hated Cody Pope. The defendant also apparently hated Cody Pope's truck. So, on May 26, 2009, the defendant slashed a tire on Cody Pope's truck and also scratched the truck. Then, the defendant drove away. Only problem was that every neighbor in a six square block area saw Joey Jennings commit this crime.

The State charged the defendant, Joey Jennings, with Criminal Mischief, as a Class B misdemeanor. The case proceeded to jury trial and the defendant was found guilty as charged. The trial court sentenced the defendant to a term of imprisonment of 180 days, with 150 days of such term of imprisonment suspended and with 30 days of such term of imprisonment to serve. The trial court also placed the defendant on probation for 360 days. The defendant appealed.

One of the issues raised by the defendant on appeal was the defendant's contention that the trial court violated IC 35-50-3-1(b) by sentencing the defendant in excess of the limitation imposed by that statute. IC 35-50-3-1(b) states:

“Except as provided in subsection (c), whenever the court suspends in whole or in part a sentence for a Class A, Class B, or Class C misdemeanor, it may place the person on probation under IC 35-58-2 for a fixed period of not more than one (1) year, notwithstanding the maximum term of imprisonment set forth in sections 2 through 4 [IC 35-50-3-2 through IC 35-50-3-4] of this chapter. However, the combined term of imprisonment and probation for a misdemeanor may not exceed one (1) year.”

The defendant's grand tour of the Indiana Appellate Court system began on October 27, 2011, when the Indiana Court of Appeals issued its original opinion in this case. *Jennings v. State*, 956 N.E.2d 203 (Ind. App. 2011). The Indiana Court of Appeals held that its determination on this issue depended upon the interpretation of the phrase “term of imprisonment” in the last sentence of IC 35-50-3-1(b). If the phrase “term of imprisonment” is interpreted to mean only the 30 days that were actually ordered to be served, then the maximum term of probation would be 335 days. On the other hand, if the phrase “term of imprisonment” is interpreted to mean the entire 180 days sentence, then the maximum term of probation would be 185 days.

The Indiana Court of Appeals noted that some Indiana Appellate Courts have held that a “term of imprisonment,” for purposes of IC 35-50-3-1(b) includes not only the executed term of imprisonment, but the suspended term of imprisonment as well. See, *Collins v. State*, 835 N.E.2d 1010 (Ind. App. 2005); *Copeland v. State*, 802 N.E.2d 969 (Ind. App. 2004). However, the Indiana Court of Appeals also recognized that there was also some authority for the proposition that the phrase “term of imprisonment,” for purposes of IC 35-50-3-1(b), includes only the *executed* term of imprisonment. See, *Beck v. State*, 790 N.E.2d 520 (Ind. App. 2003); *Fry v. State*, 939 N.E.2d 687 (Ind. App. 2010).

Ultimately, in its original opinion, the Indiana Court of Appeals relied upon the decision of the Indiana Supreme Court in *Mask v. State*, 829 N.E.2d 932 (Ind. 2005). In that case, the Indiana Supreme Court interpreted the phrase “terms of imprisonment,” as that phrase appeared in IC 35-50-1-2(c). The Supreme Court held that the phrase meant the executed term of imprisonment AND the suspended term of imprisonment.

The Indiana Court of Appeals ruled, in its original *Jennings* opinion, that the phrase “term of imprisonment,” for purposes of IC 35-50-3-1(b), included both the suspended and the executed portion of the stated term of imprisonment. Therefore, the Court of Appeals remanded the case to the trial court for a redetermination regarding the length of the probation, with that probation not to exceed 185 days.

The State filed a Petition for Rehearing in this case. In that Petition for Rehearing, the State argued that the holding of the Indiana Court of Appeals in *Jennings* was incorrect because it was in conflict with the holding of the Indiana Supreme Court in *Smith v. State*, 621 N.E.2d 325 (Ind. 1993). The Indiana Court of Appeals granted the State’s Petition for Rehearing in order to address that argument.

On February 8, 2012, the Indiana Court of Appeals issued a rehearing opinion in this case. *Jennings v. State*, 962 N.E.2d 1260 (Ind. App. 2012). In its rehearing opinion, the Indiana Court of Appeals held that the State’s reliance on *Smith v. State* was misplaced, because that case interpreted provisions of IC 35-50-3-1(b) that were materially different from the current version of that statute. Having issued that opinion on rehearing, the Indiana Court of Appeals affirmed its original ruling.

Thereafter, the State filed a Petition for Transfer, requesting that the Indiana Supreme Court consider this issue. On September 18, 2012, the Indiana Supreme Court granted transfer, thereby vacating the original opinion and the rehearing opinion of the Indiana Court of Appeals.

In a unanimous decision, the Indiana Supreme Court reversed the Indiana Court of Appeals regarding the limitation on misdemeanor sentences imposed by IC 35-50-3-1(b).

The Indiana Supreme Court held that the combined term of probation and term of imprisonment for a misdemeanor sentence cannot exceed one year. The Indiana Supreme Court further held that the phrase “term of imprisonment” in IC 35-50-3-1(b) referred to

the imposed *executed* term of imprisonment and not to the imposed *suspended* term of imprisonment.

In reaching this interpretation of IC 35-50-3-1(b), the Indiana Supreme Court noted that the real problem with the interpretation of this statute by the Indiana Court of Appeals was that the interpretation did not fit with sentences imposed for a Class A misdemeanor. The Indiana Supreme Court stated:

“Under Jennings’s proposed interpretation, it would be possible for a B or C misdemeanant – but not for an A misdemeanant – to have a portion of his maximum statutory sentence suspended and still serve probation. In fact, a Class A misdemeanant could never be sentenced to the statutory maximum of one year and have a portion of that sentence suspended subject to probation. That surely was not the legislature’s intent and we will not so hold.”

Given this interpretation of IC 35-50-3-1(b) by the Indiana Supreme Court, the sentence imposed by the trial court in the case at bar was, in fact, in violation of the limitation set forth in IC 35-50-3-1(b). Therefore, the Indiana Supreme Court remanded the case to the trial court with instructions to impose a period of probation no greater than 335 days.

### Analysis

The misdemeanor sentence limitation of IC 35-50-3-1(b) is now fairly simple and straight-forward. That is, you add the stated *executed* term of imprisonment to the stated term of probation. That sum cannot exceed one (1) year.

For example, if a defendant is convicted of Criminal Trespass, a Class A misdemeanor, an appropriate sentence might be 365 days, with 10 days to serve and 355 days suspended. The term of probation in this example may not exceed 355 days.

On the other hand, a sentence for that same offense of 365 days, with 10 days to serve and probation for one (1) year is in violation of the limitation imposed by IC 35-50-3-1(b).

### ***Peterink v. State, 982 N.E.2d 1009 (Ind. 2013)***

Decided: February 20, 2013

No further appeal

Opinion certified: April 4, 2013

This is the companion case to *Jennings v. State, 982 N.E.2d 1003 (Ind. 2013)*.

In July 2010, while the defendant, Kathleen Peterink, was on probation, a probation search was conducted at the defendant's residence. During that search, cocaine or a narcotic drug and a small amount of marijuana were discovered.

The State charged the defendant, Kathleen Peterink, with Possession of Cocaine or a Narcotic Drug (a Class D felony) and Possession of Marijuana (a Class A misdemeanor).. On September 6, 2011, the defendant and the State entered into a plea agreement whereby the defendant agreed to plead guilty to the charge of Possession of Marijuana (a Class A misdemeanor) and the State agreed to dismiss the charge of Possession of Cocaine or a Narcotic Drug (a Class D felony).

On November 11, 2011, the trial court sentenced the defendant to one year, all suspended, with probation for one year. As a special condition of probation, the trial court ordered that the defendant serve six months on home detention and that the defendant was to receive "no good time credit" for that home detention.

The defendant appealed the sentence.

On appeal, the defendant argued that the suspended term of imprisonment of one year, coupled with one year of probation violated the maximum sentence for a misdemeanor conviction, pursuant to the limitation of IC 35-50-3-1(b). The Indiana Court of Appeals, based upon its previous decision in *Jennings v. State*, 956 N.E.2d 203 (Ind. App. 2011), agreed and reversed the defendant's sentence and remanded the case to the trial court for resentencing. See, *Peterink v. State*, 971 N.E.2d 735 (Ind. App. 2012).

The State then filed a Petition for Transfer.

On February 20, 2013, the Indiana Supreme Court granted transfer in *Peterink* and reversed the holding of the Indiana Court of Appeals. Based upon its decision in *Jennings v. State* that same day, the Indiana Supreme Court held that the sentence of one year, all suspended, with one year of probation was NOT in violation of the limitation set forth in IC 35-50-3-1(b).

In addition to *Jennings* and *Peterink*, the Indiana Supreme Court also considered a couple of other cases with this "Jennings" sentencing issue. Specifically, the Indiana Supreme Court consolidated *Tumbleson v. State* (Memorandum Decision dated January 20, 2012) and *Rayford v. State* (Memorandum Decision dated January 30, 2012) with *Jennings* for oral argument. However, on September 18, 2012, the Indiana Supreme Court denied transfer in both *Tumbleson* and *Rayford*.

In addition to the "Jennings" issue, the defendant also argued on appeal that she was entitled to Class I credit time for the time that she served on home detention, as a condition of probation. During the course of this appeal, all parties agreed that the defendant was entitled to "good time credit" for her service on home detention. Therefore, the Indiana Supreme Court upheld the defendant's sentence, but remanded the

case to the trial court with instructions to grant the defendant “good time credit” for her service on home detention.

## **SENTENCING – AGGRAVATING CIRCUMSTANCES**

### ***Bethea v. State, 983 N.E.2d 1134 (Ind. 2013)***

Decided: March 12, 2013

No further appeal

Opinion certified: April 22, 2013

On November 13, 2005, the defendant, Curtis Bethea, along with some other members of the Delaware County Philanthropic Society, Jerry Gore, Eddie Wilson and Tyler Seaton, agreed to participate in a home invasion at the residence of Jason Gates and Angela Bailey. Tyler Seaton (then, a 17 year old female) knocked on the door of that residence. When Jason Gates opened the door, Tyler Seaton asked to use the telephone.

While the door was open, the defendant and Jerry Gore entered the residence wielding guns. The two defendants bound Jason Gates with tape and also pulled Angela Dailey out of bed, brought her to the living room, and bound her with tape.

The defendant and Jerry Gore ransacked the house, looking for money and drugs. The two were unhappy with what they had found and demanded to know where “the rest of it was.” Jerry Gore then pistol whipped Jason Gates and kicked him in the head. The defendant and Jerry Gore went through Angela Dailey’s purse and took her driver’s license, social security card, checkbook and car keys.

As they left, the defendant and Jerry Gore stole Angela Dailey’s car. Tyler Seaton left with wheel-man Eddie Wilson.

The State charged the defendant, Curtis Bethea, with nine counts, as follows:

1. Burglary (a Class A felony – injury to Angela Dailey);
2. Robbery (of Jason Gates, a Class B felony);
3. Robbery (of Angela Dailey, a Class B felony);
4. Criminal Confinement (of Jason Gates, Class B felony);
5. Criminal Confinement (of Angela Dailey in the living room, a Class B felony);
6. Intimidation (of Jason Gates, a Class C felony);
7. Intimidation (of Angela Dailey, a Class C felony);
8. Theft (a Class D felony);
9. Criminal Confinement (of Angela Dailey, by moving her from the bedroom to the living room, a Class B felony).

On October 19, 2006, the defendant, Curtis Bethea, entered pleas of guilty, pursuant to a plea agreement, to Count 2 (Robbery of Jason Gates, a Class B felony) and

Count 5 (Criminal Confinement of Angela Dailey, a Class B felony). The plea agreement called for a dismissal of the remaining charges. Sentencing was left to the discretion of the trial court.

A sentencing hearing was held on February 9, 2007. At the conclusion of that sentencing hearing, the trial court sentenced the defendant, Curtis Bethea, to the maximum term of imprisonment of 40 years.

The defendant appealed his sentence. On appeal, the defendant argued that his sentence of 40 years was improper because the Robbery and Criminal Confinement were part of a single episode of criminal conduct and, therefore, the total term of imprisonment was limited by IC 35-50-1-2 to 30 years. Specifically, the defendant argued that Criminal Confinement was not a listed crime of violence and, therefore, the single episode of criminal conduct limitation of IC 35-50-1-2 applied.

On November 15, 2007, in a non-published Memorandum Decision, the Indiana Court of Appeals affirmed the defendant's sentence. The Court of Appeals held that the defendant's argument had previously been rejected by the Indiana Appellate Courts in *Ellis v. State*, 736 N.E.2d 731 (Ind. 2000) and *McCarthy v. State*, 751 N.E.2d 753 (Ind. App. 2001).

On May 28, 2008, the defendant, Curtis Bethea, filed a Petition for Post-Conviction Relief, in which the defendant alleged that his trial counsel provided ineffective assistance of counsel at the sentencing hearing. The defendant also alleged that his appellate counsel provided ineffective assistance of counsel during the direct appeal of the defendant's sentence. On April 12, 2011, a hearing was held on the defendant's Petition for Post-Conviction Relief. After that hearing, the trial court issued findings of fact and conclusions of law and denied the defendant's Petition for Post-Conviction Relief. The defendant appealed again.

On March 20, 2012, the Indiana Court of Appeals issued a decision in this case. In a 2-1 decision, the Indiana Court of Appeals affirmed the trial court's denial of the defendant's Petition for Post-Conviction Relief. *Bethea v. State*, 964 N.E.2d 255 (Ind. App. 2012). See, Caselaw Update, dated April 26, 2012.

Most of the issues raised by the defendant on appeal amounted to little more than Monday morning whining. The only issue of any real significance was the claim by the defendant that his appellate counsel was ineffective for failing to attack the holding by the trial court that the injury to Angela Dailey was an aggravating circumstance. The defense argued that since the injury to Angela Dailey was one of the elements of the Class A felony Burglary charge, and that Class A felony Burglary charge was dismissed by the State, the trial court was prohibited from using the injury to Angela Dailey as an aggravating circumstance.

The Indiana Court of Appeals struggled with this issue. However, the majority ultimately ruled that it was not improper for the trial court to use such an aggravating

circumstance in sentencing the defendant. In doing so, the majority of the Indiana Court of Appeals refused to follow the precedent established in *Farmer v. State*, 772 N.E.2d 1025 (Ind. App. 2002) and *Roney v. State*, 872 N.E.2d 192 (Ind. App. 2007).

On June 4, 2012, the Indiana Supreme Court accepted transfer in this case, thereby vacating the opinion of the Indiana Court of Appeals.

The Indiana Supreme Court examined the case law that had developed and had established the rule that a trial court may not use, as an aggravating circumstance at sentencing, a fact that is an element of a charge that was dismissed by the State. In a well-written and well-reasoned opinion written by Justice David, the Indiana Supreme Court reviewed the history of the development of this sentencing limitation rule.

The Indiana Supreme Court noted that the line of cases articulating this rule began with *Hammons v. State*, 493 N.E.2d 1250 (Ind. 1986). In that case, the defendant was charged with Murder. The case proceeded to jury trial and the jury found the defendant not guilty of Murder, but guilty of the lesser-included offense of Voluntary Manslaughter. During the sentencing hearing in *Hammons*, the trial court judge repeatedly declared that the jury had erred in its decision and that there was ample evidence to prove that the defendant had committed Murder. The trial court then sentenced the defendant to the maximum term of imprisonment on the Voluntary Manslaughter conviction.

In *Hammons*, the Indiana Supreme Court reversed the sentence imposed by the trial court. In doing so, the Supreme Court held that the trial court had, essentially, sentenced the defendant for a crime for which he had been acquitted.

The Indiana Supreme Court then examined the line of decisions whereby the Indiana Court of Appeals interpreted *Hammons v. State* to mean that a trial judge may not use, as an aggravating circumstance at sentencing, the facts surrounding any charges dismissed by the State or charges that the State agreed not to file, as a part of the plea agreement. See, *Conwell v. State*, 542 N.E.2d 1024 (Ind. App. 1989); *Carlson v. State*, 716 N.E.2d 469 (Ind. App. 1999); *Farmer v. State*, 772 N.E.2d 1025 (Ind. App. 2002); *Roney v. State*, 872 N.E.2d 192 (Ind. App. 2007).

After a thorough review of all of these cases, the Indiana Supreme Court ruled that the limitation initially imposed on the trial courts in *Hammons* does NOT apply to cases where the defendant pleads guilty, pursuant to a plea agreement. As a general rule, therefore, a trial court may use, as an aggravating circumstance at sentencing, the facts surrounding charges that were either dismissed or not filed, pursuant to that plea agreement.

The Indiana Supreme Court did note, however, that the State and the defendant could, in a plea agreement, agree to limit the discretion of the trial court to consider the dismissed charges at sentencing. However, if the plea agreement does not contain such limiting agreement, the trial courts are not required to “turn a blind eye to the facts of the incident that brought the defendant before them.”

As a result of this newly-restated rule regarding the discretion of the trial court during sentencing, the Indiana Supreme Court held that the trial court could consider the injury to Angela Dailey as an aggravating circumstance in sentencing the defendant, Curtis Bethea. Therefore, the defendant's appellate counsel was not ineffective for failing to attack this procedure on appeal and the trial court properly denied the defendant's Petition for Post-Conviction Relief.

## EVIDENCE ISSUES

### HEARSAY – EVIDENCE RULE 803(4)

*VanPatten v. State*, \_\_\_\_\_ *N.E.2d* \_\_\_\_\_ (Ind. App. 2013)

Decided: May 2, 2013

No further appeal as of May 14, 2013

The defendant, Gerald VanPatten, is the father of one of the victims, S.D. E.R. is a friend of S.D. and, during the summer of 2009, E.R. would often spend the night at S.D.'s house. The two girls were, at that time, six years old and would sleep in the same bed. In August 2009, S.D. told her mother that the defendant had, during one of the sleep-overs the night before, molested both S.D. and E.R.

S.D.'s mother took S.D. to a DCS office to be interviewed by a DCS caseworker. E.R. was brought to the DCS office and interviewed as well. During these videotaped interviews, both girls stated that the defendant had molested them. E.R. stated that the defendant had molested her the night before. S.D. stated that the defendant had molested her on prior occasions.

Both girls were taken to the Ft. Wayne Sexual Assault Treatment Center where they were examined by Joyce Moss, a forensic nurse examiner. During the course of that examination, S.D. told Joyce Moss about the molestation. According to the report that was prepared by Joyce Moss, "[P]atient states that he put his private on my private, on the inside. He put his mouth on my private and he put his finger in my private. Patient states that white stuff came out of his private."

On November 13, 2009, the State charged the defendant, Gerald VanPatten, with the following offenses:

1. Child Molesting (Class A felony – victim S.D.);
2. Child Molesting (Class A felony – victim S.D.);
3. Child Molesting (Class A felony – victim E.R.);
4. Child Molesting (Class C felony – victim S.D.).

The case proceeded to jury trial. At trial, E.R. testified that the defendant had molested her on several occasions while she was spending the night with S.D. The trial testimony of E.R. was consistent with the previous statements given by E.R. to the DCS caseworker and to forensic nurse examiner Joyce Moss.

However, at trial, S.D. recanted her previous statements about the defendant molesting her. In fact, S.D. testified that the defendant never touched her “in a bad way” or in a way that made her feel uncomfortable.

The State then called forensic nurse examiner Joyce Moss to testify about what both S.D. and E.R. had told her during the examination at the Ft. Wayne Sexual Assault Treatment Center. The defense objected to such substantive testimony by Joyce Moss. The trial court allowed the testimony of Joyce Moss pursuant to Indiana Evidence Rule 803(4) (an exception to the hearsay rule for statements made for the purpose of medical diagnosis or treatment).

The State also called the DCS caseworker to testify regarding what S.D. had told her during the initial interview. However, the trial court allowed the testimony of the DCS caseworker as impeachment evidence only and the trial court instructed the jury that the jury could not consider that testimony as substantive proof of the crime.

Ultimately, the jury found the defendant, Gerald VanPatten, not guilty on Count I, but guilty of the remaining charges. The trial court sentenced the defendant to an aggregate executed term of imprisonment of 80 years and the defendant appealed.

On appeal, the defendant claimed (among other things) that the trial court erred in allowing Joyce Moss to testify regarding what S.D. and E.R. had told her at the Ft. Wayne Sexual Assault Treatment Center. On February 14, 2012, in a Memorandum Decision, the Indiana Court of Appeals affirmed the defendant’s convictions.

Thereafter, the Indiana Supreme Court granted transfer, thereby vacating the prior opinion of the Indiana Court of Appeals.

In its opinion in the case at bar, the Indiana Supreme Court engaged in a lengthy discussion concerning Indiana Evidence Rule 803(4). That Evidence Rule states:

“The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(4) Statements for purposes of medical diagnosis or treatment. – Statements made by persons who are seeking medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.”

The Indiana Supreme Court noted that this exception to the hearsay rule is grounded in the notion that people are unlikely to lie to their doctors or other medical care providers because doing so might jeopardize their opportunity to get healthy. See, e.g., *White v. Illinois*, 502 U.S. 346 (1992).

The Indiana Supreme Court previously articulated a two-step analysis for determining the admissibility of a hearsay statement under Evidence Rule 803(4). *McClain v. State*, 675 N.E.2d 329 (Ind. 1996). That two-step analysis is:

1. Is the declarant motivated to provide truthful information in order to promote diagnosis and treatment?
2. Is the content of the statement such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment?

The first prong of the *McClain* test is relatively simple when an adult seeks the services of a medical professional. However, the Indiana Supreme Court noted that this first prong is not so simple when a young child is brought to a medical professional by a parent. The Indiana Supreme Court stated:

“But such young children may not understand the nature of the examination, the function of the examiner, and may not necessarily make the necessary link between truthful responses and accurate medical treatment. In that circumstance, “there must be evidence that the declarant understood the professional’s role in order to trigger the motivation to provide truthful information.” *Id.* (citing *U.S. v. Barrett*, 8 F.3d 1296, 1300 (8<sup>th</sup> Cir. 1993)). This evidence does not necessarily require testimony from the child-declarant; it may be received in the form of foundational testimony from the medical professional detailing the interaction between him or her and the declarant, how he or she explained his role to the declarant, and an affirmation that the declarant understood that role. *Barrett*, 8 F.3d at 1300. But whatever its source, this foundation must be present and sufficient.”

The Indiana Supreme Court noted that appellate review of this issue is necessarily case-specific and turns on the facts and circumstances of each individual case. After a lengthy review of the record of the proceedings in the case at bar, the Indiana Supreme Court held that the record did NOT reflect that S.D. adequately understood the role of the medical professional and the purpose of the visit. Therefore, the Indiana Supreme Court ruled that it could not be inferred that S.D. was motivated to speak truthfully to forensic nurse examiner Joyce Moss.

In reaching this decision, the Indiana Supreme Court seemed troubled by a number of factors, including the following:

1. S.D. was interviewed by Joyce Moss *after* S.D. was extensively interviewed by a DCS caseworker. Therefore, it was not clear whether the underlying motivation of the mother of S.D. was to seek medical treatment or to assist the police in the investigation.
2. There was not testimony from S.D. that she understood the role of the medical professionals. In addition, there was no evidence regarding S.D.'s past experiences with medical professionals.
3. While there could have been testimony given by Joyce Moss about providing an explanation to S.D. about the role of the medical professionals, no such testimony was presented. In fact, Joyce Moss could not remember what S.D. had told her and testified only as to what she (Joyce Moss) wrote in her report.

The Indiana Supreme Court concluded that the record did not reflect a proper foundation for the admission of the statements of S.D. to Joyce Moss, pursuant to Indiana Evidence Rule 803(4) and held that the trial court erred in allowing such testimony. As a result, the Indiana Supreme Court reversed the defendant's two convictions for Child Molesting, relating to S.D. as the victim.

The Indiana Supreme Court also held that it was error to allow forensic nurse examiner Joyce Moss to testify about what E.R. had told her. However, because E.R. testified consistently with the statements that E.R. previously made to Joyce Moss, the Supreme Court held that any error in admitting such hearsay testimony was harmless error. As a result, the Indiana Supreme Court upheld the defendant's conviction for Child Molesting (as a Class A felony), relating to victim E.R.

The Indiana Supreme Court remanded the case to the trial court for retrial on Count II and Count IV, where S.D. was the victim.