V. LEGISLATION/RULE MAKING

V.1. Enactment/repeal/savings clause

TITLE: Gee v. State
INDEX NO.: V.1.
CITE: (5/7/87), Ind., 508 N.E.2d 787
SUBJECT: Savings Clause - sentencing statute in effect at time of crime applies
HOLDING: Tr. Ct. did not err in refusing to apply ameliorative sentencing provisions of Ind. Code 35-50-2-4. Here, D contends application of savings clause, which denied him ameliorative sentencing, results in vindictive justice in violation of Ind. Const. D committed offense on 8/12/77. Ameliorative statute took effect 10/1/77. D's sentencing occurred on 10/25/77. Savings clause provided that offense committed before 10/1/77 should be prosecuted & remain punishable under repealed law. D was properly sentenced under statute in force at time offense was committed. (Bonner, 392 N.E.2d 1169), even though his sentencing occurred after new penal code became effective (Morris, 406 N.E.2d 1187; Holder 396 N.E.2d 112). Application of prior law to those who commit crimes/were convicted/sentenced under prior law does not constitute vindictive justice. Vicory, 400 N.E.2d 1380. Savings clause is enactment of legislature & is cloaked with presumption of constitutionality which continues until rebutted. Sidle 341 N.E.2d 763. "Penal consequences are frozen [at time crime is committed]." Parsley 401 N.E.2d 1360. Held, no error. DeBruler CONCURS IN RESULT without opinion.

RELATED CASES: Beavers ,465 N.E.2d 1388 (Tr. Ct. erred in conducting habitual proceeding & instructing jury under current habitual offender statute rather than statute in effect at time of underlying offense; held, cause remanded for new sentence).

TITLE: Gibbs v. State
INDEX NO.: V.1.
CITE: (1st Dist. 11/26/84), Ind. App., 471 N.E.2d 20
SUBJECT: Savings clause - effective statute
HOLDING: Whenever a change is made in procedural statute/rule during pendency of action, applicable statute/rule is one in effect at occurrence of particular event which statute/rule is intended to regulate. Finney, App., 385 N.E.2d 477; see also Gadacz 426 N.E.2d 376. Here, D gave notice of alibi defense on 8/11/82. Ind. Code 35-36-4-3 became effective on 9/1/82. Previous statute, Ind. Code 35-5-1-3, required prosecutor to respond prior to 9/1/82. D contends Ind. Code 35-5-1-3 controls, & all evidence at variance with his notice should have been excluded. Ct. finds particular event alibi defense provisions are intended to regulate is admission of evidence at trial. Thus, statute in effect at time of trial (IC 35-36-4-3) controls. Held, no error.

RELATED CASES: Wooley v. Comm'r of Motor Vehicles, App., 479 N.E.2d 58 (Stat 48, 230; where there is irreconcilable conflict exists between body of act & savings clause, Ct. rejects latter as void & of no effect, *citing* Shutt v. State ex rel. Cain (1909), 173 Ind. 689; held, statute permitting certain habitual traffic offenders to obtain restricted licenses after 5-year period of reformation is applicable to persons convicted prior to its effective date, despite contrary language in savings clause).

TITLE: Hamm v. City of Rock Hill
INDEX NO.: V.1.
CITE: (12/14/64), 379 U.S. 306
SUBJECT: Savings clause -- abatement of charges
HOLDING: Petitioners were convicted for violations of state trespass statutes for participating in "sit-ins" at lunch counters of retail stores. It was conceded that lunch-counter operations would probably come within coverage of Civil Rights Act of 1964, which was passed subsequent to convictions & appeals in state courts. Ct. held that Act creates federal statutory rights which under Supremacy Clause must prevail over any conflicting state laws, & that convictions, being on direct review at time Act made conduct no longer unlawful, must abate. As Congress presumably intended to avoid punishment no longer furthering legislative purpose, these convictions would have abated had they been federal. In addition, general federal saving statute is inapplicable to statute like this which substitutes right for what was previously criminal. Though these were state convictions, their abatement was likewise required not only under Supremacy Clause & because pending convictions are contrary to legislative purpose of Act, but also because abatement is necessary part of every statute which repeals criminal legislation. Held, judgment vacated & charges dismissed. Douglas, J., concurring; Black, Harlan, Stewart, White, JJ., dissenting.

TITLE: Lunsford v. State
INDEX NO.: V.1.
CITE: (5/31/94), Ind. App., 640 N.E.2d 59
SUBJECT: Savings statute -- repeal of statute does not extinguish penalty
HOLDING: Tr. Ct. did not err in sentencing D on basis of habitual offender statute in force at time of offense & D's conviction rather than on basis of amended version in force at time of D's sentencing. D argued that doctrine of amelioration should apply, requiring Ct. to employ newer standard. Because legislature neither expressed that purpose of 1993 amendment was to lessen severity of its former penalty nor specified that amendment should be applied retroactively, Ct. decided it needed to look to general savings statute. Savings statute provides that repeal of any statute shall not have effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless repealing statute shall so expressly provide, & that such statute shall be treated as still remaining in force for purposes of sustaining any proper action or prosecution for enforcement of such penalty, forfeiture, or liability. Ct. held that under savings statute, provisions of old habitual offender statute must be applied to D's sentencing, & Tr. Ct. did not err in applying this statute. Held, judgment affirmed.

RELATED CASES: Banton, 390 N.E.2d 687 (regardless of applicability of general savings clause, legislature intended to preserve convictions & sentences for crimes such as possession of burglary tools even after statutes making such behavior criminal were repealed).

TITLE: Wardlow v. State
INDEX NO.: V.1.
CITE: (3/10/77), Ind. App., 360 N.E.2d 851
SUBJECT: Savings clause -- grammatical construction of Controlled Substances Act
HOLDING: D was convicted of violation of 1935 Narcotic Act for selling cocaine. During period between D's violation & date of his indictment, General Assembly repealed pertinent provisions of that Act & enacted Controlled Substances Act. Repeal of Narcotic Act coincided with effective date of Controlled Substances Act. D appealed & claimed in part that offense charged was not prohibited act at time he was charged, tried or convicted, & that conviction is therefore contrary to law. Ct. held that it does not look to savings clause of specific repeal provision of Controlled Substances Act, except to determine whether there is clear indication of legislative intent to prohibit prosecution of violations of repealed Narcotic Act. Section 6 of Controlled Substances Act stated that laws specified were specifically repealed except with respect to rights & duties which matured, penalties which were incurred & proceedings which were begun before effective date of this act. Despite absence of word "liability" which is present in general savings provision of Ind. Code 1-1-5-1, Section 6, as above quoted, contains no expression of intent, even by implication, that liability for past violation of Narcotic Act, though as yet uncharged, was to be extinguished. Ct. held that, had General Assembly intended to preserve only criminal prosecutions which were pending prior to effective date of Controlled Substances Act, it would have utilized grammatical construction which placed modifying phrase in textual proximity to word "prosecution." However, it did not do so. Ct. therefore attributed to this provision any intent to preclude prosecution for act which was criminal offense when committed. Held, conviction affirmed.

TITLE: Van Allen v. State
INDEX NO.: V.1.
CITE: (8/27/84), Ind. App., 467 N.E.2d 1210
SUBJECT: Repeal -- repeal & reenactment without substantial change
HOLDING: Admission of breathalyzer test results in Ct. of law must be predicated on proof of certification of equipment, chemicals, & operator. Here, on September 10, 1983, day falling between repeal date of old certification statute (September 1, 1983) & effective date of new certification statute's rules & regulations (January 12, 1984), D was given breathalyzer test upon suspicion of operating motor vehicle while intoxicated. He was subsequently arrested & charged with one count of operating motor vehicle while intoxicated & one count of operating motor vehicle while intoxicated & having previous conviction for same offense within five years. Tr. Ct. denied motion to suppress use of breathalyzer test filed by D concluding that, based on principle of simultaneous repeal & re-enactment, old certification statute's rules & regulations continued to govern certification until new certification statute's rules & regulations became effective. Issue on appeal was whether rules & regulations promulgated under repealed statute continue in effect during interim period until new rules are promulgated under re-enacted statute when statute is simultaneously repealed & re-enacted without substantial change. Ct. noted that where legislative intendment requires that prior legislation remain in force until administrative body has enacted substitute regulations, repeal of old rules & regulations takes place only at time new administrative regulations go into effect. Ct. held that there was no error in Tr. Ct.'s denial of D's motion because old certification statute's rules & regulations were still in force & effect to govern certification procedures from September 1, 1983 to January 12, 1984. Held, judgment affirmed.

RELATED CASES: Piotrowski, 3 N.E.3d 1051 (Ind. Ct. App 2014) (even though no new rules promulgated regarding BAC training, certification, etc. since July 2012 expiration of transition period from IU Department of Toxicology to State Department of Toxicology, State had discretion to rely on previously existing rules because when legislature transferred rulemaking authority to State, it did not require State to promulgate new rules on breath testing; see full review at O.12.b).

V. LEGISLATION/RULE MAKING

V.2. Statutory construction

TITLE: Ali v. Federal Bureau of Prisons

INDEX NO.: V.2.

CITE: 128 S. Ct. 831 (2008)

SUBJECT: Immunity applies to prison officials for lost personal belongings

HOLDING: Court addressed the scope of 28 U.S.C. ' 2680, which carves out certain exceptions to the United States' waiver of sovereign immunity for torts committed by federal employees. Section 2680(c) provides that the waiver of sovereign immunity does not apply to claims arising from the detention of property by "any officer of customs or excise or any other law enforcement officer." Petitioner, who contended several personal items were lost during transfer from one federal prison to another, argued that the clause applies only to law enforcement officers enforcing customs or excise laws, and thus did not affect the waiver of sovereign immunity for his property claim against officers of the Federal Bureau of Prisons. Majority, in 5-4 decision, held that the broad phrase "any other law enforcement officer" covers all law enforcement officers. Case involves discussion of several aspects of statutory construction. Kennedy, J., dissenting and joined by Stevens, Souter, and Breyer, JJ., filed lengthy opinion challenging majority's decision on basis of *ejusdem generis* and *noscitur a sociis,* which together instruct that words in a series should be interpreted in relation to one another. He disagreed with majority's opinion that only one possible way existed to read the statute, with the majority not giving proper respect to "what went before" in relation to the Federal Tort Claims Act. Kennedy also expressed concern that the analytical framework and specific interpretation used by the majority will become binding on federal courts, "which will confront other cases in which a series of words operate in a clause similar to the one we consider today." Breyer, J., joined by Stevens, J., filed a separate dissent to emphasize his belief that the statute's *scope* was of primary concern. He also took issue with the great reliance the majority placed on the word "any" before "other law enforcement officer." Breyer noted context, not a dictionary, sets the boundaries of time, place, and circumstances within which words such as "any" will apply, noting that when he tells his wife "There isn't any butter" he wouldn't mean "There isn't any butter in town" but rather he would mean their refrigerator.

TITLE: Baker v. State
INDEX NO.: V.2.
CITE: (4th Dist. 10/8/85), Ind. App., 483 N.E.2d 772
SUBJECT: Statutory construction - legislative acquiescence to administrative interpretation
HOLDING: Long adhered-to administrative interpretation dating from legislative enactment, with no subsequent change made in statutory language involved, raises presumption of legislative acquiescence strongly persuasive to Cts. [Citations omitted.] Here, Ct. finds legislature acquiesced to rule established by Law Enforcement Training Board in 1972, interpreting earlier statute, that officer who fails to successfully complete basic training course within one year of appointment loses power to enforce law. 1982 amendment to law left language interpreted by rule unchanged. Held, officer had power to arrest D; convictions affirmed. Miller CONCURS IN RESULT. Young DISSENTS without opinion.

TITLE: Beckles v. United States
INDEX NO.: V.2.
CITE: (3/6/2017), 137 S. Ct. 886 (S. Ct. 2017)
SUBJECT: No vagueness challenges to federal sentencing guidelines
HOLDING: The federal sentencing guidelines, including the so-called "residual clause" in § 4B1.2(a), are not subject to void for vagueness challenges under the Due Process Clause.

Defendant was convicted of possession of a firearm by a convicted felon. See U.S.C. § 922(g)(1). As a career offender, he was eligible for and received a sentence enhancement because his instant offense constituted a crime of violence.

In Johnson v. U.S., 135 S. Ct. 2551 (2015), the Court held that an identically worded residual clause was void for vagueness. Therefore, Defendant argued the residual clause was also problematic here, but as applied to the federal sentencing guidelines. However, while applying the enhancement in Johnson dictated a specific, distinct range for the enhancement, applying the residual clause here merely guided the judge in choosing an appropriate sentence within the statutory range. And, significantly, the Court has never held that such discretion creates a viable void for vagueness claim. Thus, "[i]f a system of unfettered discretion is not unconstitutionally vague, then it is difficult to see how the present system of guided discretion could be." Held, cert. granted, Eleventh Circuit opinion at 616 Fed. Appx. 415 affirmed, and judgment affirmed. Thomas, J., joined by Roberts, C.J., and Kennedy, Breyer, and Alito, J.J.; Kennedy, J., concurring; Ginsburg, J., and Sotomayor, J., each filed opinions concurring in judgment; Kagan, J., not participating.

TITLE: Begay v. United States
INDEX NO.: V.2.
CITE: (4/16/2008), U.S., 553 U.S. 137; 06B11543
SUBJECT: DUI not 'a violent felony' for federal sentencing enhancement
HOLDING: Majority held that New Mexico's felony DUI crime falls outside the scope of the Armed Career Criminal Act which imposes a mandatory 15-year prison term upon a felon who unlawfully possesses a firearm and who has three or more prior convictions for committing certain drug crimes or "a violent felony." 18 U.S.C. ' 924(e)(1). Whether a crime is a violent felony is determined by how the law defines it and not how an individual offender might have committed it on a particular occasion. Even assuming that DUI involves conduct that "presents a serious potential risk of physical injury to another" under the Act, the crime falls outside the clause's scope because it is simply too unlike the clause of the Act's example crimes to indicate that Congress intended that provision to cover it. If Congress meant the statute to be all encompassing, it would not have to include the examples at all. Moreover, if clause were meant to include all risky crimes, Congress likely would not have included clause before it, which includes crimes that have "as an element the use, attempted use, or threatened use of physical force against the person of another." DUI differs from the example crimes in at least one important respect: The examples typically involve purposeful, violent, and aggressive conduct, whereas DUI statutes typically do not. Scalia, J., filed a concurrence; Alito, J., filed a dissent in which Souter and Thomas, JJ. joined.

RELATED CASES: Beckles, 137 S. Ct. 886 (2017) (federal sentencing guidelines not subject to void for vagueness claims); Johnson, 135 S. Ct. 2551 (2015) (finding void for vagueness the residual clause sentence enhancement in the Armed Career Criminal Act, overruling Sykes v. United States, 564 U. S. 1 (2011) and James v. United States, 550 U. S. 192 (2007); Johnson v. U.S. 130 S. Ct. 1265 (since the Florida offense of battery by offensive touching does not require the use of physical force, it does not qualify as a predicate for enhanced sentencing under the federal ACCA).

TITLE: Brook v. State
INDEX NO.: V.2.
CITE: (2d Dist. 5/26/83), Ind. App., 448 N.E.2d 1249
SUBJECT: Statutory construction - definition; sawed-off shotgun
HOLDING: D's conviction for dealing in sawed-off shotguns was proper where gun conformed to statutory definition: shotgun having one or more barrels less than 18 inches & any weapon made from a shotgun if overall length is less than 29 inches (IC 35-23-9.1-1). Here, D possessed shotgun with 15 7/8" barrel & overall length of 29 inches. D contends "&" in statute requires both short barrel & short overall length. Ct. finds 2 legislative intentions revealed in statute: short barrel yields decreased range thus, shotgun has minimal utility as hunting/sporting tool; short overall length renders shotgun concealable & more likely to be used as a weapon. Held, conviction for dealing in sawed-off shotguns affirmed.

TITLE: Brook v. State
INDEX NO.: V.2.
CITE: (2d Dist. 5/26/83), Ind. App., 448 N.E.2d 1249
SUBJECT: Statutory construction - ejusdem generis
HOLDING: Ejusdem generis, an aid to statutory construction, was defined in Kidwell 230 N.E.2d 590: "[W]hen words of specific or limited signification in a statute are followed by general words of more comprehensive import, the general words are construed to embrace only such things as are of like kind or class with those designated by the specific words, unless a contrary intention is clearly expressed." Doctrine is not mandatory & may not be used to defeat primary rule of statutory construction which is to give effect to intent of legislature. Kidwell; Hough v. Zehrner, 302 N.E.2d 881. Ct. rejects D's contention that ejusdem generis requires word "possession" in Ind. Code 35-23-9.1-2(a) (dealing in sawed-off shotguns) to be read as possession with intent to deliver. Doctrine cannot change meaning of unambiguous words or alter intent required under statute. Held, conviction affirmed.

TITLE: Burgess v. United States
INDEX NO.: V.2.
CITE: (4/16/2008), U.S., 553 U.S. 124; 06 &11429,
SUBJECT: State misdemeanor qualifies as felony under Controlled Substance Act
HOLDING: Unanimous Court held that a state drug conviction identified as a misdemeanor by statute but carrying a maximum sentence of two years qualified as a felony drug offense under the Controlled Substances Act, which doubles the mandatory minimum sentence for certain federal drug crimes if the D was previously convicted of a "felony drug offense." Court held that because the term "felony drug offense" in 21 U.S.C. ' 841(b)(1)(A) is defined exclusively by ' 802(44) and does not incorporate ' 802(13)'s definition of "felony," a state drug offense punishable by more than one year qualifies as a "felony drug offense," even if state law classifies the offense as a misdemeanor. Court used statutory construction principles and the CSA's drafting history to come to its conclusion. Court also rejected Petitioner's argument that the rule of lenity should be applied in determining the question as the touchstone of the rule of lenity is statutory ambiguity and Congress expressly defined "felony drug offense" in a manner that is coherent, complete, and by all signs exclusive.

TITLE: Chambers v. United States
INDEX NO.: V.2.
CITE: (U.S.), (01/13/09 2009), 129 S. Ct. 687
SUBJECT: Failure to report to jail not "violent felony" for federal sentencing enhancement
HOLDING: Failure to report to jail or prison to serve a sentence is not the equivalent of escape and is not a "violent felony" that can lead to enhanced sentencing under the Armed Career Criminal Act. 18 U.S.C. ' 924 (e)(1) imposes a 15-year mandatory minimum prison term on someone convicted of having a gun illegally, if the individual has three prior convictions for "a violent felony or a serious drug offense." Statute defines "violent felony" as a crime punishable by more than one year's imprisonment that, inter alia, "involves conduct that presents a serious potential risk of physical injury to another." Whether a crime is a violent felony is determined by how the law defines it and not how an individual offender might have committed it on a particular occasion. "[W]hile an offender who fails to report must be doing *something* at the relevant time, there is no reason to believe that the *something* poses a serious potential risk of physical injury...To the contrary, an individual who fails to report would seem unlikely, not likely, to call attention to his whereabouts by simultaneously engaging in additional violent and unlawful conduct." Thus, district court erred in treating D's conviction for failure to report for weekend confinement as a "violent felony" under ACCA. Held, judgment reversed and remanded. Alito and Thomas, JJ., concurring in result.

TITLE: Cuellar v. United States

INDEX NO.: V.2.

CITE: 128 S. Ct. 1994, 170 L.Ed.2d 942 (2008)

SUBJECT: More than concealment of cash needed to convict under federal money laundering statute

HOLDING: Unanimous Court held that the federal money laundering statute, 18 U.S.C. '1956(a)(2)(B)(i), does not require proof that the D attempted to create the appearance of legitimate wealth, nor can it be satisfied solely by evidence that the funds were concealed during transport. D was arrested after a search of his car revealed nearly $81,000 bundled in plastic bags and covered with animal hair in a secret compartment under the rear floorboard. He was convicted under the statute for attempting to transport funds gained from unlawful activity from the United States to outside the United States. Court held the statutory text makes clear that a conviction requires proof that the transportation's purpose - not merely its effect - was to conceal or disguise one of the listed attributes: the funds' nature, location, source, ownership, or control. The statute contains no "appearance of legitimate wealth" requirement as Petitioner contended. However, Court agreed the simple fact that D concealed the money cannot sustain his conviction. Breaking down the statute in statutory construction terms, Court determined it most likely that Congress intended courts to apply the familiar criminal law concepts of purpose and intent rather than to focus exclusively on how a D "structured" the transportation. Because Petitioner's extensive efforts to conceal the funds en route to Mexico was the only evidence the government introduced to prove that the transportation was "designed in whole or in part to conceal or disguise the [funds'] nature, . . . location, . . . source, . . . ownership, or . . . control," Petitioner's conviction cannot stand.

TITLE: Gore v. State
INDEX NO.: V.2.
CITE: (1st Dist. 12/6/83), Ind. App., 456 N.E.2d 1030
SUBJECT: Statutory construction - penal statutes
HOLDING: Where meaning of statute is unclear, Ct. may construe statute. State ex rel. So. Hills v. Dubois County, App., 446 N.E.2d 996; Wright v. Reuss, App., 434 N.E.2d 925. Ct. determines & effects legislative intent. City of Muncie v. Campbell, App., 295 N.E.2d 379. Penal statutes must be strictly construed against state. Pennington 426 N.E.2d 408; City of Muncie. Any ambiguity is to be resolved in favor of accused. Pennington. "Penal statutes cannot be construed to include anything beyond their letter, though within their spirit, & such statutes cannot be enlarged by construction, implication, or intendment beyond the fair meaning of the language used." Meade Electric Co., Inc. v. Hagberg, App., 159 N.E.2d 408. Here, Ct. construes Ind. Code 35-1-6-5.1(c)(1) & finds it silent whether money, even derived from sale of drugs, can be ordered forfeited. Finding no statute authorizing forfeiture of money under circumstances, Ct. reverses Tr. Ct.'s disposition order. Held, reversed & remanded.

RELATED CASES: Hyche, 934 N.E.2d 1176 (Ind. Ct. App 2010) (the legislature did not intend that a purchaser can be guilty of dealing by financing or aiding in the delivery of drugs); Martin, App., 484 N.E.2d 1309 (Ct. discusses legislative intent re commissioner of BMV's authority to suspend driver's licenses).

TITLE: Hobbs v. State
INDEX NO.: V.2.
CITE: (1st Dist. 7/26/83), Ind. App., 451 N.E.2d 356
SUBJECT: Statutory construction - preamble; change of judge
HOLDING: Language in preamble to Public Law 204 ("IC 35-36-5 shall not be construed to have changed the prior law of IN concerning change of judge, specifically the rule of law permitting automatic change of judge upon request") does not reinstate automatic right to change of judge in criminal cases. Preamble is not essential/effective part of act. 73 Am.Jur.2d Statutes Section 92 (1974). Preamble may be considered in ascertaining legislative intent in construing ambiguous statute, but is not controlling (citations omitted). Ct. finds Ind. Code 35-36-5-2 is unambiguous; showing of statutory ground is necessary to obtain change of judge. Ind. S. Ct. responded to clear requirements of statute in its 7/1/81 amendment of CR 12. Held, no error in denial of motion for change of judge.

TITLE: Johnson v. United States
INDEX NO.: V.2.
CITE: (03-02-10), 08-6295, (U.S. 2010)
SUBJECT: Federal sentencing enhancement - violent force required for "violent felony"
HOLDING: Since the Florida offense of battery by offensive touching does not require the use of physical force, it does not qualify as a predicate for enhanced sentencing under the federal Armed Career Criminal Act, 924(e)(2)(B)(I). The Florida felony battery offense can be committed by merely "actually and intentionally touching" another person, "no matter how slight." In the context of the ACCA's definition of "violent felony," the phrase "physical force" means *violent* force--that is, "force capable of causing physical pain or injury to another person." The term "force" contemplates strength or energy, violence, and pressure directed against a person. It involves "a degree of power not satisfied by the merest touching." Although at common law "force" was a legal term of art satisfied by even the slightest touching, nothing in the text of the ACCA suggests that Congress meant to define "violent felony" with a term of art which defined a misdemeanor at common law. Court refused to remand to allow the government to argue that the battery satisfied 924(e)(2)(B)(ii)'s residual "otherwise" clause, because the government had previously disclaimed reliance on that provision at sentencing. Held, Eleventh Circuit Court of Appeals' opinion at 528 F.3d 1318 reversed. Alito, J., joined by Thomas, J, DISSENTING, argues that because "physical force" can mean "the merest touching," Florida's felony battery statute falls within the scope of the ACCA.

TITLE: Jones v. State
INDEX NO.: V.2.
CITE: (1st Dist. 12/15/83), Ind., 457 N.E.2d 231
SUBJECT: Statutory construction - amendments
HOLDING: Evidence was sufficient to sustain conviction for Class B burglary (dwelling) where 3-room log cabin was furnished, used by owner/family members/friends often & owner slept overnight in cabin on day of burglary. Here, D cites 3 cases decided under predecessor statute holding that summer fishing camps/temporary retreats are not dwellings. Ct. notes when legislature amends statute, presumption arises legislature intended to change law. IN Alcoholic Beverage Comm. v. OSCO Drug, Inc., App., 431 N.E.2d 823. Where prior provisions were construed by Ct.'s, it is presumed legislature was responding to those appellate decisions in replacing such provisions. Matter of the Estate of Waltz, App., 408 N.E.2d 558. Ind. Code 35-41-1-2 defines dwelling to include "place of lodging." Websters defines lodging to include temporary place to stay/sleeping accommodations. Ct. finds statute includes this cabin. Because owner was staying in cabin on night of burglary, case also governed by Smart 190 N.E.2d 650, decided under predecessor statute. Held, conviction affirmed.

RELATED CASES: Redmond, App., 900 N.E.2d 40 (where legislature amended sentence modification statute, it is presumed they did so in light of case law).

TITLE: Lockhart v. U.S.
INDEX NO.: V.2.
CITE: (3/1/2016), 577 U.S.____(U.S. 2016)
SUBJECT: D eligible for federal mandatory-minimum sentence
HOLDING: D was eligible for the ten-year mandatory minimum sentence for possession of child pornography because he has a prior state court conviction related to "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." See U.S.C. § 2252(b)(2). (Emphasis added). D's state court conviction was for sexual abuse of his adult girlfriend, not a "minor or ward." Employing the "series qualifier rule" of statutory construction, D argued the phrase "involving a minor or ward" applied to all preceding phrases, meaning someone whose state court offense involved an adult was ineligible for the enhanced sentence. The government instead invoked the "rule of the last antecedent," arguing the phrase applied only to the noun or phrase that immediately preceded it, making D eligible for the sentence enhancement.

After reviewing other relevant statutes, the Court found that D's approach would mean federal convictions for sex offenses against adults would get the mandatory minimum but state convictions for sex offenses against adults would not. The dissent argued, in part, that the Court should have adopted D's interpretation because the statute is ambiguous, and the rule of lenity dictates that such ambiguities should be resolved in favor of Ds. Held, cert. granted, Second Circuit and District Court affirmed. Sotomayor, J., joined by Roberts, C.J., and Ginsburg, Kennedy, Thomas, and Alito, JJ., Kagan, J., dissenting, joined by Breyer, J.

TITLE: Logan v. United States
INDEX NO.: V.2.
CITE: 552 U.S. 982, 128 S. Ct. 457, 169 L.Ed.2d 432 (2007)
SUBJECT: Retained rights not "restored" rights under Armed Career Criminal Act
HOLDING: Unanimous Court affirmed finding that D properly had his sentence for being a felon convicted of possessing a firearm increased for having three convictions for "violent felonies" under the Armed Career Criminal Act of 1984 (ACCA), which mandates a 15 year minimum sentence in such instances. Congress defined the term "violent felony" to include specified crimes "punishable by imprisonment for a term exceeding one year," 18 U.S.C. '924(e)(2)(B), but also provided that a state-law misdemeanor may qualify as a "violent felony" if the offense is punishable by a term of more than two years § 921(a)(20)(B). Congress amended that section in 1986 to exclude from qualification for enhanced sentencing "any conviction which has been expunged or set aside or for which a person has been pardoned or has had civil rights restored." The district court sentenced D to 15 years because of three state misdemeanor battery convictions, each punishable by a 3-year maximum sentence, and none of them revoking any of D's civil rights. D challenged his sentence on basis that civil rights retained should be treated the same as those under the "civil rights restored" exemption. Court disagreed noting the ordinary meaning of "restored" does not include retention of something never lost and '921(a)(20) provides no more expansive definition. Court further rejected D's argument that a literal reading of the statute could yield harsh disproportionate and absurd results whereas more serious offenders with rights restored may escape heightened punishment. D's argument overlooks '921(a)(20)'s "unless" clause, under which an offender gains no exemption from ACCA's application through a restoration of civil rights if the dispensation "expressly provides that the [offender] may not ship, transport, possess, or receive firearms." The resolution D proposes would correct one potential anomaly while creating others. Court was unwilling to recast the statute in Congress' stead. Court also noted that '921(a)(33)(B)(ii) rebutted D's absurdity argument, noting that section explicitly distinguished between "restored" and "retained," thereby making it more than conceivable that the legislature meant to do the same in '921(a)(20).

TITLE: Mathis v. U.S.
INDEX NO.: V.2.
CITE: (6/23/2016), 136 S. Ct. 2243 (U.S. 2016)
SUBJECT: Iowa burglary convictions not violent felonies under Armed Career Criminal Act
HOLDING: D's Iowa convictions for burglary do not qualify as predicate violent felonies under the Armed Career Criminal Act. See 18 U.S.C . 924(e). Thus, D could not be subjected to the fifteen-year mandatory-minimum sentence for being a felon in possession of a firearm. See id. The test for whether felony convictions qualify as violent felonies is whether the elements of the crime match the generic version of the same crime. Under the generic offense, burglary requires unlawful entry into a building or other structure. However, the elements of the Iowa version are broader: unlawful entry into any building, structure, or land, water, or air vehicle. Because the Iowa elements are broader, D cannot be subjected to the mandatory-minimum sentence. See Taylor v. United States, 495 U.S. 575, 600-01 (1990). Held, cert. granted and judgment reversed. Kagan, J., joined by Roberts, C.J., and Kennedy, Thomas, and Sotomayor, JJ; Kennedy, J. and Thomas, J., filed concurring opinions. Breyer, J., dissenting, joined by Ginsburg, J.; Alito, J., dissenting.

TITLE: Prewitt v. State
INDEX NO.: V.2.
CITE: (12-18-07), Ind., 878 N.E.2d 184
SUBJECT: Probation revocation sentence- can modify conditions & order executed sentence
HOLDING: Despite the plain language of Ind. Code 35-38-2-3, Tr. Ct. had authority to order D to serve part of his previously suspended sentence & add a new condition of probation. The courts have the power to change & will change "&" to "or" & vice versa, whenever such conversion is required by the context, or is necessary to harmonize the provisions of a statute & give effect to all of its provisions, or save it from unconstitutionality, or in general, to effect the obvious intention of the legislature. Ind. Dept. of State Rev. v. Stark-Wetzel & Co., 276 N.E.2d 904 (Ind. Ct. App 1971). Thus, although Ind. Code 35-38-2-3(g) lists three sentencing options in the disjunctive (using an "or") when a D's probation is revoked, the courts interpreted Ind. Code 35-38-2-3(g) in the conjunctive, using an "&." This interpretation allows judges to sentence offenders using any one of or any combination of the enumerated options & serves the public interest by giving judges the ability to order sentences they deem to be most effective & appropriate for individual Ds who violate probation.

Here, upon a third probation violation, Tr. Ct. ordered that D serve two years of his previously suspended sentence & that he received post-incarceration treatment at Richmond State Hospital as a new condition of probation. Ordering execution of part of the previously suspended sentence along with a new condition of probation was proper. Moreover, a sentence for a probation revocation is reviewed for an abuse of discretion, not appropriateness. Held, transfer granted, Ct. App.' opinion at 865 N.E.2d 669 vacated, judgment affirmed.

RELATED CASES: Curtis, 937 N.E. 2d 868 (Ind. Ct. App. 2010) (even though Ind. Code 9-13-2-86 uses the word "and" when saying a driver's actions, thoughts, and normal control of faculties must be impaired, the State is not required to prove all three were impaired in order to obtain an OWI conviction).

TITLE: Sanders v. State
INDEX NO.: V.2.
CITE: (8/1/84), Ind., 466 N.E.2d 424
SUBJECT: Statutory construction - in pari materia
HOLDING: Tr. Ct. did not err in sustaining prosecutor's objection to D's defense of "involuntariness" (IC 35-41-2-1) to robbery on ground that D was actually interposing duress defense (IC 35-41-3-8), which is unavailable to crimes against persons. Statutes relating to same general subject matter are in pari materia & should be considered together to produce harmonious statutory scheme. If statutes are irreconcilable, then more detailed & specific statute controls. Ind. Code 35-41-2-1 deals with criminal culpability in general terms. Ind. Code 35-41-3-2 through 10 define situations where D will not be deemed responsible for acts because of justifiable reason for commission or because D was incapable of forming intent. Here, D claimed he was forced to commit crime at gunpoint, clearly a duress defense. Held, no error.

TITLE: State v. D.M.Z.
INDEX NO.: V.2.
CITE: (12/16/96), Ind. App., 674 N.E.2d 585
SUBJECT: Ambiguous statutes -- rules of construction & interpretation
HOLDING: Interpretation of statute is not question of fact but one of law reserved for Tr. Ct. Robinson, 625 N.E.2d 1249. Here, D was employed at youth shelter as child-care worker. State filed information which alleged that on three separate occasions, D was victim's custodian & that she engaged in sexual conduct with sixty- year-old male at shelter in violation of child seduction statute. "Custodian" includes any person responsible for child's welfare who is employed by public of private residential school or foster care facility. D moved to dismiss charges claiming that she was not victim's custodian, shelter was not foster care facility & that child seduction statute was unconstitutionally vague. Tr. Ct. granted motion to dismiss, concluding that D was not custodian of victim & that shelter was not foster care facility. State argued that Tr. Ct. erred when it granted D's motion to dismiss because information alleged that D was victim's custodian & that Ct. was required to treat that allegation as fact in ruling on motion. Ct. held that when statute is ambiguous, it is susceptible to judicial interpretation, & that as child seduction statute is penal statute, term "custodian" is to be strictly construed against State. To be custodian under statute, person must occupy position of trust & have authority & responsibility to make decisions concerning child's welfare, to act without guidance or superior authority, as parent would or in loco parentis, & that D did not occupy such position. Held, dismissal of charges affirmed.

RELATED CASES: Leehaug, 583 N.E.2d 211 (in construing statute, duty of Ct. is to give effect to plain & ordinary meaning of language used; however, simple disagreement between parties does not necessarily constitute ambiguity); Lincoln National Bank, 446 N.E.2d 1337 (when statutes are construed, meaning of doubtful words may be ascertained by reference to meaning of other words associated with it; when two or more words are grouped together, general words will be limited & qualified by special words); Economy Oil Corporation, 321 N.E.2d 215 (in construing tax statutes relating to assessment & collection, liberal rule of construction must be indulged in order to secure their uniform implementation; however, it is well established rule of statutory construction that statutes levying or imposing taxes are not to be extended by implication beyond clear import of language of statute in order to enlarge their operation); Prosser, 629 N.E.2d 904 (in construing ambiguous statute, Ct. may look to object of statute & consider goals sought to be achieved & reasons & policy underlying statute).

TITLE: State v. Froland (Kindt)
INDEX NO.: V.2.
CITE: 193 N.J. 186, 936 A.2d 947 (N.J. 2007), modified by 949 A.2d 844
SUBJECT: Kidnaping reversed based on statutory definition of parent
HOLDING: New Jersey Supreme Court held a woman who removed her stepchildren from the state with their father's consent, but without the consent of their mother, should not have been convicted of kidnaping. State argued that the stepmother's reliance on the common meaning of "parent" in the statute was too simplistic because it failed to take into account the effect of judicial custody orders affecting parental status. Court disagreed, pointing out that the legislature "could have qualified the word 'parent' in the consent prong of the kidnapping statute based upon judicially decreed custodial status [but it] did not do so." Without such legislative direction, "courts are not free to superimpose on the ordinary word 'parent' the state's catalogue of distinctions."

TITLE: State v. Souder
INDEX NO.: V.2.
CITE: (1st Dist. 2/7/83), Ind. App., 444 N.E.2d 891
SUBJECT: Statutory construction - controlling statute; firearms forfeiture
HOLDING: All firearms confiscated by the state are to be disposed of as provided in Ind. Code 35-23-4.1-16. Here, D was charged with & convicted of violating Ind. Code 14-2-4-3 (shining light from car while in possession of firearm whereby wild bird or animal could be killed). Conservation officer seized 3 firearms & light upon D's arrest. Tr. Ct. ordered firearms returned to D pursuant to Ind. Code 35-23-1.14-16. State appeals, contending Ind. Code 14-2-9-2(b) requires forfeiture. Ct. determines rules of statutory construction require harmonizing of 2 statutes on same general subject so as to give effect to each. If statutes are irreconcilable, then more detailed statute will prevail as to subject matter it covers. Ind. Code 35-23-1.4-16 specifically controls disposition of all firearms confiscated by law enforcement officers pursuant to IN Code. Ind. Code 14-2-9-2(b) does not use term "firearms," although "hunting ... appliances or apparatus or devices" could include firearms. Ind. Code 35-23-1.4-16 controls & provides Tr. Ct. with discretion to order return of confiscated firearms. Held, no abuse of discretion; judgment affirmed.

TITLE: United States v. Hunt
INDEX NO.: V.2.
CITE: 526 F.3d 739 (11th Cir. 2008)
SUBJECT: False reports by police can be criminally prosecuted under federal statute
HOLDING: Eleventh Circuit Court of Appeals held a provision of the 2002 Sarbanes-Oxley Act that criminalizes knowingly making false entries in records with the intent to impede or obstruct a federal investigation can apply to lies entered in a police use-of-force report. Court rejected an argument that application of the statute outside the context of white collar crime is a denial of the due process requirement of fair notice. The statute, 18 U.S.C. ' 1519, applies to anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . ., or in relation to or contemplation of any such matter or case." D in this case, a police officer, was convicted under Section 1519 on the basis of a false statement he made in a use-of-force report concerning an accident in which an arrestee was seriously injured. Knowing that he faced a future investigation into potential federal civil rights violations, D wrote the report to make it look as though the use of force was justified even though it was not. The incident was later investigated by the FBI and led to D's conviction.

TITLE: United States v. Madera
INDEX NO.: V.2.
CITE: 528 F.3d 852 (11th Cir. 2008)
SUBJECT: Statutory construction: Retroactivity improper without AG's recommendation
HOLDING: Eleventh Circuit Court of Appeals reversed a sex offender's conviction under the federal Sex Offender Registration and Notification Act for failing to register upon his relocation to a different state because his conviction occurred before the attorney general made the law retroactive. **D** was convicted of a sex crime in New York in November 2005. The following June, he moved to Florida, where he was arrested in October 2006 for failing to register as a sex offender as required by the Walsh Act, 42 U.S.C. §§ 16911 et seq., which was enacted in July 2006. Title I of the Act, known as SORNA, created the national sex offender registry. SORNA provides that, "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006." The attorney general issued an interim rule in February 2007 making SORNA retroactive regardless of when the offense took place. D's trial took place months before the attorney general issued the rule. The district court ruled that the registration requirement of SORNA was retroactive from the date of enactment. Court reversed, noting the attorney general's role with regard to retroactivity was not "advisory," as the district court concluded. The law explicitly says the attorney general "shall have the authority." The district court "clearly erred by usupring the role of the Attorney General in preemptively determining SORNA's retroactive application." Inasmuch as D was charged with failing to register in the gap between the act's enactment and the attorney general's declaration that it is retroactive, he cannot be prosecuted for violating the law during the time.

RELATED CASES: Reynolds, 132 S. Ct. 975 (2012) (SORNA registration requirements do not apply to pre-Act offender until Attorney General adopts permanent rule specifying such a requirement).

TITLE: United States v. Rodriquez

INDEX NO.: V.2.

CITE: 128 S. Ct. 1783, 170 L.Ed.2d 719 (2007)

SUBJECT: State recidivist enhancement is "maximum term of imprisonment" under ACCA

HOLDING: Majority held the maximum prison term to which a state offender was exposed under a recidivist sentencing provision constitutes the "maximum term of imprisonment . . . prescribed by law" for the state conviction when it is offered as a predicate for an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. ' 924(e), stating it was relying on the plain language of the ACCA. D was convicted in federal court of being a felon in possession of a firearm. The ACCA requires a 15-year minimum prison term for that offense if a D has three prior convictions for violent felonies or serious drug offenses, with a "serious drug offense" including state drug trafficking crimes "for which a maximum term of imprisonment of ten years or more is prescribed by law." D had prior convictions for delivery of a controlled substance with the maximum term of imprisonment for first-time offenders being five years, but the government argued the convictions qualified as ACCA predicates because D faced up to 10 years under a state recidivist statute. The district court characterized this as a separate statute for ACCA purposes. Majority found that the district court's reading was at odds with how "maximum term of imprisonment" is customarily understood by participants in the criminal justice system, with it not being convinced that the term "offense" generally is understood to describe the elements constituting the crime. Majority also found that a D's status as a recidivist bears on whether an offense was a "serious" one. Court further was unconvinced by contention that a D should not be punished under federal law for being treated as a recidivist under state law. Souter, J., filed a dissent joined by Stevens and Ginsburg, JJ., finding the ACCA provision ambiguous and would apply the rule of lenity.

TITLE: United States v. Santos
INDEX NO.: V.2.
CITE: 128 S. Ct. 2020, 170 L.Ed.2d 912 (2008)
SUBJECT: Term "proceeds" in money-laundering statute applies to criminal profits, not receipts
HOLDING: Plurality upheld Seventh Circuit's determination that the word "proceeds" in the federal money-laundering statute, 18 U.S.C. ' 1956(a)(1)(A)(i) applies only to transactions involving criminal profits, not criminal receipts. Plurality held the rule of lenity dictates adoption of the "profits" reading as the statute nowhere defines "proceeds." An undefined term is generally given its ordinary meaning. However, dictionaries and the Federal Criminal Code sometimes define "proceeds" to mean "receipts" and sometimes "profits." Moreover, the many provisions in the federal money-laundering statute that use the word "proceeds" make sense under either definition. The rule of lenity therefore requires the statute to be interpreted in favor of Ds, and the "profits" definition of "proceeds" is always more D-friendly than the "receipts" definition. Plurality found neither the government's contention that the "profits" interpretation fails to give the money-laundering statute its intended scope nor that it hinders effective enforcement of the law overcame the rule of lenity. Scalia, J., wrote the opinion, in which Souter and Ginsburg, JJ., joined, and in which Thomas, J., joined as to all but one part. Stevens, J., filed an opinion concurring in the judgment. Breyer, J., filed a dissent; Alito, J. filed a dissent, in which Roberts Roberts, C.J., and Kennedy and Breyer, JJ., joined.

TITLE: Ware v. State
INDEX NO.: V.2.
CITE: (2d Dist. 10/20/82), Ind. App., 441 N.E.2d 20
SUBJECT: Statutory construction
HOLDING: Statutes passed during same legislative session should be interpreted as harmonious, so as to give effect to each. State ex rel. IN State Bd. of Finance v. Marion Superior Ct. 396 N.E.2d 340; Coghill v. Badger, App., 418 N.E.2d 1201. Presumption: statutory amendment is intended to change existing law. Gingerich, App., 426 N.E.2d 129; Johnson v. Wabash Co., App., 391 N.E.2d 1139. When legislature provides definition of word, Cts. are bound by it, regardless of other possible meanings attributable to word. Dept. of State Revenue v. Brown Co. 109 N.E.2d 426; Grange, (1929) 200 Ind. 506; Bettenbrock v. Miller (1916), 185 Ind. 600. Here, Ct. employs maxims of statutory construction to determine whether it is bound by Ind. S. Ct. decision prior to 1976 utilizing objective standard in construing former child neglect statute (Eaglen 231 N.E.2d 147) or whether subjective definition of "knowingly" appearing in culpability definition statute prevails. Held, subjective standard applicable.

TITLE: Watson v. United States
INDEX NO.: V.2.
CITE: 552 U.S. 74, 128 S. Ct. 579, 169 L.Ed.2d 472 (2007)
SUBJECT: Federal sentencing; D did not "use" firearm when traded drugs for a pistol
HOLDING: Court determined that D did not violate 18 U.S.C. '924(c)(1)(A), which sets a mandatory minimum sentence, for a D who, "during and in relation to any..... drug trafficking crime[,] . . . uses ..... a firearm," when he traded a controlled substance for a pistol. The statute does not define "uses," but the Court has previously held "a criminal who trades his firearm for drugs 'uses' it..... within the meaning of '924(c)(1)" based primarily on the "ordinary or natural meaning" of the verb in context. Smith v. United States, 508 U.S. 223 (1993). Court has also held that merely possessing a firearm kept near the scene of drug trafficking is not "use" under '924(c)(1) noting that the statute requires "evidence sufficient to show an *active employment* of the firearm by the D." Bailey v. United States, 516 U.S. 137 (1995). A person does not "use" a firearm under '924(c)(1)(A) when he receives it in trade for drugs. The government's position lacks authority in either precedent or regular English. Neither *Smith* nor *Bailey* decides the case. With no statutory definition, the meaning of "uses" has to turn on "everyday meaning" revealed in phraseology that strikes the ear as "both reasonable and normal." When D handed over the drugs for the pistol, the officer "used" the pistol to get the drugs, but regular speech would not say that D himself used the pistol in the trade. Court rejected government's argument that because '924(d)(1) authorizes seizure and forfeiture of firearms "intended to be used in" certain crimes and some of those offenses involve receipt of a firearm "use" necessarily includes receipt of a gun even in a barter transaction. Government's reliance on Smith for the proposition that the term must be given the same meaning in both subsections overreads Smith. The common verb "use" is not at odds in the two subsections but speaks to different issues in different voices and at different levels of specificity. Court also rejected government's claim that to treat receipt in trade as "use" would create unacceptable asymmetry with Smith by penalizing one side of a gun-for-drugs exchange but not the other. Policy driven symmetry cannot turn "receipt-in-trade" into "use." Whatever the tension between the prior result and the outcome here, law depends on respect for language and would be served better by statutory amendment than by racking statutory language to cover a policy it fails to reach. Ginsburg, J., filed a concurring opinion.

TITLE: Wright v. State
INDEX NO.: V.2.
CITE: (2nd Dist., 03-04-08), Ind. App., 881 N.E.2d 1018
SUBJECT: Repeat sex offender enhancement does not include attempt crimes
HOLDING: Appellate counsel was ineffective for failing to either allege trial counsel ineffective for eliciting an admission from D that he was a repeat sex offender or arguing that the repeat sex offender enhancement to D's sentence was fundamental error. Where an attempt crime is not specifically listed either by name or statute number in a criminal statute, the criminal statute does not apply to the attempt crime even if the underlying crime is listed. Ellis v. State, 736 N.E.2d 731 (Ind. 2000); Crawford v. State, 755 N.E.2d 565 (Ind. 2001). Ind. Code 35-50-2-14(a) provides that "the state may seek to have a person sentenced as a repeat sexual offender for a sex offense under 35-42-4-1 through 35-42-4-9 of 35-46-1-3 . . . by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated one (1) prior unrelated felony conviction for a sex offense under 35-42-4-1 through 35-42-4-9 or 35-46-1-3."

Here, D was convicted of attempted rape, after which his trial attorney elicited from him an admission to being a repeat sex offender. The appellate attorney raised ineffective assistance of trial counsel but did not challenge trial council's decision to have D admit to being a repeat sex offender. Because the repeat sex offender statute does not specifically include attempted rape as a sex offense, had the appellate counsel challenged the enhancement, there is a reasonable probability that the enhancement would have been reversed. Held, judgment reversed; Kirsch, J., reluctantly concurring on basis that *stare decisis* requires that Court follow Indiana Supreme Court's decisions in Crawford and Ellis.

NOTE: Although failure to raise ineffective assistance of trial counsel on appeal will generally not constitute ineffective assistance of appellate counsel, this case presents a rare situation where appellate counsel raised trial counsel's ineffectiveness but did not include the instant error.

V. LEGISLATION/RULE MAKING

V.3. Ex post facto (U.S. Const. Art. 1, 9[3]; Ind. Const. Art. 1, 24)

TITLE: Anderson v. State
INDEX NO.: V.3.
CITE: (12/3/96), Ind. App., 674 N.E.2d 184
SUBJECT: Ex post facto -- conviction of non-existent offense at time of commission
HOLDING: Ex post facto law is legislative act relating to criminal matters, retroactive in its operation. It alters situation of accused to his disadvantage or deprives him of some lawful protection to which he is entitled, such as law imposing punishment for act which was not punishable when it was committed, law which makes crime or punishment greater than when it was committed, or law which changes rules of evidence by which less or different testimony is sufficient to convict. Here, Tr. Ct. granted D's petition for post-conviction relief & set aside his 1991 conviction of attempted murder due to instructional error. D was retried & jury found him guilty of aggravated battery as lesser included offense of attempted murder. On appeal, D argued that conviction for aggravated battery which was added to Indiana Code after commission of offense, was fundamental error. D argued that his conviction of aggravated battery violated constitutional proscriptions against ex post facto laws. At time of D's offense, battery statute did not provide for enhancement of battery to class B felony. Offense of aggravated battery as Class B felony did not exist when instant offense was committed. Thus, D's conviction of aggravated battery constituted fundamental error & must be vacated. Held, reversed & remanded.

RELATED CASES: Culbertson, App., 792 N.E.2d 573 (Ct. reversed D's conviction for maintaining a common nuisance, because statute in effect at time of D's actions did not criminalize maintenance of a place for manufacture of methamphetamine).

TITLE: Bridges v. State

INDEX NO.: V.3.

CITE: (8/22/2018), 109 N.E.3d 453(Ind. Ct. App. 2018)

SUBJECT: Tolling of sex offender registration requirement for 2002 conviction did not subject D to *ex post* facto violation

HOLDING: D was not subjected to an *ex post* facto violation where his registration requirement for his 2002 child molesting conviction was extended, because after 2008 he was convicted of several offenses that resulted in his incarceration, which tolled his registration requirement under the 2008 amendment to Ind. Code § 11-8-8-19. In 2002, D was convicted of two counts of child molesting. He was required to register as a sex offender for ten years. In May of 2006 he was released from prison, and his ten-year registration requirement began, which would terminate on May 16, 2016. In 2008, the General Assembly amended Ind. Code § 11-8-8-19 to toll the registration requirement for offenders who commit additional offenses that result in incarceration. After 2008, D was convicted of felonies in 2010, 2011, and 2013. When he was released from prison on January 29, 2017, the State told him he was required to register as a sex offender because the 2008 amendments tolled the registration requirement, meaning he was required to register until January 4, 2020. D did not register and was charged with Level 5 felony failure to register. He filed a motion to dismiss, arguing that applying the 2008 tolling provision to his 2002 initial offense violates Indiana's prohibition on *ex post* facto laws. The trial court denied the motion, and D brought this interlocutory appeal.

D was not subjected to an *ex post* facto violation. He committed his subsequent offenses in 2010, 2011, and 2013, several years after the 2008 amendment went into effect. Thus, no retroactive application occurred, so there was no *ex post* facto violation. And because D committed his subsequent offenses years after the 2008 amendments became effective, he had fair notice and warning that he would be subjected to the tolling provision if he became incarcerated after 2008. Held, judgment affirmed.

TITLE: Carmell v. Texas

INDEX NO.: V.3.0

CITE: 529 U.S. 513, 120 S. Ct. 1620; 146 L. Ed. 2d 577 (2000)

SUBJECT: Ex post facto clause - laws affecting evidence necessary to convict

HOLDING: Held, the ex post facto clause of the U.S. Constitution, Article I, § 10, prohibits laws which alter the rules of evidence to require less or different testimony than the law required at the time of the offense, in order to convict the offender. Calder v. Bull, 3 Dall. 386, 390, 3 U.S. 386, 1 L.Ed. 648 (1798). A statute reducing the amount of evidence needed to support a conviction violates the ex post facto clause when applied to a D who committed acts before its effective date. Until 1993, Texas law provided that the testimony of a child victim was insufficient to sustain a conviction for a sexual offense unless (1) the testimony was corroborated by other evidence, (2) the victim informed another person of the offense within six months of its occurrence, or (3) the child was under 14 years of age at the time of the alleged offense. In 1993, Texas law was amended to extend the child victim exception to persons under 18 years old. D was indicted in 1996 for fifteen counts related to molesting his stepdaughter from 1991 to 1995, and was convicted of all counts. Four of the 15 convictions would have been unsupportable under the sufficiency statute in effect at the time of the offenses.

TITLE: City of Seattle v. Ludvigsen

INDEX NO.: V.3.

CITE: 162Wn.2d 660, 174 P.3d 43 (Wash. 2007)

SUBJECT: Ex post facto violated when OWI testing standard lowered

HOLDING: Washington Supreme Court held convicting a D of drunken driving on the basis of a breath test carried out with a device that did not meet a legally mandated quality standard at the time, but that did meet a lower standard adopted prior to trial, would violate constitutional ex post facto principles. D was arrested in 2002 on suspicion of driving while intoxicated after a breath test showed a reading of .23 percent. The municipal code then in effect made it a crime to drive at a level of .08 as shown by analysis of a person's breath or blood, but the section required that the breath-testing device have a thermometer that had been certified by a thermometer traceable to National Institute of Standards and Testing standards. D did not come to trial until 2005, by which time the municipal code had changed the test to a less rigorous standard. Court held that the code revisions amounted to a substantive change in the amount of evidence required to a support a conviction and thus violated the Constitution's ex post facto clause. When D was charged, the city had to meet a specific equipment standard if it wished to convict him using the "per se" prong of its law, i.e. on the basis of the breath test alone. The code changes held breath-testing evidence to a less exacting standard. "The City redefined the meaning of a valid test and thereby changed the meaning of the crime itself."

TITLE: Cundiff v. State
INDEX NO.: V.3.
CITE: (12/21/2016), 66 N.E.3d 956 (Ind. Ct. App. 2017)
SUBJECT: Lifetime registry required but residency restriction is not
HOLDING: The trial court did not abuse its discretion in denying Defendant's request to change his lifetime SOR obligation to a ten-year obligation. Defendant's 2003 conviction for child exploitation would have required him to register as a sex offender for life under the registry statute in effect at the time, so there is no ex post facto problem in requiring him to register for life under the newer version of the statute. However, the residency requirements of Ind. Code § 35-42-4-11 do not apply to Defendant because Public Law 6-2006 provides in part that 35-42-4-11 applies only to crimes committed after June 30, 2006. Held, judgment affirmed in part, reversed in part.

TITLE: Doe v. Town of Plainfield, Indiana

INDEX NO.: V.3.

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

SUBJECT: Constitutionality of ordinance barring sex offenders from parks

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

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

TITLE: Indiana BMV v. Zimmerman
INDEX NO.: V.3.
CITE: (4/3/85), Ind., 476 N.E.2d 114
SUBJECT: Defensive driving school (DDS) - constitutionality; ex post facto
HOLDING: Tr. Ct. erred in finding statute requiring attendance at DDS (upon conviction of 2 traffic misdemeanors, 2 traffic judgments, or one of each) constituted ex post facto law. Here, statute became effective 9/1/81. D's convictions occurred on 6/81 & 10/81. D received letter from BMV, requiring attendance at DDS. D's attorney sought relief under IN Administrative Adjudication Act for violation of due process rights, protection from ex post facto laws & bills of attainder (substituting legislative determination of guilt for judicial one) & deprivation of rights under 42 USC Section 1983. On 3/29/82, BMV advised D he did not have to attend DDS because one conviction occurred prior to effective date of statute. State's motion to dismiss case for mootness was denied by Tr. Ct., which found a Section 1983 violation (ex post facto; bill of attainder) & awarded D attorney fees pursuant to 42 U.S.C. Section 1988. Ct. looks to case law interpreting habitual traffic offender (HTO) statute. Such statutes are not ex post facto laws because they do give notice that if persons persist in certain behavior, they will be punished more severely than previously. State ex rel VanNatta v. Rising, 310 N.E.2d 873. Ct. interprets Ind. Code 9-4-7-10 to be applicable to individuals who fall under its provisions only after its effective date; thus, statute is not unconstitutional. Held, reversed & remanded with instructions to enter judgment for state. DeBruler CONCURS IN RESULT.

TITLE: Iseton v. State
INDEX NO.: V.3.
CITE: (2d Dist. 12/27/84), Ind. App., 472 N.E.2d 643
SUBJECT: Ex post facto – 6-person jury
HOLDING: Application of 1981 law re 6-person jury to D charged in 1980 & tried in 1982 was not ex post facto application. Primary purpose of constitutional prohibition against ex post facto laws is assurance that legislative acts will give fair warning of effect & permit reliance on meaning until changed. Ex post facto law: (1) is retrospective (applies to events occurring before enactment) & (2) must disadvantage D. No ex post facto violation occurs if change effected is merely procedural. Alteration of substantial right is not merely procedural. [Citations omitted.] Ct. concludes no substantial right was affected & D was not disadvantaged. [Citations omitted.] Held, no error. Sullivan CONCURS, arguing no ex post facto connotations exist because triggering event was trial, not commission of crime.

RELATED CASES: Mudd, App., 483 N.E.2d 782 (Const L 201; statute was amended to elevate crime of dealing in more than 10 pounds of marijuana to Class C felony & became effective after D's arrest; Ct. finds fundamental error (D did not raise issue), reminds state, Tr. Ct., & appellate counsel of ex post facto prohibition (see Parsley, 401 N.E.2d 1360 & Garrett, App., 411 N.E.2d 692), & remands for entry of conviction for Class D felony); Bryant, App., 446 N.E.2d 364 (Const L 253(4); retroactive application of Ct. decision construing credit time statute does not constitute ex post facto law denying D due process).

TITLE: Kirby v. State

INDEX NO.: V.3.

CITE: (4/27/2018), (Ind. 2018)

SUBJECT: Ex post facto challenge to collateral consequence of conviction cannot be raised in post-conviction proceedings

HOLDING: Post-conviction relief is generally available only from a conviction or sentence, not from a collateral consequence. Ind. Post-Conviction Rule 1(1); Kling v. State, 837 N.E.2d 502 (Ind. 2005). Here, D pled guilty in 2010 to one count of Class D felony child solicitation, leading to a 10-year sex-offender registration and an 18-month sentence, suspended to probation. D's probation conditions made schools off-limits, but he was granted explicit permission to enter school property so he could attend his son's school activities. But in 2015, Ind. Code § 35-42-4-14(b) made it a Level 6 felony for a "serious sex offender" like D to knowingly or intentionally enter school property. D challenged this restriction by filing post-conviction relief, alleging he did not "knowingly" plead guilty because he didn't know at the time of his plea that he would later be barred from school property. He also alleged that the new statute was an unconstitutional ex post facto law because it added punishment to an already-committed crime. Court of Appeals agreed with D that the statute's school-entry restriction is unconstitutional as applied to him. On transfer, the Indiana Supreme Court held that because the school-entry restriction is a statutory collateral consequence of D's conviction but not part of his conviction or sentence, post-conviction proceedings are the wrong vehicle for his ex post facto claim. Instead, the claim should be raised through a declaratory-judgment action pursuant to Ind. Code § 34-14-1-2. Held, transfer granted, Court of Appeals opinion at 83 N.E.3d 1237 vacated, denial of post-conviction relief affirmed without reaching merits of D's ex post facto claim.

TITLE: Lynch v. Mathis
INDEX NO.: V.3.
CITE: (2/19/97), 117 S. Ct. 891; 137 L.Ed.2d 63
SUBJECT: Ex Post Facto -- Eliminating Provisional Credit Time
HOLDING: Statute canceling provisional credits for prison inmates violates Ex Post Facto Clause. State argues that cancellation of provisional credits did not violate Clause because credits had been issued as part of administrative procedures designed to alleviate prison overcrowding and were therefore not integral part of petitioner's punishment. S. Ct. rejects this argument, finding motivation for original statute granting generous credit time irrelevant to Ex Post Facto inquiry. To fall within Ex Post Facto prohibition, law must be retrospective and "disadvantage the offender affected by it," Weaver v. Graham, 450 U.S. 24, 29, 101 S. Ct. 960, 67 L.Ed.17 (1981), among other ways by increasing the punishment for the crime. See Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L.Ed.2d 30 (1990). Statute here was clearly retrospective, and petitioner's sentence was lengthened by it. Unlike statute reducing frequency of parole hearings, this statute had more than "speculative and attenuated possibilities" of increasing punishment. Cf. California Dept. of Corrections v. Morales, 514 U.S. 115 S. Ct. 1597, 131 L.Ed.2d 588 (1995). Petitioner had received 1860 days of credit time which were taken away by statute. Held, reversed and remanded.

RELATED CASES: Hawkins, 973 N.E.2d 619 (Ind. Ct. App. 2012) (even though effect of amendment to education credit time statute was to deny credit to D and not allow him to finish the remaining 50% of his course work while inmates with only one class remaining were allowed to complete their degrees, there was no ex post facto violation because amendment applied prospectively, did not increase D's sentence or alter definition of his criminal conduct); Upton, App., 904 N.E.2d 700 (application of 2008 credit restricted felons statute to D was ex post facto violation).

TITLE: Miller v. Florida
INDEX NO.: V.3.
CITE: 482 U.S. 423, 107 S. Ct. 2446, 96 L.Ed.2d 351 (1987)
SUBJECT: Changes in sentencing statutes - ex post facto application
HOLDING: Neither Congress nor states are permitted to pass ex post facto law. U.S. Const., Art. 1. Central to ex post facto prohibition is concern for lack of fair notice & governmental restraint when legislature increases punishment beyond what was prescribed when crime was consummated. Weaver v. Graham, (1981), 450 U.S. 24, 28-29, 101 S. Ct. 960, 67 L.Ed.2d 17. To fall within ex post facto prohibition, (1) law must apply to events occurring before its enactment & (2) it must disadvantage offender affected by it. Here, law in effect at time of offense would have resulted in presumptive sentence of 3 1/2 - 4 years imprisonment. At time D was sentenced revised guidelines called for presumptive sentence of 5 1/2 - 7 years imprisonment. Tr. Ct. applied guidelines in effect at time of sentencing & imposed 7-year sentence. Court rejects state's argument that law is not retrospective because state's sentencing statute on its face provides for continuous review & recommendation of changes to guidelines. "[C]onstitutional prohibition against ex post facto laws cannot be avoided merely by adding to law notice that it might be changed." Further, D has been substantially disadvantaged because under new guidelines 7-year sentence is within presumptive range for which judge need not justify & sentencing decision was unreviewable. Under prior law, judge would have been required to provide clear & convincing reasons in writing to justify 7-year sentence & decision would have been reviewable on appeal. Held, sentencing D under guidelines in effect at time of sentencing violated Ex Post Facto Clause. All justices join.

TITLE: Peugh v. State

INDEX NO.: V.3.

CITE: (6/10/2013), 133 S. Ct. 2072 (US Sup. Ct. 2013)

SUBJECT: Sentencing a D under guidelines enacted after he committed his crimes violates ex post facto prohibition

HOLDING: Sentencing a person under the stiffer, revised Federal Sentencing Guidelines enacted after the person committed his crimes violated the Constitution's ex post facto prohibition because, even though the Guidelines are merely advisory, using the Revised Guidelines as a starting point creates a significant risk that a Tr. Ct. will impose a substantially longer sentence, amounting to greater punishment than that allowed at the time the crime was committed. See Calder v. Bull, 3 Dall. 386, 390 (1798); see also Garner v. Jones, 529 U.S. 244, 250 (2000). "Common sense indicates that . . . this system will steer district courts to more within-Guidelines sentences."

Here, Peugh was convicted of bank fraud. Under the Guidelines in effect at the time, Peugh could have been sentenced anywhere from 30 to 37 months. Under the Revised 2009 Guidelines, Peugh was subject to a sentence between 70 and 87 months. The District Court followed the Revised Guidelines and imposed a 70-year sentence. The 7th Circuit affirmed.

In dissent, Justice Thomas argued that because the Guidelines are advisory and a matter of discretion, there is no significant risk of an ex post facto violation. Held, reversed and remanded. Sotomayor, J., joined by Ginsburg, Breyer, Kagan, J.J., and in part by Kennedy, J. Thomas, J., dissenting joined in part by Roberts, C.J., and Scalia and Alito, J.J. Scalia, J., dissenting, joined by Alito, J.

TITLE: Ramon v. State
INDEX NO.: V.3.
CITE: (3rd Dist., 06-10-08), Ind. App., 888 N.E.2d 244
SUBJECT: Retroactive application of legislative fix to Fajardo not ex post facto
HOLDING: Application of amended version of Ind. Code 35-34-1-5 does not violate prohibition of ex post facto laws as applied to D. At time D committed offenses, Ind. Code 35-34-1-5(b) allowed amendments to matter of substance only if made more than thirty days before omnibus date. Fajardo v. State, 859 N.E.2d 1201 (Ind. Ct. App. 2007). In response to Fajardo, legislature revised subsection (b) to allow State to make an amendment to a matter of substance at any time before commencement of trial so long as amendment does not prejudice D's substantial rights. Given fact that amended statute creates no new crimes and serves a "procedural function," majority of Court concluded that application of amendment to D did not violate ex post facto provisions of either Indiana or U.S. Constitutions. Tr. Ct. did not abuse its discretion when it allowed State to amend charges from Class B felonies to Class A felonies, because amendments to charges did not prejudice D's substantial rights. Held, judgment affirmed; Robb, J., dissenting on this issue, notes that State's ability to charge D with Class A felonies was foreclosed at time legislature amended statute, and prohibition of ex post facto laws "is not limited to substantive statutes." Stroud v. State, 809 N.E.2d 274 (Ind. 2004).

RELATED CASES: Baker, 922 N.E.2d 723; Brown, 912 N.E.2d 881 (Ind. Ct. App. 2009); Gomez, 907 N.E.2d 607 (Ind. Ct. App. 2009) (retroactive application of amendment to Ind. Code 35-34-1-5 does not violate ex post facto because the amendment is procedural); Hurst, App., 890 N.E.2d 88 (strong & compelling reasons existed for retroactive application of legislative response to Fajardo).

TITLE: Rogers v. Tennessee

INDEX NO.: V.3.

CITE: 532 U.S. 451, 121 S. Ct. 1693, 149 L.Ed.2d 697 (2001)

SUBJECT: Ex post facto, year and a day rule, retroactivity

HOLDING: It was not a denial of due process or the ex post facto clause for a State supreme court to abolish the common law 'year and a day' rule and apply the new rule to D retroactively. D was convicted of homicide after stabbing another person who lingered in a coma for 15 months before dying, despite the existence of the common law “year and a day rule” which traditionally barred murder convictions unless the victim died within a year and a day of the injury. On appeal in the petitioner’s case, the Tennessee Supreme Court recognized the existence of the “year and a day rule” but abolished it as obsolete and upheld the conviction.

TITLE: Smith et al. v. John Doe

INDEX NO.: V.3.

CITE: 538 U.S. 1009, 123 S. Ct. 1925 (2003)

SUBJECT: Sex offender registry, "Megan's Law," retroactive, ex post facto

HOLDING: The Court examined Alaska's sex offender registry law and concluded that it was civil and non-punitive in nature, and therefore did not violate the Ex Post Facto clause. Conviction information published on the registry was already publicly available, and "the attendant humiliation is but a collateral consequence of a valid regulation." Dissenting, Justice Stevens pointed out that the registration requirements and reporting duties placed on offenders by the law are comparable to the duties imposed on probationers and parolees. Justices Ginsburg and Breyer also dissented arguing that the scope of the law 'notably exceeds its legitimate civil purpose.

TITLE: Spencer & Bridwell v. O'Connor
INDEX NO.: V.3.
CITE: (2nd Dist., 3-30-1999), Ind. App., 707 N.E.2d 1039
SUBJECT: Ex post facto - sex offender registry
HOLDING: Indiana's Sex Offender Registry statute does not violate prohibition on ex post facto laws contained in federal & Ind. Constitution to extent that it allows inclusion of persons who committed their offenses prior to Act's effective date. Both Ind. & U.S. Constitutions forbid any ex post facto Law from being passed. U.S. Const., art. I, § 10; Ind. Const., art. I, § 24. Ex post facto analysis under Ind. & federal Constitutions is same: focus of ex post facto inquiry is not on whether legislative change produces some sort of disadvantage, but whether any such change alters definition of criminal conduct or increases penalty by which crime is punishable. When determining whether sanction is punishment, Ct. must determine whether legislature intended proceedings to be civil or criminal, & if intent was civil, Ct. must next determine whether statutory scheme is so punitive either in purpose or effect as to negate State's intention to deem it civil. Here, legislature intended registry to be civil because it placed registry in Title 5 of Ind. Code & not Title 35, which contains criminal code, & overall design of registry's provisions signifies intent to monitor offender's whereabouts & not to punish offender.

In addition, notification requirements of registry were not so extensive as to make registry's effect punitive & to negate State's intention to deem it civil. Information found in public opinions & Ct. records is often more extensive than that contained in registry. Moreover, in light of Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L.Ed.2d 501 (1997), in which Ct. held that civil commitment of sex offenders did not override non-punitive nature of Kansas statute, notification in Ind. statute also does not rise to level of punishment. Although retaliation may occur, fact that registry may lead to public retaliation does not lead to conclusion that registry has punitive effect. Retaliation results from criminal act itself rather than notification & dissemination of information regarding criminal activity has never been considered punishment even though risk of retaliation is inherent in such public dissemination. Thus, Tr. Ct. properly entered summary judgment in favor of State. Held, judgment affirmed; Robb, J., concurring on basis that registry expands scope of respondent superior liability in that employers who hire sex offenders are responsible for acts of sex offenders.

Note: Ohio Ct. App. recently struck down its Sex Offender Registration Act because it violated Ohio Constitution. State v. Williams, 1999 Ohio App. LEXIS 217, No. 97-L-191 (Jan. 29, 1999); but see State v. Woodburn, 1999 Ohio App. LEXIS 1201, No. 98 C0 6 (March 23, 1999) (disagreeing with Williams). One of reasons for finding Act unconstitutional was that Act interfered with offender's right to pursue occupation or work freely. Ind. Code 5-2-12-11 reads that "[c]ontinuing to employ a person whose name appears on this registry may result in civil liability for the employer." Argue that Ind. Registry is also unconstitutional on this basis.

RELATED CASES: Rogers, 958 N.E.2d 4 (Ind. Ct. App. 2011) (D waived ex post facto claim by pleading guilty; limited exception to waiver rule in Douglas v. State, 878 N.E.2d 873, 878 (Ind. Ct. App. 2007) did not apply); Ridner, App., 892 N.E.2d 151 (registry requirement as sex offender was not punitive and thus not an ex post facto law when retroactively applied); Douglas, App., 878 N.E.2d 873 (incarceration for failing to register is not ex post facto when applied to a D who was only required to register years after his crime when his offense was added to the registry)); Goldsberry, App., 821 N.E.2d 447 (Tr. Ct. erred in finding D committed an act of "domestic violence," & prohibiting him from possessing a gun

in future, because D committed acts five months prior to effective date of statutory prohibition on possession of firearm by domestic batterer).

TITLE: State v. Garcia
INDEX NO.: V.3.
CITE: 285 Kan.1, 169 P.3d 1069 (Kan. 2007)
SUBJECT: Ex post facto violated by statute extending limitation period for crime proved by DNA
HOLDING: Kansas Supreme Court held the ex post facto principle that prohibits retroactive application of statutes that would extend the limitations period for time-barred crimes does not allow an exception for cases in which the loss of evidence is not a concern. Prosecutors' arguments to the contrary were based on the U.S. Supreme Court's recent discussion of the issue in Stogner v. California, 539 U.S. 607 (2003). D was convicted in 2004 of a rape and felony-murder committed in 1995. At the time of the crimes, the statute of limitations required that prosecutions commence within five years; however, in 2001 the state legislature extended the limitations period for sex offenses when "the identity of the suspect is conclusively established by DNA testing," which is what occurred in this case. Court emphasized that the plain language of Stogner did not carve out an exception for DNA evidence. "[E]ven near-perfect reliability in linking a D to a crime will be insufficient to justify reviving a time-barred prosecution ..... Under the holding of Stogner and Nunn [state case], we conclude that application of the amended [statute] resurrects a previously time-barred prosecution and violates Article I, § 10, clause 1 of the United States Constitution."

TITLE: State v. Kirby
INDEX NO.: V.3.
CITE: (3/4/2019), 120 N.E.3d 574 (Ind. Ct. App. 2019)
SUBJECT: Ex post facto challenge to unlawful school entry statute rejected
HOLDING: Kirby pled guilty in 2010 to one count of Class D felony child solicitation, leading to a 10-year sex-offender registration and 18-months probation, which he successfully concluded. The probation conditions made schools off-limits, but Kirby was granted explicit permission to enter school property so he could attend his son's school activities. But in 2015, Ind. Code § 35-42-4-14(b) made it a Level 6 felony for a "serious sex offender" like D to knowingly or intentionally enter school property. activities. So Kirby sought and received a declaratory judgment declaring the school-entry statute unconstitutional as applied to him.

Weighing the seven factors outlined in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554 (1963), Court reversed, concluding that the 2015 regulatory statute is not unconstitutional as applied to Kirby because it does not amount to retroactive punishment in violation of the Ex Post Facto Clause of the Indiana Constitution. It is not excessive to prohibit Kirby from attending his son's school events because of his prior criminal conviction. Held, judgment reversed and remanded; Baker, J., dissenting with separate opinion.

TITLE: State v. Land & Tutt
INDEX NO.: V.3.
CITE: (2nd Dist., 12-11-97), Ind. App., 688 N.E.2d 1307
SUBJECT: Ex post facto - nonsupport of dependent child
HOLDING: Tr. Ct. erred in determining that Ind. Code 35-46-1-5(a), Nonsupport of Dependent Child, constituted unconstitutional ex post facto law. Ex post facto law is any law which imposes punishment for act which was not punishable at time it was committed or imposes additional punishment to that then proscribed. Person who knowingly or intentionally fails to provide support to person's dependent child commits nonsupport of child, Class D felony. However, 1996 amendment to statute elevated offense to Class C felony if amount of support that is due & owing is at least ten thousand dollars. Ind. Code 35-46-1-5(a). Here, Ds were charged with nonsupport for period beginning on July 1, 1996, which was date amended statute became effective. Although Ds had incurred $10,000 debt prior to date of enactment of statute, failure to provide support & not amassing of $10,000 debt was act being punished. Statute's second sentence beginning "however, the offense is Class C felony if . . ." indicates that offense is what is described in first sentence & second sentence is enhancement. Thus, Tr. Ct. erred in granting D's motion to dismiss. Held, judgment reversed.

RELATED CASES: Cooper, App., 760 N.E.2d 660 (D was chargeable for amount due & owing at time of underlying act, regardless of whether some of that arrearage accrued while he was incarcerated); Wiggins, App., 727 N.E.2d 1 (agreeing with Land).

TITLE: State v. Summers
INDEX NO.: V.3.
CITE: (10/19/2016), 62 N.E.3d 451 (Ind. Ct. App. 2016)
SUBJECT: No ex post facto violation from sex offender registry tolling requirement
HOLDING: Where D was required to register as a sex offender in Illinois in 2005 and later moved to Indiana, there was no ex post facto violation in applying the Indiana Sex Offender Registry (SOR) tolling requirement to D, even though Indiana did not add the tolling requirement until 2008, because D was subject to a tolling requirement in Illinois when he registered there. Thus, maintaining that requirement across state lines imposed no punitive burden on D. Cf. Tyson v. State, 51 N.E.3d 88, 92 (Ind. 2016) (though D's crime putting him on the Texas SOR did not make D a sex offender in Indiana at the time, requiring him to register in Indiana under a new statute that expanded the definition of sex offenders did not create an ex post facto violation). Held, judgment reversed.

TITLE: Wallace v. State
INDEX NO.: V.3.
CITE: (04-30-09), 905 N.E.2d 371 (Ind. 2009)
SUBJECT: Sex offender registry - *ex post facto* violation
HOLDING: Indiana's Sex Offender Registration Act ("Act") constitutes retroactive punishment forbidden by the *Ex Post Facto* Clause contained in the Indiana Constitution when applied to a person whose crime occurred before the statute was enacted. The *ex post facto* clauses of the U.S. Constitution and the Indiana Constitution are similarly worded. When Court interprets language in the state constitution substantially identical to its federal counterpart, Court may part company with the interpretation of the U.S. Supreme Court based on the text, history, and decisional law elaborating the Indiana constitutional right. Although applying the federal intent-effects test in analyzing the *ex post facto* claim under the Indiana Constitution, Court reaches a different conclusion than the U.S. Supreme Court did in Smith v. Doe, 538 U.S. 84, 105-06 (2003) (registration requirement could be applied retroactively without violating the *Ex Post Facto* Clause of the U.S. Constitution). Under the intent-effects test, Court must first determine whether the legislature meant the statute to impose punishment. If so, then punishment results and retroactive application violates the *Ex Post Facto* Clause. If not, Court must further examine whether the statutory scheme is so punitive in effect as to negate the intention thereby transforming what had been intended as a civil regulatory scheme into a criminal penalty. In making this determination, Court considers: (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as punishment, (3) whether it comes into play only on a finding of *scienter*, (4) whether its operation will promote the traditional aims of punishment--retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purpose assigned.

Assuming without deciding that the Legislature intended the Act to be non-punitive, its effects are nonetheless punitive as to D. Six of the seven factors illustrate a punitive effect. Although the Act is a legitimate way to protect the public from sex offenders, Indiana's registration system is excessive in relation to the purpose of safety. The Act makes information on all sex offenders available to the general public without restriction and without regard to whether the individual poses any particular future risk. Moreover, there is no mechanism by which a registered sex offender can petition for relief even on the clearest proof of rehabilitation.

Here, D was charged, convicted and served the sentence for his crime before the Act was enacted. Thus, as applied to D, the Act violates the prohibition on *ex post facto* laws contained in the Indiana Constitution because it imposes burdens that have the effect of adding punishment beyond that which could have been imposed when his crime was committed. Held, transfer granted, judgment reversed and Court of Appeals' opinion at 878 N.E.2d 1268 summarily affirmed in all other respects.

RELATED CASES: Cundiff, 66 N.E.3d 956 (Ind. Ct. App. 2017) (residency duties of Ind. Code § 35-42-4-11 don't apply to Defendant because P.L. 6-2006 provides that requirement applies only to crimes committed after June 30, 2006); Lovett, 47 N.E.3d 657 (Ind. Ct. App. 2015) (Denying D's request to end

SORA registration requirement did not violate Indiana *ex post facto* prohibition, where D was required to register here for offense he committed in Washington State before Indiana's SORA went into effect, because the date of the out-of-state offense is not dispositive in *ex post facto* analysis; also the continued registration in Indiana adds no punishment as D was required to register in Washington indefinitely). Lockhart, 38 N.E.3d 215, (Ind. Ct. App. 2015) (petition to remove from SOR on *ex post facto* grounds premature because D was not on registry and could not be put on registry until released from DOC at least six years hence); Gonzalez, 980 N.E.2d 312 (Ind. 2013) (denial of D=s petition to be removed from sex offender registry on basis of 2006 amendment to I.C. § 5-2-12-15 (1996), which increased time for D to stay in registry from 10 years to life, was *ex post facto* violation because D was placed on the registry 7 years before the 2006 amendment went into effect, barring D from ever petitioning to be removed from list); Sewell, 973 N.E.2d 96 (Ind. Ct. App. 2012) (conviction for committing sex offender residency offense for residing within 1000 feet of youth program center did not violate Indiana Constitution's *ex post facto* prohibition, even though D's status as "offender against children" under Ind. Code § 35-42-4-11 was based on his child molesting conviction entered 5 years before that statute went into effect, because D established his residence in a prohibited zone after Ind. Code §35-42-4-11 was in effect; case distinguishable from State v. Pollard, 908 N.E.2d 1145, 1154 (Ind. 2009) because Pollard resided in property which only later fell within 1000 feet of a school or youth program center); Simmons, 962 N.E.2d 86 (Ind. Ct. App. 2011) (enhancement of OWI conviction to a C felony because of prior conviction for OWI causing death did not violate the prohibition on *ex post facto* laws because no additional punishment was added to prior offense; statutory enhancement affected only future crimes; see full review at K.9.b); York, N.E.2d 844 (Ind. Ct. App. 2011) (*ex post facto* claim re: residency restriction did not apply to this appeal because the alleged violation happened within D's original ten-year period rather than the lifetime requirement that became effective after his conviction); Blakemore, 925 N.E.2d 759 (Ind. Ct. App. 2010) (fact that D agreed to "comply with the statutory requirements of registering with local law enforcement as a sex offender" in 1998 did not waive his future *ex post facto* argument under Wallace); Greer, App., 918 N.E.2d 607 (the residency restriction that a sex offender cannot live within 1000 feet of a school, etc. violates *ex post facto* clause if applied to an offender who committed his crime before the statute applying the residency restriction to his crime was passed, regardless of whether D owned his home); Pollard, 908 N.E.2d 1145 (Ind. 2009) (retroactive application of the residency restriction statute, prohibiting certain sex offenders from living within 1,000 feet of school property, youth program center or a park, violates *Ex Post Facto* Clause of the Ind. Constitution); Ridner, App., 892 N.E.2d 151 (registry requirement as sex offender was not punitive and thus not an *ex post facto* law when retroactively applied); Douglas, App., 878 N.E.2d 873 (incarceration for failing to register is not *ex post facto* when applied to a D who was only required to register years after his crime when his offense was added to the registry); Spencer, App., 707 N.E.2d 1039 (as the registry existed in 1999, it was not punitive).

TITLE: Weaver v. State
INDEX NO.: V.3.
CITE: (1st Dist., 04-18-06), Ind. App., 845 N.E.2d 1066
SUBJECT: Application of sentencing statute in effect at time of offense
HOLDING: Tr. Ct. properly applied to D the sentencing statutes that were in effect when D was convicted but that had been amended before he was sentenced. A substantive change in a penal statute is an *ex post facto* law if applied retroactively, but a procedural change is not. Dobbert v. Florida, 432 U.S. 282 (1977). Disagreeing with Samaniego-Hernandez v. State, 839 N.E.2d 798 (Ind. Ct. App. 2005), Ct. cited recent decisions from other states whose legislatures have amended sentencing statutes in response to Blakely v. Washington, 542 U.S. 296 (2004), & held that the Indiana amendments are substantive & cannot be retroactively applied. The Indiana sentencing amendments, which now permit a Tr. Ct. to impose any sentence authorized by a statute or constitution regardless of the presence or absence of aggravating or mitigating circumstances cannot be merely "procedural." The amendments appear to affect some kind of disadvantageous change upon a D to extent they permit the imposition of a maximum sentence without any finding of aggravating circumstances by any factfinder-- judge or jury. Thus, application of new sentencing statutes to Ds convicted before effective date of amendments, but sentenced afterward, violates prohibition against *ex post facto* laws. Held, judgment affirmed.

RELATED CASES: Townsend, 860 N.E.2d 1268 (in dicta, judges are split as to whether the footnote in Prickett expresses the Indiana Supreme Court's intention to apply the sentencing statute (whether it is advisory or presumptive) at the time of the offense or at the time of sentencing); Prickett, 856 N.E.2d 1203 (Ct. applied version of statute in effect at time of D's sentence); Walsman, App., 855 N.E.2d 645 (presumptive sentencing scheme applies to D who committed the offense prior to statutory amendment to advisory sentence).

V. LEGISLATION/RULE MAKING

V.4. Retroactivity

TITLE: Bridges v. State

INDEX NO.: V.4.

CITE: (8/22/2018), 109 N.E.3d 453(Ind. Ct. App 2018)

SUBJECT: Tolling of sex offender registration requirement for 2002 conviction did not subject D to *ex post* facto violation

HOLDING: D was not subjected to an *ex post* facto violation where his registration requirement for his 2002 child molesting conviction was extended, because after 2008 he was convicted of several offenses that resulted in his incarceration, which tolled his registration requirement under the 2008 amendment to Ind. Code § 11-8-8-19. In 2002, D was convicted of two counts of child molesting. He was required to register as a sex offender for ten years. In May of 2006 he was released from prison, and his ten-year registration requirement began, which would terminate on May 16, 2016. In 2008, the General Assembly amended Ind. Code § 11-8-8-19 to toll the registration requirement for offenders who commit additional offenses that result in incarceration. After 2008, D was convicted of felonies in 2010, 2011, and 2013. When he was released from prison on January 29, 2017, the State told him he was required to register as a sex offender because the 2008 amendments tolled the registration requirement, meaning he was required to register until January 4, 2020. D did not register and was charged with Level 5 felony failure to register. He filed a motion to dismiss, arguing that applying the 2008 tolling provision to his 2002 initial offense violates Indiana's prohibition on *ex post* facto laws. The trial court denied the motion, and D brought this interlocutory appeal.

D was not subjected to an *ex post* facto violation. He committed his subsequent offenses in 2010, 2011, and 2013, several years after the 2008 amendment went into effect. Thus, no retroactive application occurred, so there was no *ex post* facto violation. And because D committed his subsequent offenses years after the 2008 amendments became effective, he had fair notice and warning that he would be subjected to the tolling provision if he became incarcerated after 2008. Held, judgment affirmed.

TITLE: Chaidez v. United States
INDEX NO.: V.4.
CITE: (2/20/2013), 133 S. Ct. 1103 (U.S. 2013)
SUBJECT: Padilla announced new rule so not applied retroactively
HOLDING: In holding that counsel must advise a client about the potential negative immigration consequences of pleading guilty, Padilla v. Kentucky, 130 S. Ct. 1473 (2010), created a new rule of criminal procedure. Thus, under Teague v. Lane, 489 U.S. 288 (1989), Padilla is not applied retroactively to cases already final on direct review. Here, in 2004, Chaidez pled guilty to mail fraud. In 2009, immigration officials began steps to deport her. To avoid deportation, she filed a petition for writ of coram nobis, claiming counsel failed to advise her about the possible immigration consequences of a plea. The District Court vacated her conviction, but the 7th Circuit reversed and reinstated it.

Padilla clearly created a new rule of criminal procedure, despite the dissent's claim that it merely applied Strickland to a different factual situation. Padilla did much more. It asked if Strickland should even apply in a situation where collateral consequences of a plea were at issue. Held, cert. granted, 7th Circuit affirmed, District Court reversed. Kagan, J., joined by Roberts, C.J., and Scalia, Kennedy, Breyer, and Alito, J.J.; Sotomayor, J., dissenting, joined by Ginsburg, J.

TITLE: Continental Enterprises, Inc. v. Cain
INDEX NO.: V.4.
CITE: (3/29/79), Ind. App., 387 N.E.2d 86
SUBJECT: Retroactivity -- determining intent of legislature
HOLDING: IC 32-5-3-1 provides in part that in all cases where, heretofore or hereafter, lands belonging to landowner or to landowners in this state, shall have been shut off from public highway . . . & owner or owners of lands thus affected cannot secure easement or right-of-way on & over lands adjacent thereto . . . shall have such right to easement established as was of necessity. Here, plaintiff, owner of peninsula formed with lake when State dammed river, sought to acquire easement by condemnation over only unsubmerged land adjoining peninsula. Tr. Ct. entered judgment for D & on appeal plaintiff argued that Tr. Ct. was not justified in attempting to ascertain intent of legislature in regard to statute's retroactive applicability. Specifically, Tr. Ct. pointed to use of word "heretofore" in statute as being sufficient to demonstrate intent of retroactivity. Ct. held that language chosen by legislature did not mandate unlimited retroactivity, & therefore Ct. was correct in attempting to determine legislature's intent within confines of constitution. Held, judgment for D affirmed.

TITLE: Davis v. State
INDEX NO.: V.4.
CITE: (1st Dist. 6/18/84), Ind. App., 464 N.E.2d 926
SUBJECT: Retroactivity - statutory amendment
HOLDING: Amendment to Ind. Code 35-35-1-2 adds subsection (c), which provides that any variance from statutory requirements in advising D is harmless error, is not to be applied retroactively. Unless statute indicates legislative intent that it have retroactive application, a statute should be given only prospective application. [Citations omitted.] Ct. finds no legislative intent of retroactive application. Ct. distinguishes cases cited by state. There, amended rule or statute, although not in effect at time of offense, was effective at time of trial (bond on appeal; rape shield; speedy trial). Procedure effective at time of guilty plea controls. Woods, App., 426 N.E.2d 107. Held, denial of PCR reversed.

RELATED CASES: Rowold, 629 N.E.2d 1285 (D who is sentenced prior to effective date of statute which contains ameliorative provisions, may not take advantage of ameliorative provisions absent specific legislative intent for retroactive application); Dean 499 N.E.2d 185 (amendment to statute & Ct. rule, re more severe sentence following vacation of guilty plea, applies prospectively; card at X.6.b); Mounts 496 N.E.2d 37 (Indict 2(3); amendment of statute defining defective information is procedural, thus amendment applies to actions pending on, as well as after, its effective date; DeBruler DISSENTS).

TITLE: Dorsey v. United State

INDEX NO.: V.4.

CITE: (06-21-12), 132 S. Ct. 2321 (Sup. Ct. 2012)

SUBJECT: Fair Sentencing Act's more lenient sentences apply retroactively

HOLDING: The more lenient mandatory minimum provisions of the Fair Sentencing Act ("the Act") apply to Ds who committed a crack cocaine crime before the Act went into effect but were sentenced after its effective date, even though the Act did not address the issue. Cert. granted and Seventh Circuit reversed. BREYER, J., joined by KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, J.J.; SCALIA, J., DISSENTING, joined by ROBERTS, C.J., and THOMAS and ALITO, J.J. The case was consolidated with Hill v. United States, No. 11-5721.

TITLE: Grundy v. State

INDEX NO.: V.4.

CITE: (6/30/2015), 38 N.E.3d 675 (Ind. Ct. App 2015)

SUBJECT: Habitual offender revisions do not apply retroactively

HOLDING: The July 1, 2014, revisions to the habitual offender statute, Ind. Code § 35-50-2-8, do not apply retroactively to offenses committed prior to the effective date of new criminal code. If D had been sentenced according to the revised statute, he would have received a sentence totaling four years less than he received. He argued a person cannot have the status of being a habitual offender unless and until he has been convicted of the underlying felony, which occurred after the effective date of the criminal code revisions. Although habitual offender status is not a separate crime, nevertheless that status is inextricably attached to the date of the underlying crime. See Baurer v. State, 875 N.E.2d 744 (Ind. Ct. App 2007). Thus, Tr. Ct. properly enhanced D's sentence pursuant to the habitual offender statute in effect prior to July 1, 2014. Held, judgment affirmed.

TITLE: Hollingsworth v. State

INDEX NO.: V.4.

CITE: (2/22/2013), 987 N.E.2d 1096 (Ind. Ct. App 2013)

SUBJECT: D waived claim regarding retroactivity of amendment to public intoxication statute

HOLDING: 2012 amendment to public intoxication (P.I.) statute narrowed the definition of P.I. to include actions that endanger the person's life or that of other people; breaches the peace or is an imminent danger of breaching the peace; or harasses, annoys or alarms another person. Ind. Code. 7.1-5-1-3. Legislature approved the amendment to the P.I. statute nearly two months before D committed her offense, and the amendment took effect the day before D's trial.

On appeal, D argued that the statutory change was remedial and that not applying it in her case was fundamental error. Applying contemporaneous objection rule, Court held that the retroactivity issue was never raised at D's trial and the argument was therefore waived. Even assuming that there exists a constitutional right to the retroactive application of remedial statutes, the mere fact that a constitutional right is implicated is insufficient to satisfy the fundamental error rule. Absher v. State, 866 N.E.2d 350 (Ind. Ct. App 2007). Held, judgment affirmed.

TITLE: Metrish v. Lancaster

INDEX NO: V.4.

CITE: (5/20/2013), 133 S. Ct. 1781 (U.S. Sup.Ct. 2013)

SUBJECT: Retroactive application of decision taking away diminished capacity defense for D's second trial did not violate due process rights

HOLDING: D's due process rights were not violated where Michigan Supreme Court decision taking away the diminished capacity defense - which D had used at his first trial - was applied retroactively, thus barring D from using the defense at his second trial.

The jury in D's first trial rejected his diminished capacity defense and convicted him of murder. The conviction was vacated on habeas review based on a Batson claim. In the meantime, the Michigan Supreme Court rejected a line of Michigan Court of Appeals cases that validated the diminished capacity defense. See People v. Carpenter, 627 N.W.2d 276 (2001). Based on Carpenter, the judge in D's second trial ruled D could not use the defense. D was again convicted. Thereafter, the Michigan Court of Appeals ruled that the Tr. Ct. did not violate D's right to due process by retroactively applying Carpenter.

Under clearly established federal law, judicial "alteration of a common law doctrine of criminal law violates the principle of fair warning only where [the alteration] is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." Rogers v. Tennessee, 532 U.S. 451, 462 (2001) (quoting Bouie v. City of Columbia, 378 U.S. 347, 354 (1964)). Here, although many Michigan Court of Appeals decisions had recognized the defense, the Michigan Supreme Court had never addressed the issue until after D's first trial (but before his second trial). In rejecting the decisions of the Michigan Court of Appeals, the Michigan Supreme Court's ruling was not "unexpected and indefensible by reference to [existing] law." Rogers, 532 U.S., at 462. The ruling was foreseeable. Thus, retroactive application of Carpenter was not an unreasonable application of clearly established federal law, and D was not entitled to habeas corpus relief. Ginsburg, J., for the unanimous court.

TITLE: Moore v. State
INDEX NO.: V.4.
CITE: (4/22/2015), 30 N.E.3d 1241 (Ind. Ct. App 2015)
SUBJECT: Amended sentence modification statute governed petition
HOLDING: Tr. Ct. erred in finding it lacked authority to review D's petition to modify sentence under the 2014 amendment to Ind. Code § 35-38-1-17, which dispensed with the requirement of prosecutorial consent to any modification requested more than 365 days after a person began serving their sentence. D was sentenced before the 2014 amendment. However, that date does not control because the revised statute "implemented a procedural change to a procedural statute," did not change a Tr. Ct.'s power over a sentence, and simply "lifted a procedural barrier, [prosecutorial consent,] that prevented petitions from reaching the Tr. Ct. for review." See Willis v. State, 567 N.E.2d 1170, 1172 (Ind. Ct. App. 1991). State's argument that D seeks retroactive application of amended statute rests on erroneous assumption that date of D's conviction and sentence controls. Because the revised statute defines the process to modify a sentence, the date of the petition controls. Neither does the savings clause in the 2014 overhaul of the criminal code – in which the revised statute is found – mandate review of D's petition under the pre-2014 modification statute. The savings clause says the new version of the criminal code: 1) does not affect "penalties incurred; crimes committed, or proceedings begun" before July 1, 2014 and that, 2) the doctrine of amelioration does not apply. D's request does not affect the penalties incurred or crimes committed because it is filed under a statute defining the process to seek modification. The doctrine of amelioration does not apply because an ameliorative amendment to a statute is one that reduces the maximum penalty for a crime, see Palmer v. State, 679 N.E.2d 887, 892 N.4 (Ind. 1997), which the revised statute does not do.

Despite the Tr. Ct.'s error, D nonetheless is not entitled to relief on the merits of his petition to modify. While Tr. Ct. found it had no authority to consider the petition, it also found that even if it did, it would have denied the petition because of the seriousness of D's crimes and his criminal history. This is in accord with the Tr. Ct.'s discretion. Held, judgment affirmed. Robb, J., dissenting, finding that the amended statute is not procedural but substantive because it gives a Tr. Ct. a power it previously lacked: unilateral authority to modify a sentence at any time. Thus, because the revised statute is not procedural or remedial, the general rule against retroactivity applies. Also, the savings clause bars application of the revised statute to D's petition. Thus, the Tr. Ct. correctly found that because the prosecutor did not consent to the modification, it had no authority to consider D's petition.

RELATED CASES: Cox**,** 38 N.E.3d 702 (Ind. Ct. App 2015) (savings clause in Ind. Code 1-1-5.5-21 foreclosed doctirne of amelioration to D's habitual offender enhancement); Vazquez, (Ind. Ct. App 2015) (although the amended sentence modification statute applies to D, who committed his drug dealing offenses in 2005, the statute does not entitle him to relief because his petition for modification was untimely and it exceeded the authorized number of filings); Hobbs**,** 26

N.E.3d 983 (Ind. Ct. App 2015) (amended sentence modification statute did not apply retroactively if offense committed before July 1, 2014; neither does doctrine of amelioration apply); Carr, 33 N.E.3d 358 (Ind. Ct. App 2015) (pre-July 1, 2014 version of sentence modification statute applied to D's petition to modify his sentence for murder; thus, prosecutor's consent was required); Ellis, 29 N.E.3d 792 (Ind. Ct. App 2015); Johnson, (Ind. Ct. App 2015) (pre-July 1, 2014 version of sentence modification statute, 35-18-1-17, applied to convictions and sentences entered in 1997); Swallows, 31 N.E.3d 544 (Ind. Ct. App 2015) (amended sentence modification statute did not apply retroactively if offense committed before July 1, 2014; neither does doctrine of amelioration apply).

TITLE: Rhodes v. State
INDEX NO.: V.4.
CITE: (8-26-98), Ind., 698 N.E.2d 304
SUBJECT: Erroneous sentence - Life imprisonment without parole (LWOP)
HOLDING: D's sentence of LWOP was without statutory authorization & Tr. Ct. committed fundamental error when it sentenced D under statute which was not in effect at time of commission of crime. On date of offense, Ind. Code § 35-50-2-9 did not permit State to request sentence of LWOP. Sentence of LWOP was available only as alternative when State sought sentence of death, which here State had not. Sentence that exceeds statutory authority constitutes fundamental error. Bedwell, 481 N.E.2d 1090. Held, sentence vacated; D resentenced to term of 60 years.

TITLE: United States v. Madera
INDEX NO.: V.4.
CITE: 528 F.3d 852 (11th Cir. 2008)
SUBJECT: Statutory construction: Retroactivity improper without AG's recommendation
HOLDING: Eleventh Circuit Court of Appeals reversed a sex offender's conviction under the federal Sex Offender Registration and Notification Act for failing to register upon his relocation to a different state because his conviction occurred before the attorney general made the law retroactive. D was convicted of a sex crime in New York in November 2005. The following June, he moved to Florida, where he was arrested in October 2006 for failing to register as a sex offender as required by the Walsh Act, 42 U.S.C. §§ 16911 et seq., which was enacted in July 2006. Title I of the Act, known as SORNA, created the national sex offender registry. SORNA provides that, "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006." The attorney general issued an interim rule in February 2007 making SORNA retroactive regardless of when the offense took place. D's trial took place months before the attorney general issued the rule. The district court ruled that the registration requirement of SORNA was retroactive from the date of enactment. Court reversed, noting the attorney general's role with regard to retroactivity was not "advisory," as the district court concluded. The law explicitly says the attorney general "shall have the authority." The district court "clearly erred by usurping the role of the Attorney General in preemptively determining SORNA's retroactive application." Inasmuch as D was charged with failing to register in the gap between the act's enactment and the attorney general's declaration that it is retroactive, he cannot be prosecuted for violating the law during the time.

TITLE: Vartelas v. Holder
INDEX NO.: V.4.
CITE: (03-28-12), 132 S. Ct. 1479 (U.S. 2012)
SUBJECT: No retroactive application for stricter immigration law related to "admission" for persons with convictions
HOLDING: The portions of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") that toughened provisions governing admission of non-citizens guilty of criminal offenses is not to be retroactively applied to a person whose convictions were entered before the IIRIRA was passed.

Vartelas, a legal permanent resident since 1989, pled guilty to conspiring to make a counterfeit security, a minor felony, in 1994. As a legal permanent resident, he was free to take short trips abroad, even after his conviction. He regularly visited Greece, his homeland, to spend time with his elderly parents. The IIRIRA broadened the definition of "admission" to include a lawful permanent resident returning from a brief trip outside the country. When Vartelas returned from a 2003 trip to Greece, the government relied on the new definition to deny admission into the country, *citing* his 1994 conviction as a "crime involving moral turpitude." This subjected Vartelas to removal proceedings.

Laws are prospective in application unless Congress unambiguously calls for retroactive application of a law. Landgraf v. USI Film Products, 511 U.S. 244, 263 (1994). The presumption against retroactive application is "older than our Republic." Id at 265. Retroactive application of a law violates the presumption against retroactivity when it would "attach a new disability, in respect to transactions or considerations already past." Society for Propagation of Gospel v. Wheeler, 22 F. Cas. 756, 767 (No. 13,156) (CC NH 1814); see e.g., INS v. St. Cyr, 533 U.S. 289, 321 (2001).

The relevant provisions of the IIRIRA are not to be applied retroactively because its effect of placing travel restrictions on Vartelas and those similarly situated creates a "new disability." Once able to travel abroad to fulfill religious obligations or respond to family emergencies, Vartelas and those like him now face potential banishment, a severe penalty. See Padilla v. Kentucky, 130 S. Ct. 1473 (2010). This is especially harsh where it bars a person from visiting close family members, such as Vartelas's aging parents. GINSBURG, J., joined by ROBERTS, C.J., and KENNEDY, BREYER, SOTOMAYOR, and KAGAN, J.J.; SCALIA, J., DISSENTING, joined by THOMAS and ALITO, J.J. Cert. granted, Second Circuit reversed.

TITLE: Welch v. United States
INDEX NO.: V.4.
CITE: (4/18/2016), 136 S. Ct. 1257 (U.S. 2016)
SUBJECT: Johnson v. U.S. given retroactive effect
HOLDING: In Johnson v. United States, 135 S. Ct. 2551 (2015) the Supreme Court ruled that a sentence increase of five years to life under the residual clause of the Armed Career Criminal Act ("ACCA") was unconstitutional. Because Johnson announced a new substantive rule, it has retroactive effect to cases on collateral review. See Teague v. Lane, 489 U.S. 288 (1989).

Before Johnson was decided, D pleaded guilty to being a felon who had possessed a gun, subjecting him to a ten-year sentence. 18 U.S.C. 922(g), 924(a)(2). However, the ACCA increases a sentence to a mandatory fifteen years to life if a person has three or more prior violent felony convictions, § 924(e)(1). "Violent felonies" include convictions described in the ACCA's "residual clause" as offenses that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." §924(e)(2)(B)(ii). Johnson held the residual clause unconstitutional under the void-for-vagueness doctrine.

D was sentenced to fifteen years under the ACCA. Reviewing D's conviction on direct review, the Eleventh Circuit ruled D's prior Florida conviction qualified as a violent felony under the residual clause. D sought habeas relief under Johnson, but both the district and circuit courts denied his request for a certificate of appealability. Deciding whether Johnson should be applied retroactively resolves whether the lower courts erred in denying D's request for a certificate.

Johnson is to be applied retroactively to cases on collateral review because it announced a new substantive rule. Substantive rules alter "the range of conduct or the class of persons that the law punishes." Schriro v. Summerlin, 542 U.S. 348, 353 (2004). By striking down the residual clause, Johnson limited the substantive reach of the ACCA, altering "the range of conduct or the class of persons that the [ACCA] punishes." Schriro, at 353. Before Johnson, the ACCA applied to anyone possessing a firearm after three violent felony convictions, even if one or more of those convictions qualified only under the residual clause. Such a person faced fifteen years to life in prison. After Johnson, the same person is no longer subject to the ACCA and faces no more than ten years in prison. Thus, Johnson announced a substantive rule.

Because Johnson is retroactive, D should be granted a certificate of appealability, and the matter is remanded for further consideration. Held, cert. granted, Eleventh Circuit opinion vacated, and judgment reversed. Kennedy, J., joined by Roberts, C.J., and Ginsburg, Breyer, Alito, Sotomayor, and Kagan, JJ; Thomas, J., dissenting.

TITLE: Whittaker v. State
INDEX NO.: V.4.
CITE: (5/20/2015), 33/1063 (Ind. Ct. App 2015)
SUBJECT: Savings clause for criminal code revision not unconstitutional
HOLDING: The savings clause of the 2014 criminal code revision does not violate the Equal Privileges and Immunities Clause of the Indiana Constitution. D was charged in September 2013 with Class D felony theft and alleged to be a habitual offender. He pleaded guilty to the charges in September 2014 and was sentenced to an aggregate sentence of two years. On appeal, D claimed that the savings clause improperly prohibits the ameliorative sentencing statutes of the new criminal code to apply to certain offenders, including himself. He argued the savings clause unconstitutionally created two classes of offenders: those who committed their offenses before the new criminal code went into effect July 1, 2014, but were sentenced after that date, and those who committed their offenses after the July 1 effective date. Under the revised criminal code, D could face a lesser sentence for theft. D, in an act of free will, selected his offense date as August 31, 2013, thereby choosing to commit theft as a Class D felony subject to a sentence of six months to three years. By doing so, he differentiated himself from those offenders who committed the offense of theft after July 1, 2014. Thus, D is not similarly situated to those Ds who committed offenses after July 1, 2014, and, therefore, he has no viable equal privileges and immunities claim. Held, judgment affirmed.

TITLE: Wolfe v. State
INDEX NO.: V.4.
CITE: (4/28/77), Ind. App., 362 N.E.2d 188
SUBJECT: Retroactivity -- doctrine of amelioration
HOLDING: D pleaded guilty to rape on January 18, 1974. On that date, sentence for conviction of rape was indeterminate period of not less than two years nor more than twenty-one years. On same day D pleaded guilty he petitioned Tr. Ct. for examination as possible criminal sexual deviant. During period of time in which criminal sexual deviancy proceedings were pending, Indiana General Assembly amended rape statute, Ind. Code 35-13-4-3, & changed possible sentence from indeterminate period to determinate period of not less than two years nor more than twenty-one years, to be effective February 15, 1974, almost month after D had pleaded guilty. D was found not to be sexual deviant & was sentenced to prison on October 4, 1974, for indeterminate period of two to twenty-one years. D claimed that Tr. Ct. erroneously sentenced him by using statute in force at time of his conviction instead of amended statute in force at his sentencing. Ct. held that in view of fact that amendment changing punishment for rape from indeterminate to determinate sentence was not intended to be amelioratory, but expressed legislative intent that rapist be sent to prison & remain there for longer & more definite periods of time, Tr. Ct. properly sentenced D by using statute in force at time of his guilty plea. Held, conviction & sentence affirmed.

RELATED CASES: Schwass, 554 N.E.2d 1127 (D was not entitled to ameliorative effect of statutory amendment of robbery where amendment did not take effect until after D was sentenced); Watford, 384 N.E.2d 1030 (to take advantage of limited exception provided for ameliorative revisions & statutory punishments, D must have been sentenced after effective date of ameliorative amendment).

V. LEGISLATION/RULE MAKING

V.5. Preemption

TITLE: Alvers v. State
INDEX NO.: V.5.
CITE: (1st Dist. 2/18/86), Ind. App., 489 N.E.2d 83
SUBJECT: Preemption
HOLDING: Indiana's anti-racketeering statute is not preempted by federal statute prohibiting racketeer influenced & corrupt organizations (RICO). Preemption is judicially created doctrine based on Supremacy Clause of U.S. Const. Preemption is employed to reconcile exercise of authority by federal & state governments within single framework. State law must yield if Congress preempts particular field. Congress may preempt area by (1) expressing its intent to supplant state law or (2) regulating subject so pervasively that it completely occupies area. Here, Ct. finds federal RICO statute does not expressly preempt state law. In determining existence of non-express preemption, Ct. considers whether (1) area requires national uniformity; (2) there is evidence of Congressional design to preempt field; or (3) state statute actually & directly conflicts with federal provision. Ct. finds no conflict, no intent to preempt, & decides that federal RICO statute is designed to affect interstate/international business, whereas IN's statute deals with intrastate concerns. Held, no preemption.

TITLE: Arizona v. United States
INDEX NO.: V.5.
CITE: (06-25-2012), 132 S. Ct. 2492 (Sup. Ct. 2012)
SUBJECT: Most of Arizona immigration law preempted by federal law
HOLDING: Because Article I, § 8, cl. 4 of the U.S. Constitution gives Congress power to "establish a uniform Rule of Naturalization," Congress's power over immigration and alien status is broad; thus, most of the Arizona immigration law is preempted by the federal law. Section 3 of the Arizona law makes failure to comply with federal alien-registration requirements a misdemeanor. Section 5(C) makes it a misdemeanor for an unauthorized alien to seek or engage in work in Arizona. Section 6 lets state and local officers arrest without a warrant a person who the officer has probable cause to believe a deportable offense. Finally, section 2(B) requires officers conducting a stop, detention, or arrest to verify the person's immigration status.

Absent express preemption, a federal law preempts state law where Congress has determined that it alone must regulate a field of conduct. This intent may be inferred where regulation is "so pervasive . . . that Congress left no room for the States to supplement it" or where a "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Rice v. Santa Fe Elevator Corp., 331 U. S. 218, 230 (1947). Second, state laws are preempted when they are "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U. S. 52, 67 (1941).

Section 3 is preempted because it intrudes on alien registration, a field which Congress has reserved to itself. Section 5(C)'s criminal penalty is preempted because it is an obstacle to the federal regulatory system. Section 6 is preempted also because it also creates an obstacle to federal law. Although federal law allows state officers to help identify, apprehend, detain, or remove unauthorized aliens, it does not allow the unilateral decision to detain authorized by section 6.

At this stage, it was improper to enjoin section 2(B) before the state courts had an opportunity to interpret it without some showing that the section's enforcement actually conflicts with federal immigration law. Section 2(B) has three limitations: 1) a detainee is presumed not to be an illegal alien if he or she provides a valid Arizona driver's license or similar identification; 2) officers may not consider race, color, or national origin except as allowed by the United States and Arizona Constitutions; and 3) section 2(B) must be "implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens." If section 2(B) only requires state officers to conduct a status check during an authorized, lawful detention or after a detainee has been released, it would likely survive preemption. Cert. granted, Ninth Circuit affirmed in part, reversed in part. KENNEDY, J., joined by ROBERTS, C.J., and GINSBURG, BREYER, and SOTOMAYOR, J.J.; SCALIA, J., THOMAS, J., and ALITO, J., filed opinions CONCURRING IN PART, DISSENTING IN PART.

TITLE: Hory v. State
INDEX NO.: V.5.
CITE: (09-13-11), 954 N.E.2d 475 (Ind. Ct. App 2011)
SUBJECT: Preemption - truckers may be fined for failing to obey Indiana safety laws
HOLDING: Tr. Ct. did not err in imposing a fine on D, an operator of a semi-tractor and trailer, for failing to obey Indiana traffic safety laws. D illegally parked on a highway in violation of IND. CODE 9-21-16-1. On appeal, he argued that he was a trucker engaged in interstate commerce and should have been convicted under IND. CODE 8-2.1-24-18, a statute that incorporates federal motor safety regulations that pre-empt state law. Under federal preemption doctrine, State law must yield if Congress preempts particular field. There are three variations of preemption doctrine: 1) express preemption, which occurs when a federal statute expressly defines scope of its preemptive effect; 2) field preemption, which occurs when a pervasive scheme of federal regulations makes it reasonable to infer that Congress intended exclusive federal regulation of the area; and 3) conflict preemption, which occurs when it is either impossible to comply with both federal and state or local law, or where state law stands as an obstacle to the accomplishment and execution of federal purposes and objectives. Florian v. Gatx Rail Corp., 930 N.E.2d 1190 (Ind. Ct. App 2010).

Here, D did not establish an express or implied pre-emption of local traffic safety laws by federal motor safety regulations. And preemptive directive "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. ' 14501(c)(2)(A); see also City of Columbus v. Ours Garage and Wrecker Service, Inc., 536 U.S. 424 (2002) (historic police power of States not to be superseded by Federal Act unless that was clear and manifest purpose of Congress). Held, judgment affirmed.

V. LEGISLATION/RULE MAKING

V.6. Amelioration

TITLE: Bell v. State
INDEX NO.: V.6.
CITE: (4th Dist., 8-18-95), Ind. App., 654 N.E.2d 856
SUBJECT: Doctrine of amelioration applied to class C & D felony HO (HO) provisions
HOLDING: D was entitled to benefits of ameliorative provisions of HO statute as amended effective 07-1-93. In 1990, D was convicted of forgery, a class C felony, & 2 counts of attempted fraud, class D felonies. D was sentenced under old HO statute to 34 years incarceration. In 1993, Ind. Code 35-50-2-8 was amended so that maximum enhancement for class C & D felonies was reduced. In 1994, D's amended petition for post-conviction relief was granted, but p-c Ct. applied HO provisions in effect at time D committed crimes. Doctrine of amelioration provides for application of more lenient sentencing statute in effect at time of sentencing as opposed to statute in effect at time of crime. Lunsford v. State (1994), Ind. App, 640 N.E.2d 59. Doctrine is appropriate only if legislature intended amended statute apply to all persons to whom such application would be possible & constitutional.

Here, amendment to HO statute is truly ameliorative as applied to class C & D felonies, & as applied to D in particular. Present HO statute contains no express savings clause, & legislature failed to specify in 1993 amendment when punishment imposed should be applied. Enactment of ameliorative sentencing amendment is, in itself, sufficient indication that it be applied to all to whom such application would be possible & constitutional; thus application of general savings statute is unnecessary. Dowdell v. State (1975), Ind. App., 336 N.E.2d 699; Lewandowski v. State (1979), Ind., 389 N.E.2d 706. Held, reversed & remanded.

RELATED CASES: Turner, App., 870 N.E.2d 1083 (D was entitled to take advantage of more lenient sentencing available under new neglect of dependent statute; see full review at K.11.k.1); Turner, App., 669 N.E.2d 1024 (because D's trial & sentence were imposed before effective date of ameliorative statute, failure to raise doctrine of amelioration did not constitute IAC); Elkins, 659 N.E.2d 563 (Tr. Ct. erred in resentencing D pursuant to HO statute in effect at time he committed offense).

TITLE: Hellums v. State
INDEX NO.: V.6.
CITE: (11-30-01), Ind. App., 758 N.E.2d 1027
SUBJECT: Doctrine of amelioration not applicable to new crime
HOLDING: Doctrine of amelioration did not apply to Ind. Code 35-48-4-14.5, which criminalizes possession of chemical reagents or precursors with intent to manufacture controlled substances as class D felony where D was charged with class B felony dealing in controlled substance. Doctrine of amelioration allows D, who is sentenced after effective date of statute that provides for more lenient sentencing, to take advantage of more lenient statute rather than be sentenced under more harsh statute that was in effect when D was charged or convicted. Richards v. State, 681 N.E.2d 208. In 2000, Ind. Code 35-48-4-14.5 was added to Indiana Code as "new" section. Because new statute was not intended to reduce penalty for attempt to deal in methamphetamine, it is not an amendment, much less an ameliorative amendment, under which D should have been sentenced. Therefore, class B felony conviction was appropriate, not class D felony for possession of chemical reagents. Held, judgment affirmed.

TITLE: Lunsford v. State
INDEX NO.: V.6.
CITE: (5/31/94), Ind. App., 640 N.E.2d 59
SUBJECT: Amelioration -- look to general savings statute
HOLDING: Under doctrine of amelioration, D who is sentenced after effective date of statute providing for more lenient sentencing is entitled to be sentenced pursuant to statute rather than sentencing statute in effect at time of commission or conviction of crime. General rule is that law in effect at time crime was committed is controlling. Jackson, 275 N.E.2d 538. Here, D appealed sentence imposed by Tr. Ct. after determining that D was habitual offender following his convictions of battery resulting in bodily injury & of robbery resulting in bodily injury. D presented issue of whether Tr. Ct. erred in sentencing D on basis of habitual offender statute in force at time of offense & D's conviction rather than on basis of amended version in force at time of D's sentencing. D argued that doctrine of amelioration should apply, requiring court to employ newer standard. Court held that because legislature neither expressed that purpose of 1993 amendment was to lessen severity of its former penalty nor specified that amendment should be applied retroactively, it needed to look to general savings statute. This statute provides that repeal of any statute shall not have effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless repealing statute shall so expressly provide, & that such statute shall be treated as still remaining in force for purposes of sustaining any proper action or prosecution for enforcement of such penalty, forfeiture, or liability. Court held that under savings statute, provisions of old habitual offender statute must be applied to D's sentencing, & Tr. Ct. did not err in applying this statute. Held, judgment affirmed.

TITLE: Weatherford v. State
INDEX NO.: V.6.
CITE: (8/25/95), Ind. App., 654 N.E.2d 899
SUBJECT: Amelioration -- vindictive justice
HOLDING: D was convicted of unlawful dealing in controlled substance & of being habitual criminal. He appealed denial of his motion to correct erroneous sentence, contending that Tr. Ct. erred in sentencing him to term of life imprisonment under old statute, Ind. Code 35-8-8-1, rather than term of thirty years under new statute, Ind. Code 35-50-2-8, pursuant to doctrine of amelioration. Court noted that adoption of new statute as better means of serving constitutional purpose of our penal system does not mean that prior law did not serve that purpose. Therefore, application of prior law to those who committed crimes & were convicted & sentenced under that prior law does not constitute vindictive justice under Ind. Const. Art. I, section 18. Vicory, 400 N.E.2d 1380. Court applied general rule that law in effect when crime was committed controls sentencing. Rowald, App., 629 N.E.2d 1285. Court held that there was no error in sentencing D. Held, judgment affirmed.

TITLE: Winbush v. State
INDEX NO.: V.6.
CITE: (2nd Dist., 10-28-02), Ind. Ct. App, 776 N.E.2d 1219
SUBJECT: Amended suspendability statute - doctrine of amelioration
HOLDING: Tr. Ct. properly held that D's sentence for dealing in cocaine as Class A felony was nonsuspendable. Version of Ind. Code 35-50-2-2 in effect at time D committed offense prohibited Tr. Ct. from suspending any portion of sentence in excess of minimum sentence if felony committed was dealing in cocaine. D argued that Tr. Ct. should have sentenced him according to amended version of statute in effect at time of his sentencing, which would not have prohibited Tr. Ct. from suspending part of minimum sentence. Doctrine of amelioration allows D to be sentenced under more lenient provisions of statute in effect at time of sentencing rather than be sentenced under more harsh statute in effect at time offense was committed. Richards v. State, 681 N.E.2d 208 (Ind. 1997). However, case law has interpreted amendment to statute to be ameliorative only if maximum penalty under new version of statute is shorter than maximum penalty under old version of statute. Hellums v. State, 758 N.E.2d 1027 (Ind. Ct. App 2002). Ct. admitted it was difficult to hold that D should not receive advantage of reduced incarceration which would be available to him under amended version of statute. However, Ct. is bound by those cases in which Cts. have declined to expand doctrine of amelioration beyond application in only those instances in which maximum sentence is reduced. While it would seem logical that doctrine of amelioration be applied in this case, as D would have received more lenient sentence, Ct. may not expand its application until authorized to do so by Indiana S. Ct. Held, judgment affirmed.

TITLE: Wooley v. Comm'r of Motor Vehicles
INDEX NO.: V.6.
CITE: (1st Dist. 6/11/85), Ind. App., 479 N.E.2d 58
SUBJECT: Amelioration
HOLDING: Statute permitting certain habitual traffic offenders to obtain restricted licenses after 5 year period of reformation is applicable to persons convicted prior to its effective date (4/1/84), despite contrary language of saving clause. Ind. Code 9-12-2- 5(b). Here, D was convicted under Ind. Code 9-4-13-3(a)(2) (3 offenses in combination) [now Ind. Code 9-12-1-1(a) (2)]. Prior statute would not allow D to obtain restrictive license. D contends legislature intended to enact law, ameliorative in nature, to blunt economic hardship of 10-year suspension; thus, this statute would apply to persons under existing suspension as well as persons suspended after 4/1/84. Where there is irreconcilable conflict between body of act & saving clause, latter is rejected as void & of no effect. Shutt v. State ex rel. Cain (1909), 173 Ind. 689. Ct. finds emergency clause bolsters this interpretation. Held, Tr. Ct. ordered to overrule state's motion to dismiss D's petition for probationary license.

RELATED CASES: Rowold, 629 N.E.2d 1285 (D who is sentenced prior to effective date of statute which contains ameliorative provisions, may not take advantage of ameliorative provisions absent specific legislative intent for retroactive application). Harris 481 N.E.2d 382 (where D was sentenced prior to effective date reducing factual crime from Class A to Class B robbery, D cannot obtain advantage of ameliorative sentencing provisions, *citing* Watford 384 N.E.2d 1030); Pier, App., 446 N.E.2d 985 (D not entitled to benefit of amendment providing only DWI convictions after 6/30/78 be considered in escalating offense to Class D felony; Staton DISSENTS, arguing amendment was ameliorative in effect & should apply).

V. LEGISLATION/RULE MAKING

V.8. Court rulemakeing authority

TITLE: State v. Bridenhager
INDEX NO.: V.8.
CITE: (2/23/72), Ind., 279 N.E.2d 794
SUBJECT: Court rule-making authority
HOLDING: D attempted to appeal & Court dismissed motion. D then filed petition for rehearing. Issue presented was whether State procedural rules were in conflict with legislative enactments. Ct. held that it is vested with inherent authority to promulgate procedural rules, & legislative enactments in conflict therewith must succumb to paramount authority of S. Ct. Held, judgment affirmed.

Note: Ind. Code 34-5-1-1 states that Indiana S. Ct. is only authority which can adopt, amend or rescind rules of Ct. affecting procedural matters.

V. LEGISLATION/RULE MAKING

V.9. Administrative agency rulemaking authority

TITLE: State v. Driver
INDEX NO.: V.9.
CITE: (3d Dist. 7/30/87), Ind. App., 511 N.E.2d 11
SUBJECT: Rulemaking authority of administrative agency
HOLDING: Tr. Ct. erred in dismissing charges against D, based upon finding that regulation D allegedly violated was invalid. Here, D was charged with violating 310 I.A.C. 2-23-1, which establishes speed permissible on Lake George in Steuben County. Tr. Ct. held Dept. of Natural Resources (DNR) exceeded its rulemaking authority. DNR's rule-making authority is strictly limited to its enabling statute. VanAllen, App., 467 N.E.2d 1210. Tr. Ct. recognized Ind. Code 14-1-1-56 granted authority to DNR to promulgate regulations. Ct. finds Tr. Ct. was incorrect in its finding that regulation in question was inconsistent with other provisions of chapter. Ct. finds no inconsistency. Held, dismissal reversed & cause remanded.