W. PENALTIES/ DISABILITIES/ FORFEITURE AND REMEDIES

W.1.a.2. Disenfranchisement (Ind. Code 35-50-1-4, repealed 1986)

TITLE: Daugherty v. State
INDEX NO.: W.1.a.2.
CITE: (7/18/84), Ind. App., 466 N.E.2d 46
SUBJECT: Consequences of felony conviction -- disenfranchisement
HOLDING: D was convicted of official misconduct. As part of penalty for this crime, he was barred from holding public office for ten years. On appeal, D noted that Ind. Code 35-50-5-1, which provided for ten-year prohibition against holding public office, was repealed effective September 1981, one month prior to his conviction. D claimed that because subsequent statute, Ind. Code 35-50-5-1.1, could not be given retroactive effect, there was no statute in effect. Ct. held that because Ind. Code 35-50-5-1 was in effect when crime occurred, it was clearly applicable sentencing statute. Parsley, 401 N.E.2d 1360. Held, affirmed in part & reversed in part; Ratliff, J., concurring.

TITLE: Snyder v. King
INDEX NO.: W.1.a.2.
CITE: (12-15-11), 958 N.E.2d 764 (Ind. 2011)
SUBJECT: D not disenfranchised under Infamous Crimes Clause
HOLDING: Article II, 8, of the Indiana Constitution authorizes the General Assembly to disenfranchise "any person convicted of an infamous crime." D contended that because misdemeanor battery is not an "infamous crime," his constitutional rights were violated when his voter registration was canceled after he was convicted and incarcerated for that crime. Court agreed that misdemeanor battery is not an "infamous crime" but held that General Assembly has separate constitutional authority to cancel the voter registration of any person incarcerated following conviction, for the duration of the incarceration. Whether a crime is infamous for purposes of the Clause depends not on the nature of the punishment, but on the nature of the crime itself. Court refused to make a bright-line rule that all misdemeanors would not fall under the Infamous Crimes Clause. "An infamous crime is one involving an affront to the democratic governance or public administration of justice such that there is a reasonable probability that a person convicted of such a crime poses a threat to the integrity of elections." Here, Indiana Constitution was not violated when D was not allowed to vote during his incarceration, pursuant to Ind. Code. 3-7-13-4, 5(a) and 3-7-46-2. Fact that the statute cites the Infamous Crimes Clause as basis for its enactment, instead of the general police power, does not render it invalid.

W. PENALTIES/ DISABILITIES/ FORFEITURE AND REMEDIES

W.1.d Other

TITLE: Carachuri-Rosendo v. Holder

INDEX NO.: W.1.d.

CITE: (06-14-10), U.S., 130 S. Ct. 2577

SUBJECT: Simple drug possession may not count as an "aggravated felony" for purposes of immigration law when state conviction is not based on the fact of a prior conviction

HOLDING: For purposes of removal proceedings of a resident alien under the Immigration and Nationality Act, an "aggravated felony" must be based upon an offense for which the person was actually convicted and not an offense with which the person could have been charged. Petitioner was a legal permanent resident in Texas convicted of two minor drug possession misdemeanors and sentenced to an aggregate 30 days in jail. The second case could have been charged as a felony because of the prior drug possession conviction but was not. Court rejected the government's argument that since petitioner was eligible to be charged as a felon his second conviction should be treated as an aggravated felony for purposes of depriving him a discretionary remedy to avoid deportation. The Court concluded that the government's argument did not fit within an "everyday" understanding of the term "aggravated felony." The statutory language is to be read as requiring an actual and not just a potential conviction of a felony based on a prior drug offense. The Court noted by way of analogy that federal practice was to charge the aggravating prior felony as an element of the offense before recidivist enhancements would be applicable so as to afford an accused an opportunity to challenge the fact of the prior conviction itself. Noted also was the fact that the second of the minor offenses of which petitioner was charged would, if charged as a federal offense, not have been punished as a felony. Held, Fifth Circuit Court of Appeals' opinion at 570 F.3d 263 reversed; Scalia, J. CONCURRING; Thomas, J., CONCURRING.

RELATED CASES: Mellouli v. Lynch, 135 S. Ct. 1980 (2015) (state misdemeanor paraphernalia conviction did not require deportation); Moncrieffe v. Holder, 133 S. Ct. 1678 (2013) (marijuana conviction did not require automatic deportation because D possessed small amount - 1.3 grams - and received no remuneration for the drug); Kawashima v. Holder, 132 S. Ct. 1166 (2012) (filing false tax return under 26 U.S.C. § 7206 is a crime involving "fraud or deceit," thus qualifying it as an "aggravated felony," subjecting a person to deportation if loss to the government exceeds $10,000).

TITLE: Coleman v. Tollefson
INDEX NO.: W.1.d.
CITE: (5/18/2015), 135 S. Ct. 1759 (2015)
SUBJECT: Dismissal pending on appeal still counts as "3rd strike" under pauper status law
HOLDING: For purposes of a federal "three strikes" law that bars in forma pauperis ("IFP") status to a prisoner who has had three prior actions dismissed as frivolous, malicious, or legally insufficient, a prior dismissal counts as one of the three strikes even if the dismissal is still pending before an appellate court. See 28 U.S.C. § 1915(g).

D filed three federal lawsuits, which were dismissed on grounds enumerated in § 1915(g). While the third dismissal was pending on appeal, D sought IFP status on four new federal lawsuits he had filed. The District denied D's request, reasoning that the third dismissal counts as a strike even though D was still challenging the dismissal on appeal. The Sixth Circuit affirmed.

The plain, literal language of the statute supports the interpretation of the District and Circuit courts. The statute refers to "dismissals," not "affirmed dismissals." Further, in normal legal vernacular, the term "dismissal" does not include subsequent appellate action.

A literal reading of "was dismissed" and "prior occasions" is consistent with the statute's treatment of trial actions and appeals because the statute repeatedly treats them as distinct, separate stages of litigation. This approach is also consistent with the way the law treats judgments, which, unless stayed, take effect despite a pending appeal.

Finally, the statute's purpose favors a literal interpretation. It was created to "filter out the bad claims and facilitate the good." Jones v. Bock, 549 U.S. 199, 204 (2007). Under the D's view, he could file many more frivolous lawsuits while the appeal of the dismissal was pending.

There are two risks to the Court's approach. First, an erroneous dismissal could wrongly deprive IFP status to a litigant filing a lawsuit after the dismissal but before the erroneous dismissal was reversed on appeal. However, circuit courts have reversed district court dismissals on § 1915(g) grounds only twice.

The other risk is that under the Court's analysis, a person appealing a third dismissal could not obtain IFP status on appeal to challenge the dismissal, thus denying appellate review. However, this was not D's situation, so the issue was left for another day. Held, cert. granted, Sixth Circuit's opinion at 733 F.3d 175 affirmed. Breyer, J., for a unanimous Court

TITLE: Henderson v. United States
INDEX NO.: W.1.d.
CITE: (5/18/2015), 135 S. Ct. 1780 (2015)
SUBJECT: Federal law permits felon to transfer guns to third party
HOLDING: 18 U.S.C. §922(g), which bars convicted felons from possessing guns, does not categorically prohibit the felon from transferring the guns to a third party, such as a friend, subject to the reviewing court's satisfaction that the third party will not let the felon exert any influence over the guns. Here, D was charged with felony distribution of marijuana, see 21 U.S.C. §§841(a)(1), (b)(1)(D), and as a condition of bail, he surrendered his guns to the FBI. He pled guilty. Once released from prison, D asked the District Court to order the FBI to transfer his guns to a friend. The District Court denied the request, finding that such a transfer would give D constructive possession of the guns. The Circuit Court affirmed on the same grounds.

18 U.S.C. §922(g) does not bar all transfers of guns to third parties, as the government argues, no matter how independent the third party is of a felon's influence, unless the recipient is a licensed gun dealer or other third party who will sell the guns on the open market. The government's position conflates a felon's possession of guns, which the statute clearly does prohibit, with a felon's simple right "to alienate his property." The government's reading of the statute is too broad as it would prevent a felon from disposing his guns even in ways that would guarantee he never uses them again. The proper inquiry under the statute is not whether D plays a role in where his guns should go but instead whether D will have the ability to use of direct the use of the guns once they are transferred. Held, cert. granted, judgment of the Circuit Court of Appeals vacated (555 Fed. Appx 851), and remanded for consideration in accord with the Court's holding and analysis. Kagan, J., for a unanimous Court.

TITLE: Jennings, et al. v. Rodriguez, on behalf of class
INDEX NO.: W.1.d.
CITE: (2/27/2018), 138 S. Ct. 830 (2018)
SUBJECT: Detained aliens have no right to periodic bond hearing
HOLDING: Detained aliens have no right to periodic bond hearings during the course of their detention. See 8 U.S.C. § 1225(b); § 1226(a); § 1226(c). The most natural reading of §§1225(b)(1) and (b)(2) is that applicants for admission must be detained until certain proceedings have concluded. Until then, nothing in the statutory text imposes a limit on the length of detention, and neither provision says anything about bond hearings. Likewise, nothing in the statute event hints at a six month limit on detention as the Ninth Circuit found. Section 1226(c) is even clearer. By allowing release of aliens "only if" the Attorney General decides certain conditions are met, it reinforces the conclusion that aliens detained under its authority are not entitled to release under any circumstances other than those expressly recognized by the statute. Finally, nothing in §1226(a), which authorizes the Attorney General to arrest and detain an alien "pending a decision" on removal and which permits the Attorney General to release the alien on bond, supports the imposition of periodic bond hearings every six months in which the Attorney General must prove by clear and convincing evidence that continued detention is necessary. Held, cert. granted, Ninth Circuit Court of Appeals opinion at 804 F.3d 1060 reversed. Case remanded for consideration of constitutional claims in the first instance. Alito, J., delivered opinion except as to Part II. Roberts, C.J., and Kennedy, J., joined that opinion in full; Thomas and Gorsuch, JJ, joined as to all but Part II; Sotomayor, J., joined as to Part III–C. Thomas, J., filed opinion concurring in part and concurring in judgment, in which Gorsuch, J., joined except footnote 6. Breyer, J., dissenting, joined by Ginsburg and Sotomayor, JJ. Kagan, J., did not participate.

TITLE: Judulang v. Holder
INDEX NO.: W.1.d.
CITE: (12-12-11), 132 S. Ct. 476 (2011)
SUBJECT: Deportation policy was arbitrary and capricious
HOLDING: The federal government sought to deport a lawful permanent resident, who has lived here since 1974, based on a 1989 voluntary manslaughter conviction. Former Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), provided a "waiver of excludability," which let a non-citizen enter the country despite a criminal conviction. Courts have required such waivers to be available to lawful permanent residents facing deportation as well.

The Board of Immigration Appeals (BIA) ruled, and the Ninth Circuit affirmed, that a "crime of violence" was not "comparable" to any ground for exclusion, including the one for crimes involving moral turpitude. This made Judulang ineligible for Section 212(c) relief.

The Court held that a policy for deciding when resident aliens may seek relief from deportation under a now-repealed provision of immigration law is arbitrary and capricious. The Court ruled that the "comparable-grounds" approach was not reasonable. "Rather than considering factors that might be thought germane to the deportation decision, that policy hinges § 212(c) eligibility on an irrelevant comparison between statutory provisions."

> The comparable-grounds approach does not rest on any factors relevant to whether an alien (or any group of aliens) should be deported. *It instead distinguishes among aliens* – decides who should be eligible for discretionary relief and who should not – *solely by comparing the metes and bounds of diverse statutory categories in which an alien falls*. The result [has] no *connection to the goals of the deportation process or the rational operation of the immigration laws*." (Emphasis added). Held, certiorari granted, and judgment reversed (Kagan, J., with other Justices concurring).

TITLE: Sessions v. Dimaya
INDEX NO.: W.1.d.
CITE: (4/17/2018), (U.S. Supreme Court 2018)
SUBJECT: "Violent felony" definition for immigrant removal is unconstitutionally vague
HOLDING: The definition of "crime of violence" for purposes of mandatory removal of an immigrant who commits an aggravated felony is unconstitutionally vague. See 8 U.S.C 1101(a)(43) (removal statute); see also 18 U.S.C. 16(b) (definition of "crime of violence").

A lawful immigrant from the Philippines, D has lived in the United States since 1992. He has two residential burglary convictions, neither of which involved violence. Based on the convictions, the immigration court and the Board of Immigration Appeals ordered D removed from the United States. The 9th Circuit overturned the BIA's order, finding that Section 16(b) was unconstitutionally vague. It relied on Johnson v. United States, 135 S. Ct. 2551 (2015), where the Court found the Armed Career Criminal Act's similarly worded definition of "violent felony" was so vague that it violated due process.

18 U.S.C. §16(b) defines a "crime of violence" to encompass "any … offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Rather than assessing whether the particular facts of someone's conduct pose the substantial risk required under the statute, courts consider the overall nature of the offense, and ask "whether 'the ordinary case' of an offense poses the requisite risk." The Court concluded that defining the "ordinary case" under the "crime of violence" provision poses the same vagueness and due process problems, including unpredictability and arbitrariness, as those identified in Johnson. The Court also observed that even though this case is a civil matter (unlike Johnson), the same due process analysis applies because the penalty required by the statute – removal – is severe. Held, cert. granted, 9th Circuit opinion at 810 F.3d 1110 affirmed, and judgment reversed. Kagan, J., joined by Ginsburg, Breyer, Sotomayor, and Gorsuch, JJ; Gorsuch, J., concurring opinion and concurring in judgment; Roberts, C.J., dissenting, joined by Kennedy, Thomas, and Alito, JJ; Thomas, J., dissenting, joined by Kennedy and Alito, JJ.

TITLE: State v. Paredez
INDEX NO.: W.1.d.
CITE: 136 N.M. 533, 101 P.3d 799 (N.M. 2004)
SUBJECT: Counsel has Duty to Advise of Specific Immigration Consequences of Plea
HOLDING: Where guilty plea would put client within statutorily class of deportable aliens, making deportation a near certainty, trial counsel was ineffective in advising client simply that guilty plea "could affect" his immigration status. The New Mexico supreme held that defense counsel has an affirmative duty to determine the immigration status of their clients, and if a client is a non-citizen, counsel must advise the client of the specific immigration consequences of pleading guilty, including whether deportation would be virtually certain. The Court outlined three potential types of ineffectiveness in this context: (1) misinforming the defendant that deportation will not be a consequence of plea when it is in fact a possibility; (2) advising the client that he "could" or "might" be deported when deportation is a virtual certainty; and (3) giving no advice to an alien defendant on the immigration consequences of a guilty plea. Cf., e.g., U.S. v. Couto, 311 F.3d 179 (2d Cir. 2002) (only affirmative misrepresentation amounts to IAC in this context).

TITLE: United States v. Castleman

INDEX NO.: W.1.d.

CITE: 134 S. Ct. 1405 (U.S. S. Ct. 2014)

SUBJECT: State domestic assault conviction constitutes federal misdemeanor crime of domestic violence, thus barring D from possessing a gun

HOLDING: D, who pled guilty to a version of misdemeanor domestic assault in Tennessee state court, thereby committed a federal "misdemeanor crime of domestic violence" under 18 U.S.C. §922(g)(9), as his state court conviction was one involving "the physical use of force." The consequence is that D cannot possess a firearm. The case turns on what constitutes "the physical use of force."

The force need not be violent. A mere "offensive touching" as contemplated by common law battery will suffice. Although the Tennessee statute under which D was charged could theoretically apply to assaults not involving the use of force, the Court could determine if the crime had the requisite element of physical force by reviewing the indictment. As charged and pled, D necessarily caused bodily injury through the physical use of force. Held, cert. granted, 6th Circuit opinion at 695 F.3d 582 vacated, and judgment reversed and remanded. Sotomayor, J., for the Court, joined by Roberts, C.J., Kennedy, Ginsburg, Breyer, and Kagan, J.J.; Scalia, concurring in part and concurring in judgment; Alito, J., concurring in judgment, joined by Thomas, J.

RELATED CASES: Voisine, 136 S. Ct. 2272 (2016) (conviction for reckless domestic assault qualifies as misdemeanor crime of domestic violence under 18 U.S.C § 922(g)(9), making person convicted of such an offense ineligible to own a gun).

TITLE: United States v. Martinez-Martinez
INDEX NO.: W.1.d.
CITE: 468 F.3d 604 (9th Cir. 2006)
SUBJECT: Immigration - firing at residential structure not "crime of violence"
HOLDING: The Ninth Circuit U.S. Court of Appeals held that an Arizona conviction for discharging a firearm at a "residential structure" does not necessarily threaten the use of physical force against someone and thus does not qualify as a prior "crime of violence" for purposes of a steep sentence enhancement provided by the U.S. Sentencing Guidelines for aliens who illegally re-enter the country after a conviction. The commentary to the guideline, U.S.S.G. 2L1.2, defines "crime of violence" as including an offense "that has as an element the use, attempted use, or threatened use of physical force against the person of another." The statute under which the Defendant had previously been convicted makes it a crime to "knowingly discharge[] a firearm at a residential structure," defining residential structure as "a movable or immovable or permanent or temporary structure that is adapted for both human residence or loading," including "any building, vehicle, railroad car or place with sides and a floor that is separately securable from any other structure attached to it and that is being used for lodging, business or transportation." The Ninth Circuit had previously held that violation of a California statute prohibiting the discharge of a firearm at an "inhabited dwelling house" necessarily involved threatening behavior and thus amounted to a crime of violence, even if no one was actually home at the time. U.S. v. Cortez-Arias, 403 F.3d 1111 (9th Cir. 2005). The difference here, the Court said, is that the California courts had interpreted the statute at issue in Cortez-Ari*as* as requiring present occupancy of the structure, while the Arizona courts have interpreted for the purposes of second-degree burglary, a residential structure includes even one that is presently vacant and uninhabited or not in use pending occupation by a different occupant. The Ninth Circuit decided that the Arizona statute's focus on a structure's suitability for residency, as opposed to actual occupancy, means that it encompasses conduct different from that at issue in Cortez.

TITLE: Vartelas v. Holder
INDEX NO.: W.1.d.
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.

W. PENALTIES/ DISABILITIES/ FORFEITURE AND REMEDIES

W.2. RICO/Civil remedies for racketeering activities (CRRA) (Ind. Code 34-4-30.5); see also K.7.r

TITLE: Anderson et al. v. Wolford
INDEX NO.: W.2.
CITE: (12/16/92), Ind. App., 604 N.E.2d 659
SUBJECT: State has concurrent jurisdiction to consider civil claims under federal civil RICO
HOLDING: Action was brought to resolve dispute as to distribution of remaining funds of employee assistance fund set up to provide emergency relief to unemployed workers. Tr. Ct. dismissed federal RICO claim & distributed funds. Ds appealed, claiming that federal Cts. have exclusive jurisdiction over such RICO claims & that Tr. Ct. therefore erred in determining it had jurisdiction. Ct., *citing* to Tafflin, 493 U.S. 455, held that State Ct. had concurrent jurisdiction to consider civil claims under federal civil RICO. Held, dismissal of federal RICO Act claim affirmed.

TITLE: 4447 Corporation v. Goldsmith
INDEX NO.: W.2.
CITE: (3/2/87), Ind., 504 N.E.2d 559
SUBJECT: Civil remedies for RICO activities -- adult bookstore & contents can be seized
HOLDING: Appeals were taken from Circuit Ct. denying motions to vacate injunctive orders providing for padlocking of adult bookstores & seizure of contents thereof. Ct. App. held that Indiana's RICO statute was unconstitutional & State petitioned to transfer. Ct. stated that before addressing questions certified for interlocutory appeal, it had to analyze issue found by Ct. App. to be dispositive, where the RICO/CRRA statutory scheme as it pertains to predicate offense of obscenity violates First & Fourteenth Amendments to United States Constitution. Ct. held that First & Fourteenth Amendments were not violated because purpose of statutory scheme is to compel forfeiture of assets acquired through racketeering activity, regardless of nature of assets seized. Held, transfer granted, opinion of Ct. App. vacated & causes remanded; DeBruler, J., dissenting.

TITLE: L.E. Services, Inc. v. State Lottery Commission of Indiana
INDEX NO.: W.2.
CITE: (1/31/95), Ind. App., 646 N.E.2d 334
SUBJECT: Civil remedies for RICO activities -- aggrieved party
HOLDING: Lottery commission brought action against vendor which proposed to offer out- of-state lottery tickets for purchase by state residents, alleging violations of anti-gambling laws & state lottery Statute. Tr. Ct. issued restraining order against vendor, entered partial summary judgment in favor of commission, & denied vendor's summary judgment motion. Vendor brought interlocutory appeal, claiming that Commission was not "aggrieved party" within meaning of Indiana Civil Remedies for Racketeering Activity Act (CRRA). Ct. held that pursuant to CRRA, aggrieved person is person who has interest in property or in enterprise that either is object of corrupt business influence or has suffered damages or harm as result of corrupt business influence. Facts established that Commission was aggrieved party within meaning of CRRA in that Commission is charged by statute to maintain integrity & dignity of Hoosier Lottery & security division of Commission is charged with responsibility of investigating violations of lottery rules & taking steps necessary to ensure security & integrity of operation of lottery. Held, entry of partial summary judgment in favor of Commission & denial of vendor's summary judgment motion affirmed.

W. PENALTIES/ DISABILITIES/ FORFEITURE AND REMEDIES

W.3. Property forfeiture

TITLE: Abbott v. State

INDEX NO.: W.3.

CITE: (03/30/2022), Ind. Ct. App., 183 N.E.3d 1074

SUBJECT: In civil forfeiture proceedings, forfeited funds cannot be used for defense-related expenses

HOLDING: In civil forfeiture cases, specifically the racketeering forfeiture statute, owners may not use seized cash for defense-related expenses. Here, the State moved to forfeit four firearms and more than $9,000 in cash from Defendant that was found during a search warrant. Defendant was suspected of dealing drugs and the State designated evidence that he had sold methamphetamine and other narcotics to undercover law enforcement during two controlled buys. Defendant unsuccessfully requested the appointment of counsel at public expense for the forfeiture proceeding, as well as a transcript of proceedings on appeal. During a hearing on the State's motion for summary judgment, Defendant claimed the money found in his pocket was lawfully obtained and was set aside to purchase a motorcycle the same day he was arrested. The sale had been postponed, he said, and he simply had not taken the cash out of his pocket. Also, he said, he was employed leading up to his arrest, and his 2015 tax documents showed two sources of lawful wages collectively exceeding $20,000. The Indiana Supreme Court reversed the trial court's summary judgment finding for the State, finding that Defendant's showing of lawful income and testimony that the cash was for a lawful purpose created enough conflicting inferences to preclude summary judgment. Finally, the Court affirmed the denial of Defendant's request for appointed counsel, stating even if exceptional circumstances may have existed, the trial court did not err in its decision. Held, transfer granted, Court of Appeals' opinion at 164 N.E.3d 736 vacated, judgment affirmed in part and reversed in part. Rush, C.J., concurring in part and dissenting in part, would find an abuse of discretion from the trial court's denial of counsel, noting that defendants like the one in this case, who are incarcerated, indigent, and facing civil-forfeiture need not be treated akin to all other civil litigants under the civil appointment of counsel statute.

TITLE: Buter v. State
INDEX NO.: W.3.
CITE: (12-27-19), Ind. Ct. App., 140 N.E.3d 870
SUBJECT: Legislative amendments to Indiana's civil forfeiture scheme did not constitute ex post facto law and did not defeat a pre-existing forfeiture action in state court
HOLDING: In 2018, the Legislature passed a wide-ranging civil forfeiture reform bill that was designed to increase due process protections for property owners whose property is seized. Among those protections is a requirement for a trial court to find probable cause to support a seizure within seven days of law enforcement taking the property. The legislation also built-in hardship provisions for "innocent owners" and created a disbursement mechanism for forfeiture proceeds.

Here, without addressing the question of whether the 2018 Amendments cured the constitutional infirmities identified by Washington v. Marion County Prosecutor, et al., 2017 U.S. Dist. LEXIS 132235 (U.S. Dist. Court, S. Ind. 2017), Court had "little hesitation in at least concluding that the 2018 Amendments were all procedural in nature," and applying them to the seizure of the car in this case does not constitute an ex post facto law. Court expressed no opinion on question of whether the 2018 amendments cured the constitutional defects of Ind. Code chapter 34-24-1, as Butler failed to raise the issue but did not. He failed to carry his burden to establish that the seizure of the Pontiac was in any way improper. Held, grant of summary judgment to the government, forfeiture of 2004 Pontiac and $236 affirmed.

TITLE: Eminger v. State

INDEX NO.: W.3.

CITE: (2-10-23), Ind. Ct. App., 204 N.E.3d 926

SUBJECT: Forfeiture -- State's successive Trial Rule 60(B) motion could not serve as a substitute for a direct appeal

HOLDING: Trial court abused its discretion in granting the State's motion for relief from judgment under Indiana Trial Rule 60(B)(8), which the State filed after the court had previously granted Defendant's own Rule 60(B) motion. Defendant's T.R. 60(B) motion claimed that he had not been properly served notice of the State's motion to transfer seized currency to the U.S. Department of Justice and that the transfer order violated the procedures outlined in Indiana Code 34-24-1 on the disposition of seized property. Court of Appeals held that granting Defendant's T.R. 60(B) motion was correct because he was not afforded due process protections in the transfer proceeding. And instead of presenting a previously unknown or unknowable procedural or equitable basis for relief from the trial court's judgment on Defendants motion, the State simply rehashed its original arguments against Defendant's motion. The proper procedure for the State to challenge the trial court's order granting Defendant's T.R. 60(B) motion was to timely appeal the trial court's judgment pursuant to T.R. 60(C), not to wait more than three months before filing its own 60(B) motion. The State's only "new"" argument-- that the U.S. had afforded Defendant his due process protections in the forfeiture proceeding-- was of no force or effect because it did not address the due process problems in the transfer proceeding. Thus, this "new" argument by the State was not a sufficient basis from which the trial court could have revisited its order granting Defendant's Trial Rule 60(B) motion. Held: judgment on State's T.R. 60(B) motion reversed, trial court's decision on Defendant's motion is reinstated on its merits and remanded with instructions for hearing to allow Defendant to challenge the lawfulness of the State's seizure of currency. Should the trial court on remand determine that the State's seizure of the currency was unlawful, the State shall "reimburse" Defendant "instanter," and the State may then "choose to try to recoup that money from the federal government." Lewis v. Putnam Cnty. Sheriff's Dep't, 125 N.E.3d 655, 6600 (Ind. Ct. App. 2019).

TITLE: Katner v. State
INDEX NO.: W.3.
CITE: (9-20-95), Ind., 655 N.E.2d 345
SUBJECT: Forfeiture requires nexus between property & offense
HOLDING: Indiana's forfeiture statute, Ind. Code 34-4-30.1-1, requires State to show existence of "more than an incidental or fortuitous" relationship between property sought in forfeiture & underlying offense. To assure that adequate nexus exists, State must demonstrate by preponderance of evidence that property sought in forfeiture was used "for the purpose of committing, attempting to commit, or conspiring to commit" an enumerated offense under Ind. Code 34-4-30.1-1. Ct. App. decision in Caudill v. State (1993), Ind. App., 613 N.E.2d 433, is incorrect to extent it supports forfeiture based on mere possession of illegal substance & simultaneous use of vehicle. Here, evidence was insufficient to show that D's mere possession of cocaine in his car constituted "transportation" of drug for purpose of possessing drug. Nexus requirement is means to guarantee that government is seizing actual instruments of illegal drug trade. Depriving persons of their property unrelated to drug trade will do little to advance Legislature's intent to curb expanding drug commerce. Held, transfer granted, Ct. App. decision at 640 N.E.2d 388 affirmed & adopted; Sullivan, J., dissenting.

RELATED CASES: Serrano, 946 N.E.2d 1139 (Ind. 2011) (State's evidence did not compel conclusion that the presence of cocaine was anything more than "incidental or fortuitous").

TITLE: Lipscomb v. State

INDEX NO.: W.3.

CITE: (4th Dist., 11-28-06), Ind. App., 857 N.E.2d 424

SUBJECT: Forfeiture - insufficient evidence; statutory presumption does not apply to money found on arrestee

HOLDING: Ct. reversed forfeiture order where State failed to prove by a preponderance of the evidence that the $1952 in D's possession at the time of his arrest was money received in consideration of his dealing cocaine. Pursuant to Ind. Code 34-24-1-1(d), money found on or near a person who is committing, attempting to commit, or conspires to commit any of the specifically enumerated offenses is presumed forfeitable. Caudill v. State, 613 N.E.2d 433 (Ind. Ct. App 1993). Contrary to State's assertion, the statutory presumption does not apply simply because money is found on or near a person when that person is being arrested for dealing in cocaine. Rather, for the presumption to apply, the money must be found at the same time the person is committing, attempting to commit, or conspiring to commit any of the specifically enumerated drug offenses.

Here, police arrested D based on events that occurred more than two weeks prior. Moreover, at time of his arrest when money was found, D was committing crime of possession of cocaine as a class D felony, which is not one of the offenses enumerated in the statute. It was unreasonable to infer from evidence presented at forfeiture hearing that money in D's possession at time of his arrest was more likely than not derived from dealing cocaine. Held, judgment reversed.

TITLE: Sandefur v. State
INDEX NO.: W.3.
CITE: (1st Dist., 1-9-96), Ind. App., 662 N.E.2d 186
SUBJECT: Forfeiture & criminal prosecution - no double jeopardy violation
HOLDING: State's prosecution of forfeiture proceedings against D did not bar criminal prosecution for dealing marijuana & related offenses. Double jeopardy is implicated to extent that civil sanction may not fairly be characterized as remedial, but only as deterrent or retribution. United States v. Halper, 490 U.S. 444 (1989). Here, police officers seized $2,569.00 in cash & 1977 Chevrolet van from D upon his arrest. Approximately $1,400.00 of seized cash was "buy money" which State had provided confidential informant to purchase marijuana from D. State initiated forfeiture proceedings against cash & van seized from D. By agreement, van was transferred to lienholder, & after hearing, Tr. Ct. ordered $1,500 of cash to be forfeited & ordered $1069.00 balance to be returned to D. Under these circumstances, Tr. Ct. did not abuse discretion in determining that $1,500.00 forfeiture was remedial & not punishment. Forfeiture bore rational relation to goal of compensating State for its expenses. Nearly all of money ordered forfeited had been furnished by State for controlled buys, & over $1,000.00 in cash was returned to D. Held, judgment affirmed; Sullivan, J., concurred in result.

TITLE: Sargent v. State
INDEX NO.: W.3.
CITE: (3/24/2015), 27 N.E.3d 729 (Ind. 2015)
SUBJECT: Car forfeiture reversed where owner arrested for iPhone theft inside store
HOLDING: Ind. Code § 34-24-1-1(a)(1)(B) permits forfeiture of vehicles "if they are used or are intended for use by the person or persons in the possession of them to transport or in any manner to facilitate the transportation of" stolen property worth $100 or more. Here, Tr. Ct. granted forfeiture of Sargent's car after she was convicted of Class D felony theft for trying to steal four iPhones from a Wal-Mart return center where she worked. Sargent lent the car to a friend earlier in the day and asked the friend to be at the store a few minutes before her work shift was over, but Sargent was stopped and searched before she left work.

On transfer from Court of Appeals' opinion affirming forfeiture, majority of Indiana Supreme Court found that Sargent's car was wrongly seized as a result of her theft conviction. Sargent had neither actual nor constructive possession of her car at the time it was "used or intended for use" to "facilitate the transportation of stolen property." At all relevant times Sargent was detained in the store and thus had no physical control over the vehicle. Held, transfer granted, Court of Appeals' opinion at 985 N.E.2d 1108 vacated, reversed and remanded with instructions to enter an order granting summary judgment in Sargent's favor. David, J., joined by Massa, J., dissenting, noted that Sargent exerted dominion and control over car by instructing her friend to return so that she could drive home at the end of her shift. Massa, J., dissenting separately to comment on discretion the State enjoys in determining when to seek asset forfeiture. "When authorities overreach, the judiciary is tempted to impose remedies that do justice in a particular case but may do harm to the law over time."

TITLE: State v. Klein
INDEX NO.: W.3.
CITE: (2nd Dist., 12-10-98), Ind. App., 702 N.E.2d 771
SUBJECT: Double jeopardy (DJ) - criminal prosecution following in rem civil forfeiture
HOLDING: DJ principles prohibited criminal prosecution of D for attempted rape & criminal confinement following civil forfeiture of his car. Sole basis of forfeiture was that D drove his car to & from complaining witness's house on date he allegedly committed attempted rape and/or criminal confinement, which are two of enumerated offenses in Ind. Code 34-4-30.1-1. Statute warrants forfeiture of vehicle used in escape from such offenses. D provided clearest proof that despite civil nature of forfeiture statute, sanction in this case was so punitive that forfeiture transformed from civil to criminal. Because there was no purpose for forfeiture of D's car other than punishment, jeopardy attached upon forfeiture & subsequent criminal proceedings against D constituted multiple punishments for same offense in violation of DJ.

However, criminal prosecution for attempted criminal deviate conduct & criminal deviate conduct charges was not precluded by DJ because those offenses are not included in list of offenses warranting forfeiture under Ind. Code 34-4-30.1-1. Bryant, 660 N.E.2d 290. Held, Tr. Ct.'s dismissal with prejudice of attempted murder, attempted rape & criminal confinement charges affirmed; dismissal of attempted criminal deviate conduct & criminal deviate conduct charges reversed.

Note: See Klein, 719 N.E.2d 386, Sullivan, J. & Shepard, C.J., dissenting from denial of transfer.

RELATED CASES: Davis, App., 819 N.E.2d 863 (D failed to present "clearest proof" that forfeiture proceedings in this case were so punitive in form & effect as to render them criminal); Willis, App., 806 N.E.2d 817 (Tr. Ct. did not err in denying D's motion to dismiss operating while intoxicated (OWI) charge, following forfeiture of $1,300 found on D & seized by police at time of his arrest; DJ principles do not preclude use of same facts to support both a forfeiture proceeding for money confiscated by police & a subsequent criminal investigation); C.R.M., App., 799 N.E.2d 555 (no error in denying D's motion to dismiss State's delinquency petition alleging possession of marijuana, following State's forfeiture of $550 found in D's wallet; Klein erroneously compared expenditure of law enforcement resources with value of D's property); O'Connor, App., 789 N.E.2d 504 (Ct. App. questioned viability of Klein); Lewis, App., 755 N.E.2d 1116 (impoundment & holding of D's vehicle did not constitute "punishment;" unless & until Tr. Ct. entered judgment ordering D's car forfeited, D had not been punished as result of forfeiture proceedings).

TITLE: Ziegler v. State
INDEX NO.: W.3.
CITE: (1st Dist., 1-9-03), Ind. App., 780 N.E.2d 1169
SUBJECT: Forfeiture - State's filing deadlines
HOLDING: Tr. Ct. erred in denying D's motion to dismiss State's civil complaint for forfeiture of cash & handgun that were seized by police. Filing of forfeiture action by State is covered by one of three mandatory time period deadlines: 1) 90 days after receiving written notice from owner demanding return of seized property; 2) 180 days after property is seized; & 3) before statute of limitations runs for prosecuting offense. The last time period deadline will only occur when less than 180 days exist between seizure & limit to prosecute set forth in statute of limitations. These time periods do not offer any options to State. Ct. rejected State's argument that it had option to file its complaint within period that a prosecution may be commenced for offense that is basis for seizure. Held, judgment reversed.

W. PENALTIES/ DISABILITIES/ FORFEITURE AND REMEDIES

W.3. Property forfeiture

W.3.a. Vehicles (Ind. Code 34-4-30.1)

TITLE: Caudill v. State
INDEX NO.: W.3.a.
CITE: (5/12/93), Ind. App., 613 N.E.2d 433
SUBJECT: Forfeitures -- connection between seized vehicle & drug violation
HOLDING: Claimant appealed from order of Tr. Ct. forfeiting his vehicle & cash found on his person after arrest for drug possession. D challenged sufficiency of Tr. Ct.'s forfeiture order by asserting that in order to bring forfeiture action under Ind. Code 34-4-30.1-4, State must prove substantial connection between seized property & drug violations. Ct. held that because evidence showed D had cocaine in his possession while he drove Bronco, & that State alleged in its forfeiture complaint that D was committing offense of either dealing in cocaine and/or possession of cocaine as A, B, or C felony, these facts established sufficient basis under Ind. Code 34-4- 30.1-1(a) (1) (A) (vi) to justify forfeiture of D's Bronco. In addition, Ind. Code 34-4-30.1-1(c) provides that money found on or near person who is committing, attempting to commit, or conspiring to commit any of specifically enumerated offenses is presumed forfeitable. Held, order of forfeiture affirmed; Baker, J., concurring & dissenting.

TITLE: Curtis v. State
INDEX NO.: W.3.a.
CITE: (1/29/2013), 981 N.E.2d 625 (Ind. Ct. App. 2013), *aff'd on reh'g*, 987 N.E.2d 523
SUBJECT: Forfeiture statute does not apply to fraud or copyright infringement cases
HOLDING: After D pled guilty to fraud for selling pirated movies out of his truck, Tr. Ct. erred in denying his Trial Rule 60(B) motion for relief from judgment following forfeiture of his truck. Forfeiture was based on assumption that the content of the pirated movies sold out of the truck constituted "stolen or converted property" pursuant to Ind. Code 34-24-1-1(a)(1)(B). However, copyright infringement does not constitute theft under Dowling v. United States, 473 U.S. 207, 105 S. Ct. 3127, 87 L.Ed.2d 152 (1985). Moreover, statute clearly allows forfeiture in cases of theft or conversion but says nothing about copyright infringement or fraud. As forfeiture of truck was not authorized by statute, D has established extraordinary circumstances justifying relief. Held, judgment reversed.

TITLE: Florida v. White
INDEX NO.: W.3.a.
CITE: 526 U.S. 559; 119 S. Ct. 1555; 143 L.Ed.2d 748 (1999)
SUBJECT: Seizure of Forfeitable Property from Public Place -- No Warrant Necessary
HOLDING: Where police officers have probable cause to believe that automobile is forfeitable contraband, they do not need warrant to seize it from public place. Here, police observed D using car to deliver cocaine, giving them probable cause to believe it was forfeitable under Florida's Contraband Forfeiture Act, Fla. Stat. §932.701. After arresting D two months later on unrelated charges, officers seized his car from his employer's parking lot &, while conducting an inventory search, found cocaine. D moved to suppress because officers who seized his car did not have a warrant. The Tr. Ct. *denied* his suppression motion, but the Florida Supreme Court reversed. The U.S. Supreme Court reverses this holding, looking first at historical context. At time 4th Amendment was adopted, Congress authorized warrantless searches of ships & seizure of goods subject to duties, leading Court to conclude that Congress distinguished between goods concealed in a dwelling house or similar place, & like goods concealed in a movable vessel & capable of being put out of reach of a search warrant. See Carroll v. U.S., 267 U.S. 132 (1925). Although police lacked probable cause to believe that D's car contained contraband, they had probable cause to believe that the car itself was contraband, & concerns about movement of a vehicle itself are as weighty as concerns about the movement of goods concealed inside. 4th Amendment jurisprudence has also consistently accorded law enforcement officers greater latitude in exercising their duties in public places. Here, because police seized D's car from a public area, the warrantless seizure did not involve any invasion of his privacy. Under these circumstances, officers did not need warrant to seize D's car.

TITLE: Mesa v. State
INDEX NO.: W.3.a.
CITE: (3/25/2014), 5 N.E.3d 488 (Ind. Ct. App. 2014)
SUBJECT: Summary judgment proper in forfeiture proceeding
HOLDING: Tr. Ct. properly granted summary judgment to State without a hearing on complaint to forfeit D's 2004 Hummer. State designated evidence the Hummer was a proceed of cocaine dealing. D's response designated no evidence to create material issues of fact but merely attacked the credibility of the State's affiants and demanded an evidentiary hearing.

Forfeiture actions may be disposed through summary judgment. Curtis v. State, 981 N.E.2d 625 (Ind. Ct. App. 2013); Ivy v. State, 847 N.E.2d 963 (Ind. Ct. App. 2006). Entry of summary judgment was proper because by failing to designate any evidence, D tried to defeat the State's motion by resting on the denials in his initial responsive pleading. This does not suffice. "[A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Ind. Trial Rule 56(E). It was also proper to grant the State's motion for summary judgment without a hearing because by requesting an "evidentiary hearing," D was asking for a full trial, not a summary judgment hearing, where the scope of the hearing is restricted to argument about whether the designated evidence creates material issues of fact and whether the movant is entitled to judgment as a matter of law. Held, judgment affirmed.

TITLE: One 1968 Buick, 4 Door v. State
INDEX NO.: W.3.a.
CITE: (4th Dist., 08-24-94), Ind. App., 638 N.E.2d 1313
SUBJECT: Forfeiture, ownership interest
HOLDING: Ownership of vehicle State wishes to have forfeited is to be determined at time of vehicle's seizure not time of commission of underlying arrest, & State must show by preponderance that owner of vehicle at that time knew or had reason to know vehicle had been used in commission of offense. Here, offenses at issue occurred in February & March 1992, vehicle was seized at time of D's arrest on September 17, 1992, & BMV records indicated car was transferred to D's brother on September 15, 1992. Ct. looked at forfeiture statute, Ind. Code 34-4-30.1-4, & found it ambiguous as to when the ownership interest in contested vehicle was to be determined, i.e., whether it applied to time forfeiture complaint was filed, time vehicle was seized, or time offense was committed. After analysis of various other statutes & case law, Ct. concluded proper interpretation was to apply ownership at time of seizure. Because State then had to show owner at that time knew or had reason to know of vehicle's involvement in criminal activity, & there was no evidence presented here that D's brother (owner at that time) had such knowledge, Ct. found evidence was insufficient to support seizure of vehicle. Decision contains good language about need to narrowly construe forfeiture statutes.

TITLE: State v. Timbs
INDEX NO.: W.3.a.
CITE: (10/28/2019), 134 N.E.3d 12 (Ind. 2019)
SUBJECT: Framework for determining if property forfeiture is excessive under Eighth Amendment
HOLDING: On remand from the United States Supreme Court, which unanimously reversed the Indiana Supreme Court's prior holding at 84 N.E.3d 1179 and held that the Eighth Amendment's Excessive Fines Clause applies to the states through the 14th Amendment. In its first Timbs decision, the Indiana Supreme Court allowed the state to move forward with the forfeiture of Timbs' $40,000 Land Rover because the U.S. Supreme Court had not specifically ruled that the Excessive Fines Clause had been incorporated to the states. Here, as with its first Timbs ruling, the Indiana Supreme Court did not decide on remand whether the forfeiture of Timbs' vehicle under Indiana Code § 34-24-1-1(a)(1)(A) is excessive. But relying on Austin v. United States, 509 U.S. 602 (1993), the Court held that the forfeiture of Timbs' vehicle is a "fine" under the Eighth Amendment. In developing a framework for trial courts to use when evaluating a forfeiture under the Eighth Amendment, the Court considered Austin and United States v. Bajakajian, 524 U.S. 321 (1998). Rejecting the State's argument that the excessiveness question turns only on whether the property was an instrumentality of the crime, the majority instead held that "the Excessive Fines Clause includes both an instrumentality limitation and a proportionality one for use-based in rem fines." That holding is supported by precedent history and the text of the Excessive Fines Clause. Specifically, to stay within the bounds of the Excessive Fines Clause, a use-based fine must meet two requirements: (1) the property must be the actual means by which an underlying offense was committed; and (2) the harshness of the forfeiture penalty must not be grossly disproportional to the gravity of the offense and the claimant's culpability for the property's misuse. A use-based fine will be considered excessive if the property was not an instrumentality of the underlying crimes. The relevant crimes "are those on which the State bases its forfeiture case." In this case, the Court determined Timbs' Land Rover was an instrumentality of his crimes based on the fact that he drove the vehicle to one of the controlled buys. The Court then adopted a gross-disproportionality standard for reviewing civil forfeitures under the Eighth Amendment. That standard, which is different than the standard used with the Cruel and Unusual Punishment Clause, considers three non-exclusive factors: the harshness of the punishment, including the property owner's economic means; the severity of the offenses; and the claimant's culpability. In remanding the case for an excessiveness analysis using this framework, the Court instructed the trial court to "determine whether Timbs has overcome his burden to establish that the harshness of the forfeiture's punishment is not only disproportional, but grossly disproportional, to the gravity of the underlying dealing offense and his culpability for the Land Rover's corresponding criminal use." Slaughter, J., dissenting, would "embrace the State's proposed rule, which asks only whether the forfeited asset was the instrumentality of a crime… at least until the Supreme Court tells us otherwise." Further, the majority's ruling does not give trial courts guidance on how to apply the newly created framework.

TITLE: State v. Timbs

INDEX NO.: W.3.a.

CITE: (06/10/2021), 169 N.E.3d 361 (Ind. 2021)

SUBJECT: Harshness of vehicle's forfeiture grossly disproportionate to the gravity of Defendant's crime and his culpability for the vehicle's misuse

HOLDING: In forfeiture proceeding, Timbs met his high burden of showing that the harshness of his Land Rover's forfeiture was grossly disproportionate to the gravity of his underlying drug dealing offense and culpability for the vehicle's misuse. In so holding, Court declined the State's invitation to reconsider the proportionality test developed in State v. Timbs, 134 N.E.3d 12 (Ind. 2019) for examining forfeitures under the Excessive Fines Clause. The State argued instead that the court should focus primarily on the question of whether the property to be forfeited is an instrumentality of the crime. "[Timbs'] adoption of the gross-disproportionately analysis was based on a number of reasons — signals from the U.S. Supreme Court that proportionality was a necessary piece of the excessiveness inquiry for "*in rem*" fines; the recognition that almost all courts have rejected the State's proposed instrumentality-only test; the fact that modern "*in rem*" forfeitures are divorced from their historical roots; and the text and history of the Excessive Fines Clause. " In applying the gross disproportionately framework, Court reached the same conclusion as the trial court that Timbs met his burden, considering his culpability, the harshness of the punishment and the severity of the offense. While Timbs was very blameworthy for the property's misuse, the "*in rem"* fine was overly harsh, and the dealing crime was of lesser severity. The forfeiture of the Land Rover was significantly more punitive than remedial, and contrary to the State's claim, the trial court did not endorse a blanket rule that if a crime didn't have a discernible victim, then a forfeiture must be grossly disproportionate. "Rather, the trial court's analysis focused on a fact that even the State's brief seems to acknowledge: Timbs' crime did 'not involve specific injuries to specific victims." The Court further pointed out that other factors revealed the purpose of the use-based *in rem* forfeiture was to significantly punish Timbs, including the extent to which the vehicle's forfeiture would remedy the harm caused; the Land Rover's market value; other sanctions imposed on Timbs; and the effects the forfeiture will have on him. Slaughter, J., concurring to highlight his "deep concerns" with what the Court's totality-of-the-circumstances excessiveness test means and how lower courts will apply it in future cases. Massa, J., dissenting, disagrees that Timbs met his high burden to show gross disproportionately.

TITLE: Timbs v. Indiana
INDEX NO.: W.3.a.
CITE: (2/20/2019), 139 S. Ct. 682 (U.S. 2019)
SUBJECT: Excessive Fines Clause is enforceable against the States through the 14th Amendment
HOLDING: The Eighth Amendment's protection against excessive fines is an incorporated protection applicable to the states under the 14th Amendment's Due Process Clause. Timbs pleaded guilty to dealing in a controlled substance and conspiracy to commit theft. At the time of Timbs's arrest, the police seized a Land Rover SUV Timbs had purchased for $42,000 with money he received from an insurance policy when his father died. The State sought civil forfeiture of Timbs's vehicle, charging that the SUV had been used to transport heroin. Observing that Timbs had recently purchased the vehicle for more than four times the statutory maximum $10,000 monetary fine assessable against him for his drug conviction, the Tr. Ct. denied the State's request. The vehicle's forfeiture, the court determined, would be grossly disproportionate to the gravity of Timbs's offense, and therefore unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Court of Appeals affirmed, but the Indiana Supreme Court reversed, holding that the Excessive Fines Clause constrains only federal action and is inapplicable to state forfeitures.

In a unanimous opinion, U.S. Supreme Court held that the Excessive Fines Clause is enforceable against the States through the 14th Amendment, the protection having been "a longstanding part of the American legal tradition." See Austin v. United States, 509 U.S. 602 (1993). "Like the Eighth Amendment's proscriptions of 'cruel and unusual punishment' and '[e]xcessive bail,' the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority. This safeguard...is 'fundamental to our scheme of ordered liberty.'"

However, the Court stopped short of deciding whether the Excessive Fines Clause is incorporated as it relates specifically to civil in rem forfeitures, the core dispute of the state litigation. The question of whether the Eighth Amendment's Excessive Fines Clause restricts the States' use of civil asset forfeitures was not properly before the court because the Indiana Supreme Court "nowhere addressed the Clause's applicability to civil in rem forfeitures." Held, Indiana Supreme Court opinion at 84 N.E.3d 1179 vacated and remanded for further proceedings. Gorsuch, J., concurring, opined that the appropriate vehicle for incorporation might be the 14th Amendment's Privileges and Immunities Clause, not the Due Process Clause. Thomas, J., concurring on basis that the Privileges and Immunities Clause was the better incorporation vehicle.

TITLE: Washington, on his own and behalf of class v. Marion County Prosecutor
INDEX NO.: W.3.a.
CITE: (8/18/2017), 264 F. Supp. 3d 957 (U.S. District Court, S. Ind. 2017)
SUBJECT: Indiana forfeiture statute unconstitutional
HOLDING: Finding that Indiana's forfeiture statute violates the due process clauses of the Fifth and Fourteenth Amendments, the District Court permanently enjoined the Ds from enforcing a portion of the statute (Ind. Code 34-24-1-1(a)(1)). In 2016, Washington was arrested and charged with, inter alia, dealing marijuana. His car was towed and held for forfeiture. He filed a class action against the Marion County Prosecutor and other county entities. The statute he challenged lets the State hold a vehicle up to six months before it is required to seek permanent possession through a forfeiture hearing. Mathews v. Eldridge, 423 U.S. 319 (1976) requires a court to consider the private interest affected by the seizure; the risk of erroneous deprivation and the value of additional safeguards; and the Government's interest, including the administrative burden that additional procedures would impose. United States v. Good Real Prop., 510 U.S. 43, 53 (1993) (*citing* Mathews, 424 U.S. at 335).

Here, Washington's private interests are compelling. Vehicles are an important form of personal property, and their "particular importance derives from their use as a mode of transportation, and, for some, the means to earn a livelihood." Krimstock v. Kelly, 306 F.3d 40 (2nd Cir. 2002). Further, the government may deprive a person of their vehicle up to 180 days without taking any action, with the owner having no recourse because the statute prohibits replevin actions. In addition, the statute does not allow interim relief, such as temporarily returning the vehicle upon the affected person posting bond.

The statue also creates a risk of erroneous deprivation and additional safeguards to let a person challenge the forfeiture would not impose an undue burden on the government. The only process a person receives before a forfeiture hearing is a law enforcement officer's determination that probable cause exists for an arrest. Also, in order to be eligible for forfeiture, the vehicle's involvement in illegal activity must be more than incidental or fortuitous; however, there is no chance to address this requirement before the hearing. This is troublesome because the statute lets law enforcement seize vehicles from individuals who are entirely unconnected with the conduct giving rise to the arrest. See Krimstock, 306 F.3d at 53.

The government does have a strong interest in ensuring that vehicles subject to seizure are not removed to another jurisdiction, concealed, or destroyed before forfeiture proceedings. However, Washington does not argue that the Government may not hold vehicles, pending seizure proceedings; instead, he seeks the opportunity to challenge the propriety of continued deprivation. While requiring a post-seizure hearing would impose a burden on the government, "due process always imposes some burden on the government." Smith v. City of Chicago, 524 F.3d 834, 838 (7th Cir. 2008), vacated and remanded sub nom. Alvarez v. Smith, 558 U.S. 87 (2009). In sum, the private interest and risk of erroneous deprivation factors outweigh any governmental interest. Thus, Mathews requires the State to provide individuals a way to challenge continued deprivation of their property before the forfeiture hearing. Held, Ds permanently enjoined from enforcing Ind. Code § 34-24-1-1(a)(1).

W. PENALTIES/ DISABILITIES/ FORFEITURE AND REMEDIES

W.3. Property forfeiture

W.3.b. Other

TITLE: $47,940 U.S. Currency v. State
INDEX NO.: W.3.b.
CITE: (5/31/2017), 77 N.E.3d 839 (Ind. Ct. App 2017)
SUBJECT: Dismissal of forfeiture case already pending in another Tr. Ct.
HOLDING: When two courts have concurrent jurisdiction over a case, the court first acquiring jurisdiction is considered to have exclusive jurisdiction over that case. Pivarnik v. N. Ind. Public Serv. Co., 636 N.E.2d 131 (Ind. 1994). Here, Tr. Ct. improperly granted State's notice to transfer seized funds when there was a similar action already pending in another court. Police officers had consent to enter and visually inspect suspicious parcels at a shipping company. During inspection, a parcel addressed to Sorhaindo was singled out for more investigation. After a K9 gave a positive indication of a controlled substance in Sorhaindo's package, State opened a miscellaneous criminal case in Marion Superior Court, Criminal Division, Courtroom 6, under Cause number 49G06-1506-MC- 022791 (MC-22791), and applied for a search warrant to search the parcel for drugs and/or evidence of drug trafficking. The search yielded $47,940.00 United States currency but no controlled substances. The State filed a Complaint for Forfeiture against Sorhaindo in Marion Superior Court, Civil Division, Courtroom 12, under cause number 49D12-1512-MI-042103 (MI-42103). The following day, under MI-42103, the State filed a Notice and Motion to Transfer Seized Property to the United States and Tr. Ct. granted the State's transfer motion. Sorhaindo unsuccessfully moved to dismiss MI-42103 because of the action pending in MC-22791 involving the same parties, search and seizure.

Court of Appeals held that the actions pending in Courtroom 6 and Courtroom 12 were substantially the same action. Courtroom 12, therefore, erred by denying Sorhaindo's motion to dismiss because Courtroom 6 retained exclusive jurisdiction over the original turnover action. The appropriate remedy is to set aside the turnover order issued in MI- 42103 and to remand this cause to MC-22791 for the commencement of turnover proceedings. Should Sorhaindo again choose to challenge the lawfulness of the search warrant leading to the seizure of his funds, he should be afforded a hearing on whether the seizure complied with the warrant's language. Held, turnover order issued in Courtroom 12 set aside and remanded to Courtroom 6 for the commencement of turnover proceedings.

TITLE: Adams v. State

INDEX NO.: W.3.b.

CITE: (05-21-12), 967 N.E.2d 568 (Ind. Ct. App. 2012)

SUBJECT: Appeal not subject to dismissal despite statute's mandatory directive to transfer property

HOLDING: D's appeal of Tr. Ct.'s order granting State's motion to transfer D's seized property to federal authorities for forfeiture proceedings was not subject to dismissal, even though the transfer, Ind. Code § 35-33-5-5(j), provides that upon a motion for a prosecuting attorney, the Tr. Ct. "shall" order the property seized to be transferred to the appropriate federal authority. The propriety of a transfer order hinges on the lawfulness of the search and seizure of a D's property. See id.; see also Ind. Code § 34-24-1-2(a). A D has the right to challenge the lawfulness of the search before Tr. Ct.'s granting of a motion to transfer property. Membres v. State, 889 N.E.2d 265, 268-69 (Ind. 2008).

TITLE: Adams v. State
INDEX NO.: W.3.b.
CITE: (05-21-12), 967 N.E.2d 568 (Ind. Ct. App. 2012)
SUBJECT: Order to transfer funds seized from D to federal authorities was proper
HOLDING: Tr. Ct. properly ordered the State to transfer $25,000 seized from D to federal authorities because there was probable cause to search his person and his car. The Indiana "turnover statute," Ind. Code § 35-33-5-5(j), provides that upon a prosecutor's motion, Tr. Ct. shall order property seized under Indiana's forfeiture statutes - see Ind. Code § 34-24-1-1, et. seq. - to be transferred to the appropriate federal authority for disposition under federal forfeiture laws, so long as the seizure is incident to a lawful arrest. See Ind. Code § 34-24-1-2(a)(1)(A). Here, the facts clearly established probable cause.

D is incorrect that the turnover statute requires the State to prove a nexus between the property seized and the underlying offense, here possession and/or dealing narcotics. Because the turnover statute merely provides a mechanism to transfer property to federal authorities and not to actually forfeit property, the State need not establish such a nexus but simply demonstrate the property was seized pursuant to a valid search. See Membres v. State, 889 N.E.2d 265, 269 (Ind. 2008). The State amply demonstrated the propriety of the search. Held, judgment affirmed.

TITLE: Adams v. State
INDEX NO.: W.3.b.
CITE: (05-21-12), 967 N.E.2d 568 (Ind. Ct. App. 2012)
SUBJECT: D entitled to notice of State's motion to transfer property
HOLDING: Even though the statute governing transfer of property seized from D does not require the State to notify D about its motion to transfer property - see Ind. Code _ 35-33-5-5(j) and United States v. $75,863.50 U.S. Currency, 2009 WL 1951800 at *2 (S.D. 2009) - notice is still required because the propriety of a transfer order hinges on the lawfulness of the seizure of a D's property. See id.; see also Ind. Code § 34-24-1-2(a). A D may challenge the legality of the search but can do so only if given notice of the motion to transfer property. See Members v. State, 889 N.E.2d 265, 269 (Ind. 2008). However, the lack of notice here was harmless.

TITLE: Caudill v. State
INDEX NO.: W3.b.
CITE: (5/12/93), Ind. App., 613 N.E.2d 433
SUBJECT: Forfeitures -- connection between seized cash & drug violation
HOLDING: Claimant appealed from order of Tr. Ct. forfeiting his vehicle & cash found on his person after arrest for drug possession. D challenged sufficiency of Tr. Ct.'s forfeiture order by asserting that in order to bring forfeiture action under Ind. Code 34-4-30.1-4, State must prove substantial connection between seized property & drug violations. Ct. held that because evidence showed D had cocaine in his possession while he drove Bronco, & that State alleged in its forfeiture complaint that D was committing offense of either dealing in cocaine and/or possession of cocaine as A, B, or C felony, these facts established sufficient basis under Ind. Code 34-4- 30.1-1(a)(1)(A)(vi) to justify forfeiture of D's Bronco. In addition, Ind. Code 34-4-30.1-1(c) provides that money found on or near person who is committing, attempting to commit, or conspiring to commit any of specifically enumerated offenses is presumed forfeitable. Held, order of forfeiture affirmed; Baker, J., concurring & dissenting.

TITLE: Chan v. State
INDEX NO.: W.3.b.
CITE: (06-21-12), 969 N.E.2d 619 (Ind. Ct. App. 2012)
SUBJECT: Retail value of stolen item does not include sales tax
HOLDING: In an issue of first impression, the Court held that for purposes of Indiana's forfeiture statute, Ind. Code 34-24-1-1, the retail value of a stolen item does not include the sales tax that would have been due on the item. Here, D stole two garage door remote controls and an ear bud case at an Indianapolis Mendards store. Before taxes, the cost of the items totaled $97. Sales tax on the items would have been $7.00. The State filed a complaint seeking forfeiture of the Honda D used to drive to and from the Mendards store.

Indiana's civil forfeiture statutes provide that a vehicle may be forfeited if it is used or intended to be used to transport any stolen or converted property, "if the retail or repurchase value of that property is one hundred dollars ($100) or more." Ind. Code § 34-24-1-1(a)(1)(B) (emphasis added).

D argued the tax cannot be considered part of the value of the goods because Ind. Code § 6-2.5-2-1 provides that sales tax is paid "to the retail merchant as a separate added amount to the consideration in the transaction." (Emphasis added). The State argued the common understanding of retail value would include both the price of the goods and the amount of the tax.

Both interpretations are reasonable. When faced with more than one reasonable interpretation of a statute, courts construe forfeiture statutes similarly to how they construe criminal statutes. Criminal statutes are interpreted under the rule of lenity, which protects against creating a crime by mere construction. 8 Indiana Law Encyclopedia Criminal Law § 7 (2004). Likewise, forfeitures are not favored by law, so forfeiture statutes are strictly construed. 36 Am. Jur. 2d Forfeitures and Penalties § 8 (2011); see also Gomez v. Vill. of Pinecrest, 17 So. 3d 322 (Fla. Dist. Ct. App. 2009), approved, 41 So. 3d 180 (Fla. 2010); People v. Borash, 354 Ill. App. 3d 70, 820 N.E.2d 74 (Ill. App. Ct. 2004), appeal denied. Thus, the retail value of the items D stole is $97, so the State may not seek forfeiture of D's Honda. Held, judgment reversed.

TITLE: Gonzalez v. State
INDEX NO.: W.3.b.
CITE: (5/19/2017), 74 N.E.3d 1228 (Ind. Ct. App 2017)
SUBJECT: Forfeiture reversed - no evidence D part of a conspiracy
HOLDING: Evidence was insufficient to forfeit the $810.00 found in Defendant's pocket because there was no evidence Defendant was a co-conspirator with the other vehicle occupants or that his money facilitated their offenses.

Defendant was a passenger and one of four occupants in a car that was pulled over. The officer smelled marijuana in the car, saw marijuana in the glove box when it was opened to retrieve the rental agreement, and saw marijuana residue throughout the car. It was eventually discovered that the driver had rented the vehicle, one of the passengers had cocaine in her purse, and another passenger had secreted cocaine in her body. The other passengers pled to felonies related to possession of a narcotic. Defendant pled guilty to possession of marijuana as a class B misdemeanor.

Forfeitures are not favored and should be enforced only in accord with "both the letter and spirit of the law." Hughley v. State, 15 N.E.3d 1000, 1005 (Ind. 2014). Here, in the absence of a criminal conviction other than misdemeanor possession of marijuana, and the absence of evidence that Defendant committed an additional offense, the State urged the Tr. Ct. to infer from Defendant's presence in the vehicle that he was a co-conspirator. However, the evidence did nothing more than show Defendant's proximity to the narcotics was merely "incidental or fortuitous." See Serrano v. State, 946 N.E.2d 1139, 1143 (Ind. 2011). Thus, the State failed to show a nexus between the cash in Defendant's pocket and the commission of another offense. See id. Therefore, the forfeiture was outside the letter and spirit of the law. See Hughley, 15 N.E.3d at 1005. Held, judgment reversed.

TITLE: Gore v. State
INDEX NO.: W.3.b.
CITE: (1st Dist. 12/6/83), Ind. App., 456 N.E.2d 1030
SUBJECT: Property forfeiture - money
HOLDING: Tr. Ct. erred in granting state's petition for order on disposition of property ($4,900) & thereby refusing to return money to D. Here, following D's conviction for drug possession, D requested return of money seized during & after his arrest. Tr. Ct. ordered D's money to be disposed of pursuant to Ind. Code 35-1-6-5.1 & Ind. Code 36-8-3-17. Former statute provides "[p]roperty which may be lawfully possessed shall be returned to its rightful owner if known." "Shall" is mandatory. "Property" is defined as "anything of value" including "money." Ind. Code 35-41-1-2. Ct. construes statute (Ind. Code 35-1-6-5.1(c)) & finds it silent on whether money derived from sale of drugs can be lawfully possessed. Legislature has not provided for forfeiture of such money. Because money can be lawfully possessed & because legislature has not clearly expressed its intent, Tr. Ct. erred in refusing to return money to D Held, reversed & remanded.

RELATED CASES: Merlington, App., 839 N.E.2d 160 (Tr. Ct. erred in not returning $641 found on D's person, which was used to pay Ct. costs & fines following his conviction for possession of methamphetamine with intent to deliver); Pannarale, App., 627 N.E.2d 828, *sum. aff'd*, 638 N.E.2d 1247 (Although finding waiver of any error in return of property due to failure to include transcript, Ct. discussed provisions of Ind. Code 35-1-6-5.1, replaced by Ind. Code 35-33-5-5).

TITLE: Gulzar v. State

INDEX NO.: W.3.b.

CITE: (06/24/20), Ind., 148 N.E. 3d 971

SUBJECT: Amended expungement statute clarifying “date of conviction” in AMS cases applies retroactively

HOLDING: Indiana Supreme Court finds a new law that eliminates the confusion of date of eligibility for expungement applies retroactively. Senate Enrolled Act 47 makes clear that in cases such as Defendant's, the date of the felony conviction controls expungement eligibility, not any subsequent reduction. The majority of the Indiana Supreme Court agreed that the change in the law should apply retroactively to Defendant's case. While the legislation was not expressly retroactive, the majority read it as such, finding it remedial. “Here, the amendment to the misdemeanor expungement statute is remedial — it cured a defect in the prior law,” “And, given the broad goals behind Indiana’s expungement scheme, coupled with the urgency with which the legislature addressed this issue, we find that applying the remedial law retroactively to Defendant effectuates its purpose.” The change in law, the majority held, “cured a mischief that existed in the prior statute, namely, confusion on when the waiting period begins for certain ex-offenders seeking expungement. … In short, we find that the remedial amendment is aimed at making expungement immediately available for individuals who (1) successfully petition for conversion of a minor felony to a misdemeanor and (2) wait five years from their felony conviction date before seeking expungement." Justice Slaughter dissented, believing the Court's analysis requires Court to speculate about legislative motives.

TITLE: Hodges v. State
INDEX NO.: W.3.b.
CITE: (06/27/19), Ind., 125 N.E. 3d 578
SUBJECT: Turnover order affirmed -- probable cause to believe parcel and cash involved in drug trafficking
HOLDING: Trial court did not abuse its discretion by granting the State's motion to turn over to the federal government a shipped box containing $60,990 wrapped in multiple layers of sealed packaging that bore the odor of narcotics. The box was seized by a detective who was inspecting packages at a parcel-shipping company. Officers proceeded to open the box, and a canine alerted that the money contained therein and packaging surrounding it contained the odor of narcotics. The officer sought and was granted a warrant authorizing a search of the package and seizure of proceeds of drug trafficking. The box displayed "telltale signs" of parcels containing drugs and drug money (i.e., multiple layers of sealed packaging, a vacuum-sealed plastic container, and large amount of rubber-banded cash). The officers then obtained a court order to turn it over to federal authorities. Hodges, the individual who shipped the parcel, argued on appeal that the seizure exceeded the scope of the warrant.

The Supreme Court affirmed, holding that the totality of circumstances supplied a basis for probable cause to believe the cash was proceeds of drug trafficking. Thus, the seizure was lawful, and the trial court properly made its order transferring the property to the federal government. In so holding, Court disapproved of Bowman v. State, 81 N.E.3d 1127 (Ind. Ct. App. 2017), modified on denial of reh'g., to the extent that it conflicts with this opinion. Court noted that just because the cash is seized and turned over to federal authorities does not mean it will be forfeited – the government also has the option of returning it. "If it seeks forfeiture, the court overseeing that proceeding may assess any innocent explanations for the circumstances and determine who is entitled to the property. We decide only that the turnover from state to federal authorities is proper." Held, transfer granted, Court of Appeals' opinion at 81 N.E.3d 1127 vacated, judgment affirmed.

TITLE: State v. Souder
INDEX NO.: W.3.b.
CITE: (1st Dist. 2/7/83), Ind. App., 444 N.E.2d 891
SUBJECT: Property forfeiture - firearms; controlling statute
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 three 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: U.S. v. Bieri
INDEX NO.: W.3.b.
CITE: 68 F.3d 232 (8th Cir. 1995)
SUBJECT: Forfeiture of Home - Impact on Children Weighed Against Culpability of Parents
HOLDING: Fact that property subject to criminal drug forfeiture serves as home of innocent minor children is factor to be considered in determining whether forfeiture would be excessive. Importance of this factor diminishes as criminal culpability of parents increases.

TITLE: U.S. v. Bajakajian
INDEX NO.: W.3.b.
CITE: 524 U.S. 321 (1998)
SUBJECT: Forfeiture -- Eighth Amendment Excessive Fines Clause
HOLDING: Forfeiture of $357,144, for offense of failing to report transfer of that money out of U.S., violates Eighth Amendment Excessive Fines Clause because it is grossly disproportionate to gravity of offense. Petitioner was taking lawfully acquired money out of country to repay lawful debt, but failed to report, as required by federal statute, that he was transporting more than $10,000 out of the country. He was prosecuted for violation of reporting requirement, and entire amount was forfeited pursuant to 18 U.S.C. 982(a)(1), which provides that person convicted of willfully violating statute which includes reporting requirement shall forfeit entire amount of property "involved in such an offense." Forfeiture here constitutes fine because it is extracted in punishment of offense. Forfeiture here required conviction for violating reporting requirement and was imposed at culmination of criminal prosecution. It is not remedial in nature, since loss of information provided by reporting is not remedied by confiscation of money. Such punitive forfeitures violate Excessive Fines Clause only if they are grossly disproportionate to offense they are designed to punish. Grossly disproportionate standard gives due deference to legislature and is mindful of imprecision of judicial determinations of proportionality. Forfeiture of $357,144 here is grossly disproportionate to offense of failing to report transfer of funds. Petitioner could have lawfully transported currency if he had reported it. Reporting requirement was aimed toward money launderers, drug dealers, and tax evaders, whereas petitioner's only violation was failing to report transfer. Criminal offense subjected him only to 6-month incarceration and $5000 fine. There is no correlation between forfeiture of $357,144 and relatively minor deprivation of information to Government.

TITLE: U.S. v. Parcel of Land Known as 92 Buena Vista Ave., Rumson, N.J.

INDEX NO.: W.3.b.

CITE: 507 U.S. 111, 113 S. Ct. 17, 122 L.Ed.2d 469 (1993)

SUBJECT: Forfeiture - Federal 1970 Comprehensive Drug Abuse Prevention and Control Act; innocent owner/relation back

HOLDING: A property owner who purchased property with proceeds traceable to illegal drug transaction, but who claimed lack of knowledge of illegal source of funds, is entitled to assert "innocent owner" defense to civil in rem forfeiture action commenced by government against property under above act. Statute's "relation back" provision merely means that government's title relates back to time of offending conduct once forfeiture is decreed, not that title automatically vests in government at that time. Respondent here received $240,000 cash gift from her boyfriend and used it to purchase home for herself and children. In district court, government established probable cause to believe that this money was derived from donor's illegal drug trafficking activities and obtained civil in rem forfeiture of house. District court rejected respondent's innocent owner claim because she was not bona fide purchaser for value (BFP), and because it believed that innocent owner defense was available only to those who acquired an interest in property before illegal acts giving rise to forfeiture took place, because relation back provision of statute vested title in government at time of illegal acts. Six-member majority agrees with Ct. App. that "owner" extends to non-BFPs. Four-member plurality writes further that property of one who can satisfy innocent owner defense is not subject to forfeiture, and therefore relation back provision does not apply. Two justices concur in result, writing that relation back provision applies to property subject to innocent owner claim, but that it takes effect only after forfeiture is decreed, not at time of illegal acts. Held, Ct. App. affirmed, remanded to District Court to determine whether respondent is innocent owner.

TITLE: Vitaniemi v. State
INDEX NO.: W.3.b.
CITE: (1st Dist. 9/28/82), Ind. App., 440 N.E.2d 5
SUBJECT: Property forfeiture - no provision in statute; 1937 Fish & Game Act not controlling
HOLDING: Hunting implements are subject to confiscation & forfeiture under Ind. Code 14-2-9-2(b) only when D is convicted of a violation of 1937 Fish & Game Act (fish, frogs, mussels, game, fur-bearing animals, birds). Here, Ds were convicted of possession of loaded firearms & unlawful cutting & removing of ginseng roots in a state park (Ind. Code 14-2-3-3). Tr. Ct. confiscated digging tools & firearms & ordered Department of Natural Resources to dispose of them. Ct. rejects state's argument that forfeiture statute is applicable to all laws of IN. Ds were not convicted of Fish & Game Act violation, & statutes under which Ds were convicted contain no forfeiture provision. Held, confiscation & forfeiture provisions of judgment ordered vacated.

W. PENALTIES/ DISABILITIES/ FORFEITURE AND REMEDIES

W.3. Property forfeiture

W.3.c. Controlled substances

TITLE: Brune v. State
INDEX NO.: W.3.c.
CITE: (2/26/76), Ind. App., 342 N.E.2d 637
SUBJECT: Property forfeiture -- marijuana & vehicles
HOLDING: D was stopped for speeding while pulling trailer & was arrested for possession of marijuana. His marijuana & vehicle were seized & admitted as evidence at trial. D appealed claiming in part that seizure was illegal. Ct. held that where D's car which was pulling enclosed trailer was stopped for speeding & officer discovered contraband sticking out from under locked door of trailer & noticed smell of marijuana as he approached D, there was probable cause to arrest D. In addition, officer had right under forfeiture statute to seize both marijuana & vehicles. Held, conviction & forfeiture affirmed.

W. PENALTIES/ DISABILITIES/ FORFEITURE AND REMEDIES

W.4. Remedies

W.4.b. Expungement

TITLE: Berryman v. State
INDEX NO.: W.4.b.
CITE: (06-21-19), Ind., 127 N.E.3d 1246
SUBJECT: Insanity finding cannot be expunged
HOLDING: A finding that a defendant is not responsible by reason of insanity (NRRI) is considered a "conviction" under Ind. Code § 35-38-39; thus, an individual may not have a finding of NRRI expunged under Ind. Code § 35-38-9-1. Berryman sought to expunge the records in a case where the jury found him NRRI on a charge of murder by using Ind. Code § 35-38-9-1, which allows an individual arrested for a crime, but not convicted, to seek expungement.

The Court construed the definition of the word "conviction" as used in the statute to include an adjudication as NNRI because to hold otherwise would be absurd and unjust and could not have been the legislature's intent.

TITLE: Blake v. State
INDEX NO.: W.4.b.
CITE: (2nd Dist., 01-24-07), Ind. App., 860 N.E.2d 625
SUBJECT: Expungement of arrest records following gubernatorial pardon
HOLDING: Trial Ct. properly denied Blake's petition to expunge the records related to his arrest for robbery in 1992 but erred in denying his request to expunge his record of conviction. Following a pardon by Governor Daniels in 2005, Blake sought to acquire a license to practice law in Connecticut for the first time. In carrying out executive mandate of a pardon, trial Ct. has no choice but to clear a D's name by expunging the record of his conviction. State v. Bergman, 558 N.E.2d 1111 (Ind. Ct. App 1990). However, Bergman does not require expunction of *all* records pertaining to a conviction. There is no statute in Indiana pertaining to expunction of arrest records following a gubernatorial pardon. Ind. Code 35-38-5-1 is only avenue for expunging an arrest record, but it applies only to expunction of records prior to conviction or when there is no conviction. Majority of decisions from other states have held that a pardon does not entitle the pardonee to expunction of all criminal records related to the conviction. Gubernatorial pardon issued in this case revealed no language to infer that Blake's pardon was either conditional or unconditional. Held, judgment affirmed in part, reversed in part, & remanded with instructions.

TITLE: Dada v. State
INDEX NO.: W.4.b.
CITE: (6/26/2015), 39 N.E.3d 686 (Ind. Ct. App 2015)
SUBJECT: Person given summons in lieu of arrest entitled to expungement
HOLDING: Tr. Ct. erred in denying petition to expunge a summons for a charge of Class C misdemeanor illegal consumption of an alcoholic beverage. Petitioner's illegal consumption charge was dismissed pursuant to a pretrial diversion agreement. Although the expungement statute relating to criminal charges not resulting in a conviction applies "only to a person who has been arrested," Ind. Code § 35-38-9-1(a), Court concluded the Legislature did not intend it to exclude someone issued a summons instead of arrested. There is a stigma associated with past criminal charges, whether or not the individual was arrested. J.B. v. State, 27 N.E.3d 336 (Ind. Ct. App 2015). Held, judgment reversed.

NOTE: Statute has since been amended effective 7/1/15 to allow expungement for those charged with a crime, but not arrested.

TITLE: DeCola v. State
INDEX NO.: W.4.b.
CITE: (10/17/2018), 113 N.E.3d252 (Ind. Ct. App 2018)
SUBJECT: School suspensions ineligible for expungement - no right to jury trial
HOLDING: Trial court properly denied petitioner's request to expunge any and all records pertaining to his 2001 high school suspension. Indiana Code does not allow for an individual to have a school suspension expunged from his records. Rather, expungement as a remedy is limited to criminal arrests and convictions. Ind. Code § 35-38-9-2(5). Also, because expungement was not triable by a jury at common law, petitioners seeking expungement are not entitled to a jury trial. Held, judgment affirmed.

TITLE: J.B. v. State
INDEX NO.: W.4.b.
CITE: (3/10/2015), 27 N.E.3d 336 (Ind. Ct. App 2015)
SUBJECT: Records of dismissed conviction may be expunged
HOLDING: The Tr. Ct. erred in denying D's request to expunge the records from his dismissed conviction. These records may be expunged, even though Ind. Code § 35-38-9-2 does not expressly allow a Tr. Ct. to expunge records from a dismissed conviction.

Under a 1999 plea agreement, D pled guilty to Class A misdemeanor Battery in exchange for eventual dismissal of the conviction once D successfully completed probation. D successfully completed probation, and the Tr. Ct. dismissed the conviction. D later filed his petition to expunge, which established that he met all statutory criteria to have the dismissed conviction expunged. However, the Tr. Ct. denied the petition, ruling that since it had earlier dismissed the conviction, "there [was] no conviction to expunge."

This ruling was erroneous because it failed to acknowledge that: 1) Ind. Code §35-38-9-2 "unambiguously requir[es] expungement when all of the statutory requirements are met, see Taylor v. State, 7 N.E.3d 362, 365 (Ind. Ct. App. 2014); 2) Ind. Code § 35-38-9-2(b) authorizes expungement of records related to the conviction, not the conviction itself, and, thus 3) by simply dismissing D's conviction, the Tr. Ct. "did nothing to purge the records of the court and other agencies that relate to that conviction." Finally, the dismissal of D's conviction would be meaningless if the records related to the conviction remained accessible. The General Assembly could not have intended such a result. Held, matter remanded to expunge records related to D's conviction.

W. PENALTIES/ DISABILITIES/ FORFEITURE AND REMEDIES

W.4. Remedies

W.4.b. Expungement

TITLE: B.S. v. State
INDEX NO.: W.4.b.
CITE: (3/5/2018), 95 N.E.3d 177 (Ind. Ct. App 2018)
SUBJECT: Expungement includes records of post-conviction relief proceedings
HOLDING: Pursuant to Ind. Code § 35-38-9-1, the Tr. Ct. granted expungement of the records from the criminal case number under which B.S. was convicted. However, Tr. Ct. denied B.S.'s request to expunge all records under his post-conviction cause number in which his underlying misdemeanor conviction was vacated. In an issue of first impression, Court held the statute requires the PCR records should also be expunged, even though the proceedings are under a separate cause number. Ind. Code § 35-38-9-1(f) states "no information" related to expunged cases shall be maintained in various state information systems, and "any records" must be sealed or redacted. The intent and policy underlying Ind. Code § 35-38-9-1 is to allow an individual who satisfies certain criteria to escape the stigma of a criminal conviction by "sealing off the paper trail establishing that there ever was a conviction." J.B. v. State, 558 N.E.3d 336, 340 (Ind. Ct. App. 2015). Because B.S. qualifies for expungement under the statute, he is able to escape the stigma of his now-overturned criminal conviction; however, in order to do so, all records pertaining to that conviction must be sealed. Held, judgment reversed and remanded with instructions to enter an order expunging records from B.S.'s underlying criminal cause number and from his post-conviction cause number in accordance with Ind. Code § 35-38-9-1.

TITLE: Alden v. State
INDEX NO.: W.4.b.1
CITE: (5/27/2014), 10 N.E.3d 1028 (Ind. Ct. App. 2014)
SUBJECT: Tr. Ct. must consider D's Restricted Access petition
HOLDING: Tr. Ct. abused its discretion in denying D's motion to prohibit release of his criminal record pursuant to repealed restricted access statute, Ind. Code § 35-38-5. At hearing on D's petition, State objected on grounds that he had failed to notify all the required parties, including the Attorney General and the Indiana State Police Central Repository. Relying on Pittman v. State, 9 N.E.3d 179 (Ind. Ct. App. April 30, 2014), Court held that D satisfied the notice requirements of Indiana Criminal Rule 18 by serving the prosecutor, the adverse party "of record" under the rule. The petition is an additional filing in the criminal case and not a new, free-standing cause of action.

Moreover, fact that legislature repealed this statute effective 7/1/13, subsequent to D's filing, does not affect the validity of D's case. Ind. Code § 1-1-5-6 gives a party the right to pursue an action allowed by statute even if that statute is later repealed, as long as the party undertakes the action prior to the repeal. Accordingly, because D filed his motion before the Legislature repealed Indiana Code § 35-38-8-3, the repeal did not affect the validity of his action. Held, judgment reversed and remanded for consideration on the merits.

TITLE: Allen v. State
INDEX NO: W.4.b.1.
CITE: (12/22/2020), 159 N.E.3d 580 (Ind. 2020)
SUBJECT: Expungement prohibition for those convicted of felonies resulting in serious bodily injury (SBI) only applies if SBI is an element of the offense
HOLDING: Because Indiana's Permissive Expungement Statute excludes from eligibility persons convicted of certain offenses but vests in the court discretion to either grant or deny a petition, a trial court should engage in a two-step process when considering a petition for expungement. First, trial court must determine whether the conviction is eligible for expungement and the petitioner has met the requirements. Ind. Code §§ 35-38-9-4(b), -4(e). If the conviction is ineligible, the inquiry ends there. But if the court determines that the conviction is eligible for expungement, it must then collect enough information to determine whether it should grant or deny the petition. In issuing its decision, a trial court may consider a broad array of information, including the nature and circumstances of the crime and the character of the offender. Here, Defendant's conviction for Class B felony conspiracy to commit burglary was eligible for expungement even though the facts incidental to his conviction involved serious bodily injury. A person may be eligible for expungement unless the felony for which he stands convicted "resulted in serious bodily injury to another person." I.C. § 35-38-9-4(b)(3). That the facts of the incident leading to the conviction show serious bodily injury is not enough to exclude a person from eligibility for expungement. See Trout v. State, 28 N.E.3d 267 (Ind. Ct. App. 2015).

In this case, significant evidence supported Defendant's expungement petition: testimony about his role as a committed father, husband, and provider; letters of recommendation from family, friends, and coworkers; and support from the victims themselves. But the trial court did not articulate its reasons for denying his expungement petition. It may have entirely failed to consider the evidence favoring expungement based on a mistaken belief that Defendant was ineligible for expungement. Thus, the Court reversed the trial court's order denying the petition for expungement and remanded with instructions for the court to reconsider its decision consistent with this opinion. Held, transfer granted, Court of Appeals' opinion at 142 N.E.3d 488 vacated, judgment reversed and remanded.

RELATED CASES: Allen, 181 N.E.3d 454 (Ind. Ct. App. 2022) (on remand, Tr. Ct. did not err in denying expungement petition).

TITLE: Alvey v. State
INDEX NO: W.4.b.1.
CITE: (8/6/2014), 15 N.E.3d 72 (Ind. Ct. App 2014)
SUBJECT: Three-year waiting period does not apply under new expungement statute
HOLDING: On rehearing from opinion at 10 N.E.3d 1031, which affirmed denial of D's petition for expungement, Court held that the three-year waiting period for filing a new petition does not apply to any new petition D may file to expunge his Class A misdemeanor conviction under the new, more liberal standards of Ind. Code 35-38-9-2. D's petition filed under old statute was not denied due to the exercise of the court's discretion under Ind. Code 35-38-9-4 or 5, but rather on the basis that he twice violated probation and it did not meet the requirements of the then-existing statute. Thus, the three-year waiting period is inapplicable. Held, judgment affirmed.

RELATED CASES: Plummer, 13 N.E.3d 420 (Ind. Ct. App 2014) (noting that expungement statute was amended effective 3/14 to remove the requirement that petitioner prove that he "successfully complete" sentence).

TITLE: Ball v. State
INDEX NO.: W.4.b.1.
CITE: (2/23/2021), 165 N.E.3d 130 (Ind. Ct. App. 2021)
SUBJECT: Abuse of discretion to deny petition for expungement
HOLDING: Petitioner committed two felony offenses when he was sixteen years old but has been a law-abiding citizen for the past twenty years. He tendered letters to the trial court attesting to his good character and strong work ethic. He is married and has four children, but his convictions prevented him from volunteering at the children's schools. He has owned a real estate business for eighteen years and a heating and air conditioning business for twelve years, but his convictions prevent him from servicing certain clients. He is also an active volunteer in his community, but certain organizations do not allow him to volunteer because of his convictions. The trial court denied his petition for expungement, relying on the fact the value of the stolen guns was more than $16,000, and the Court of Appeals reversed. Noting that while the trial court had the discretion to consider that fact in determining whether to grant or deny the petition, that fact alone was simply not enough to support the denial of the petition when all the other evidence supported expungement. The court also observed that the expungement statute, IN Code 35-38-9-7, should be liberally construed to advance the remedy for which it was enacted. Cline v. State, 61 N.E.3d 360, 363 (Ind. Ct. App. 2016), *abrogated in part on other grounds in* Allen, 159 N.E.2d at 585. Held, judgment reversed and remanded with instructions.

TITLE: Borel v. State
INDEX NO.: W.4.b.1.
CITE: (9/30/2015), 44 N.E.3d 791 (Ind. Ct. App. 2015)
SUBJECT: Error denying petition to expunge
HOLDING: Tr. Ct. erred in denying D's petition to expunge, and the related motion to correct error, because the record does not support the Tr. Ct.'s finding that D failed to pay fines, fees, and court costs.

In 1976, D was convicted of Entering a Dwelling with Intent to Commit a Felony. In 2014, he asked the Tr. Ct. to expunge records related to the conviction. The State objected, claiming D failed to show he had paid all fines, fees, and court costs. See Ind. Code § 35-38-9-8(b)(11)(2014) (later amended to remove proof of payment requirement).

The typed entries in the docket do not indicate that any court costs were imposed. There is a handwritten note next to one of the entries consisting of the following: "[illegible word, perhaps 'costs] $37.00." The note was not signed or initialed, and there is no indication when the note was added to the docket over the last thirty years. Thus, there is insufficient evidence that the Tr. Ct. imposed court costs or that court costs remain unpaid. Held, judgment reversed.

TITLE: Burton v. State
INDEX NO.: W.4.b.1.
CITE: (2/3/2017), 71 N.E.3d 24 (Ind. Ct. App. 2017)
SUBJECT: Expungement of Class D/Level 6 felonies unavailable for sex or violent offenders
HOLDING: A sex or violent offender is not eligible for expungement of Class D/Level 6 felonies. Ind. Code § 35-38-9-3(b). Defendant sought to expunge his 1992 Clark County convictions, both Class D felonies, for theft and fraud. Defendant's petition listed all of his convictions, including 1992 State of Washington convictions for rape, child molesting, and sexual exploitation of a minor, and a later Washington conviction for rape. These convictions make Defendant a sex or violent offender under Ind. Code § 11-8-8-5, making him ineligible for expungement of his Class D felony convictions. Ind. Code § 35-38-9-3(b). Defendant argued that this statute only precludes expungement of the disqualifying offenses listed in the statute. However, the statute's plain language provides otherwise. Held, dismissal of petition for expungement affirmed.

TITLE: Cline v. State
INDEX NO.: W.4.b.1.
CITE: (9/15/2016), 61 N.E.3d 360 (Ind. Ct. App 2015)
SUBJECT: Denial of expungement reversed
HOLDING: Tr. Ct. abused its discretion when it denied D's motion for expungement. See Ind. Code § 35-3-9-4(e). The expungement statute should be liberally construed to advance the remedy for which it was created. See Brown v. State, 947 N.E.2d 486, 490 (Ind. Ct. App. 2011), *trans. denied*. Besides meeting all statutory factors, D has been consistently employed; obtained an Associate's degree, a CPR license, and a ServeSafe certification; and was promoted to management yet was fired only because her employer learned about her criminal record. Also, in denying the petition, the Tr. Ct. cited factors that are not statutory bars to expungement, such as the types of offenses D committed, including dealing methamphetamine, all such convictions being deemed a "a pain in my ass" by the Tr. Ct. Court also noted that only five years had elapsed since D completed probation, even though the statute requires only three. Held, judgment reversed; Barnes, J., dissenting, argued that nothing bars a Tr. Ct. from *citing* non-statutory factors to deny a petition for expungement and that the majority reweighed the evidence. However, he would remand for the Tr. Ct. to *clarify* how many convictions D had because it appears the Tr. Ct. mistakenly understood that D's criminal history included eight convictions, when in fact it included only two.

RELATED CASES: W.R., 87 N.E.3d 30 (Ind. Ct. App. 2017) (distinguishing Cline, trial court did not abuse discretion in denying D's petition to expunge because unlike Cline, D committed a new crime (OWI) after he was convicted of the two drug related felonies that he asked the trial court to expunge).

TITLE: D.A. v. State
INDEX NO.: W.4.b.1.
CITE: (9/1/2016), 58 N.E.3d 169 (Ind. 2015), **SUPERCEDED BY STATUTE**
SUBJECT: Expungement statutes do not apply to civil forfeiture proceedings
HOLDING: Addressing a matter of first impression, Court held that Indiana's comprehensive second-chance laws that allow expungement of certain criminal convictions do not permit expungement of civil forfeiture records. Thus, Tr. Ct. correctly denied D.A.'s request to apply expungement order to records of a civil forfeiture proceeding that arose from the same facts underlying his now-expunged conviction. D.A. was convicted of dealing and possession offenses in 2003 resulting from a controlled drug buy. In a separate civil forfeiture action, Tr. Ct. also ordered forfeiture of $720 seized from D.A. during his arrest.

Indiana's comprehensive new expungement statutes provide second chances by broadly allowing records from arrests, juvenile delinquency allegations, criminal charges and convictions to be expunged. But under the plain language of Ind. Code § 35-38-9-4, civil forfeitures are not included within the "conviction records" that may be expunged, and they do not relate to a conviction. To hold otherwise would create unintended consequences, such as the inability of someone to expunge a civil forfeiture if they were not convicted of a crime, because the statutes require a criminal conviction.

Although the expungement statutes do not permit expungement of forfeitures, Court noted that public access to these types of records does not diminish the statute's' "strong protection" against discrimination based on an expunged conviction or arrest record. See Ind. Code § 35-38-9-10(b). Held, transfer granted, Court of Appeals' opinion at 49 N.E.3d 580 vacated, judgment affirmed. Rucker, J., concurring in result.

NOTE: Effective July 1, 2019, expungements now include collateral actions. A collateral action means an action or proceeding, including an administrative proceeding that is factually or legally related to an arrest, a criminal charge, a juvenile delinquency allegation, a conviction, or a juvenile delinquency adjudication and includes a proceeding or action concerning a seizure, civil forfeiture, and a petition for specialized driving privileges. See Ind. Code § 35-38-9-0.5.

TITLE: G.E. v. Ind. Dept. of Child Services
INDEX NO.: W.4.b.1.
CITE: (4/15/2015), 29 N.E.3d 769 (Ind. Ct. App. 2015)
SUBJECT: Denial of expungement of child abuse report affirmed
HOLDING: Ind. Code § 31-33-27-5 (effective 2012) allows a person to ask for expungement of child abuse or neglect reports. The court "may" grant the petition if it finds by clear and convincing evidence that there is "little likelihood that the petitioner will be a future perpetrator of child abuse or neglect" and "the information has insufficient current probative value to justify its retention in records of the department for future reference."

Here, in a case of first impression, Court held that a woman seeking to expunge a substantiated report of child neglect in order to keep her job as a cook at a day care center did not meet the necessary statutory requirements to grant the expungement. Even if G.E.'s testimony alone established that she no longer posed a threat to children, she did not show that her substantiated report of neglect or abuse from 2000 no longer has current probative value to keep in DCS' records. Because G.E.works at a child care center, child care centers are prohibited from employing or using the services of someone known to have abused children, and employment of such people could be grounds to revoke a license, it is clear that G.E.'s records have probative value. Held, denial of expungement petition affirmed.

TITLE: Gerber v. State
INDEX NO.: W.4.b.1.
CITE: (3rd Dist., 08-28-09), 912 N.E.2d 386 (Ind. Ct. App. 2009)
SUBJECT: Expungement - denial based on fact that statute of limitations has not expired
HOLDING: Trial court erred by treating the running of the statute of limitations period as a prerequisite to petitioning for expungement. Court rejected State's argument that, for cases in which no charges are filed, person should wait a reasonable time after being arrested to file a petition for expungement and limitations period constitutes a reasonable time. This position has no support in text of expungement statute and would "effectively prevent anyone arrested for a Class A felony of murder from petitioning for expungement when no charges are filed because a prosecution for those offenses may be commenced at any time.

Here, State did not file notice of opposition to Gerber's petition for expungement, and trial court thus had discretion to summarily deny the petition only if it found the petition "insufficient." Ind. Code 35-38-5-1(d)(3)(A). Although meaning of the term "insufficient" remains unclear, trial court has discretion on remand to either: 1) summarily grant the petition; 2) set matter for hearing; or 3) summarily deny the petition after finding it insufficient. Because prosecutor did not file a notice of opposition, trial court should not have permitted prosecutor to file a brief opposing Gerber's petition and "such participation should not be permitted on remand." Held, judgment reversed and remanded; Baker, C.J., concurring in part and dissenting in part, believes that on remand, trial court has no authority to summarily deny Gerber's petition. Barnes, J. concurring in result in part and dissenting in part, would permit participation by prosecutor on remand.

TITLE: H.M. v. State
INDEX NO.: W.4.b.1.
CITE: (12/8/2016), 65 N.E.3d 1054 (Ind. Ct. App. 2016)
SUBJECT: Marion County Sheriff violated expungement statute in denying job application
HOLDING: Even though Ind. Code § 35-38-9-6(a) allowed the Marion County Sheriff ("MCS") to access information showing that H.M.'s criminal record had been expunged, it did not allow MCS to use that information to withhold a job offer as "[i]t is unlawful . . . to refuse to employ . . . any person because of a conviction or arrest record expunged or sealed under this chapter." See Ind. Code § 35-38-9-10(b).

After his criminal record was expunged, H.M. applied for a special deputy position with MCS. When MCS declined to offer the job, H.M. filed a motion for contempt, arguing that MCS violated the anti-discrimination provision in the expungement statute. MCS moved to dismiss the motion for contempt; the Tr. Ct. granted the motion.

While Ind. Code § 36-8-10-10.6(b)(2) and (3) does bar law enforcement from appointing felons and some misdemeanants as special deputies, the legislature has not created an exception that would allow law enforcement agencies to skirt the anti-discrimination provision of Ind. Code § 35-38-9-10(b). Thus, the Tr. Ct. erred in granting MCS's motion to dismiss. Held, judgment reversed. Barnes, J., concurring, "urg[ing] our legislature to examine this provision of Indiana law and carve out some sort of law-enforcement exception."

TITLE: In re J.S.
INDEX NO.: W.4.b.1.
CITE: (12/28/2015), 48 N.E.3d 356 (Ind. Ct. App. 2015)
SUBJECT: BMV must report commercial driver's expunged OWI conviction
HOLDING: Trial court erred in prohibiting the Bureau of Motor Vehicles (BMV) from reporting the operating while intoxicated conviction of a driver who had his criminal record expunged. As a result of his second OWI conviction, J.S., who had held a commercial driver's license (CDL), received a lifetime prohibition from ever carrying a CDL. Trial court granted J.S.'s expungement petition and also prohibited the BMV from disclosing his 2009 conviction to the CDL Information System, despite Indiana and federal laws requiring disclosure. See 49 C.F.R. § 384.225; I. C. § 9-24-6-2(d).

In concluding that trial court's order violates Supremacy Clause and is contrary to Legislative intent, Court noted it could not "foresee a situation where the General Assembly would intend to (1) create a law that is in direct conflict with existing state and federal law, (2) put Indiana at risk of losing substantial sums of federal aid, or (3) risk the de-certification of Indiana's CDL program." Court also noted the 2015 amendment to I. C. § 35-38-9-2, which expressly allows the BMV to comply with the reporting requirements, indicates that the General Assembly has always intended for the BMV to comply with these provisions. Held, judgment reversed and remanded with instructions to amend the expungement order to comply with existing federal and Indiana laws.

TITLE: Kelley v. State
INDEX NO.: W.4.b.1.
CITE: (3/26/2021), 166 N.E.3d 936 (Ind. Ct. App. 2021)
SUBJECT: Expungement statute prohibits expungement of murder conviction
HOLDING: Petitioner, incarcerated in another State, filed a petition to expunge his criminal record in Indiana arguing he was eligible for expungement of his Indiana felony convictions because, due to his continuous incarceration, he has not engaged in any criminal activity since his 2011 arrest. Court of Appeals upheld the trial court's denial of expungement because neither I.C. 35-38-9-3 nor I.C. 35-38-9-4 allow murderers to petition for expungement.

TITLE: Keene v. State

INDEX NO.: W.4.b.1.

CITE: (1/23/2019), 118 N.E.3d 801 (Ind. Ct. App 2019)

SUBJECT: No constitutional right to cross-examine victim impact statement in expungement proceedings

HOLDING: As in context of criminal sentencing hearings, Ds do not have the right to cross-examine a victim-impact statement at expungement hearings. Expungement is a statutory, rather than a constitutional, right. Thus, D's due process rights were not violated when Tr. Ct. admitted into evidence a written statement from the victim of a crime. Held, denial of expungement affirmed.

TITLE: Key v. State
INDEX NO.: W.4.b.1
CITE: (12/17/2015), 48 N.E.3d 333 (Ind. Ct. App. 2015)
SUBJECT: Expungement petitioner entitled to hearing when prosecutor objects
HOLDING: Tr. Ct. erred in summarily denying D's expungement petition for his Class B felony aiding robbery and D felony resisting law enforcement convictions without first holding a hearing. The prosecutor filed an objection and argued reasons to deny the petition. After reviewing the petition, the State's objection, the offense and D's criminal history, Tr. Ct. denied the petition without setting a hearing. Ind. Code § 35-38-9-9(c) (2014 version) provides that if the prosecutor objects to the expungement petition, "the court shall set the matter for hearing." Summary denial is appropriate only where the petition is facially defective or reveals petitioner is not eligible for expungement. Neither were true of D's petition. The Legislature gave petitioners a due process right to a hearing under the plain and ordinary meaning of the statute.

Court rejected State's argument that the statute conflicts with Trial Rule 12(C), which allows court to enter judgment based on petition and response without holding hearing. There was no indication that Trial Rule 12(C) was the legal basis for denying the expungement petition, and there is no conflict between the two procedures because they both permit the court to enter judgment where the motion or pleading will fail as a matter of law. Held, judgment reversed and remanded.

TITLE: Kleiman v. State
INDEX NO.: W.4.b.1.
CITE: (4th Dist. 04/23/92), Ind. App., 590 N.E.2d 660
SUBJECT: Expungement of arrest record unavailable after acquittal
HOLDING: Ind. Code 35-38-5-1, which allows for expungement of arrest records only when charges are dropped prior to trial, is not unconstitutional, & Tr. Ct. has no authority outside of statute to order expungement of arrest record. D was acquitted of public indecency & petitioned for expungement of his arrest record, & Tr. Ct. denied petition. Ind. Code 35-38-5-1 applies only to situations where charges against Ds are dropped prior to trial, & Ct. determined that this is only authority for Ct's to order expungement, relying on Sotos, App., 558 N.E.2d 909. Ct. distinguished Bergman 558 N.E.2d 1111, because Bergman Ct. was discussing expungement of conviction after pardon, not expungement of arrest record.

Ct. also found that differential treatment of those whose charges are dropped before trial, & those who are acquitted did not violate privilege & immunities clause of Ind. Const., Ind. Const. Art. 1, §23. Ind. Code 35-38-5-1 distinguishes between those who have been wrongfully arrested, & those who have been rightfully arrested but later acquitted. A finding of "no probable cause" or that mistake was made, is determination that person should not have been arrested, & it serves no purpose to maintain records on those Ds. D did not argue that there was no probable cause to arrest him, or that mistake was made because of identity error or no crime being com mitted, & so when he was arrested, police had some reason to believe he had committed crime. Fact that his trial resulted in acquittal didn't change that fact, & it is reasonable for state to keep records of those arrested where there was probable cause to believe they had committed crime. Therefore, statute was not unconstitutional. Held, denial of expungement affirmed.

RELATED CASES: Reynolds, App., 774 N.E.2d 902, *disapproved on other grounds*, State v. Arnold, 906 N.E.2d 167 (Ind. 2009) (distinction in expungement statute between one having prior arrest & one having no prior arrest is not irrational).

TITLE: Marshall v. State
INDEX NO.: W.4.b.1.
CITE: (3/9/2016), 52 N.E.3d 41 (Ind. App. 2016)
SUBJECT: Crime not reduced to judgment still bars expungement
HOLDING: D was not entitled to expungement, even though he was not convicted of any crimes during the statutory waiting period, because he admitted to committing a crime during the same period. Between 1992 and 2006, D was convicted of a number of OWI and PI charges as well as criminal recklessness and misdemeanor battery. In April of 2013, he was charged with operating a vehicle as an habitual traffic violator and driving while suspended. The State dismissed these charges once D completed pretrial diversion.

Under the criteria of Ind. Code § 35-38-9-3(c) and Ind. Code § 35-38-9-2(b), the trial court was required to grant D's petition for expungement because he established he had not been convicted of another offense during the statutory waiting period. However, Ind. Code § 5-38-9-8(b)(6) requires a person seeking expungement to "affirm that the petitioner has not committed another crime within the period required for expungement." (Emphasis added). D admitted to committing an offense by participating in pretrial diversion.

Resolving this statutory tension requires looking at the expungement statutes as a whole, J.B. v. State, 27 N.E.3d 336,338 (Ind. Ct. App. 2015), and also by considering the legislature's objective in allowing expungement: assisting those who have remained law abiding. Cf. Taylor v. State, 7 N.E.3d 362, 367 (Ind. Ct. App. 2014); Alvey v. State, 10 N.E.3d 1031, 1034 (Ind. Ct. App. 2014). Expunging D's records where he has admitted to committing a criminal offense "does not further the policy objective of assistance to one who has paid his societal dues without incident." Held, judgment affirmed.

TITLE: Mishra v. State

INDEX NO.: W.4.b.1.

CITE: (3/9/21), Ind. Ct. App., 165 N.E.3d 602

SUBJECT: Expunged conviction treated as if it never occurred, even in subsequent expungement proceeding

HOLDING: The trial court erred in considering Petitioner's expunged conviction when it denied his expungement on the grounds that he had been convicted of a crime during the previous five years. The prosecutor in Monroe County consented to the filing of an expungement petition before the expiration of the five-year statutory waiting period for a 2016 class A misdemeanor conviction. Petitioner filed to expunge that conviction and to expunge his 2007 class A misdemeanor in this case. Before the Monroe Circuit Court granted that petition, the trial court denied his petition for expungement, finding that Petitioner had failed to meet all the other statutory requirements under Indiana Code section 35-38-9-2(e) because he had been convicted of a crime within the previous five years, namely the 2016 Monroe County conviction. A week after the Monroe Circuit Court granted his petition to expunge the 2016 conviction, Petitioner re-filed his expungement petition, noting the expungement of the 2016 conviction. The trial court again denied the petition on grounds that Petitioner had been convicted of a crime within the previous five years. The Court of Appeals found that because his Monroe County conviction has been expunged, the plain language of the statute commands that he be treated as if that 2016 conviction had never occurred, and he is entitled to expungement of his 2007 conviction. Held, judgment reversed.

TITLE: Mishra v. State

INDEX NO.: W.4.b.1.

CITE: (12/13/2022), Ind. Ct. App., 200 N.E.3d 486

SUBJECT: Trial court erred by omitting a portion of expungement statute's language from its order

HOLDING: The trial court granted the expungement of Petitioner's criminal convictions and arrest record. However, in its order the court struck language regarding restoring Petitioner's right to be considered a proper person under Ind. Code 35-47-1-7(2), for purposes of obtaining a license to carry a handgun or to obtain a retail handgun dealer's license. Ind. Code 35-38-9-10(c), provides: "the civil rights of a person whose conviction has been expunged shall be fully restored, including the right to vote, to hold public office, to be a proper person under IC 35-47-1-7(2), and to serve as a juror." At the hearing, the trial court stated its reason for striking the "proper person" language was that "I generally don't have all the information necessary under that statute to determine whether or not [Petitioner] is a proper person. So I always strike that portion."

The Court of Appeals noted that IC 35-38-9-10(c) does not require the trial court to make a determination as to whether a defendant is a proper person pursuant to the entirety of IC 35-47-1-7, but that it merely acknowledges that the convictions being expunged by the trial court no longer prevent him from being a proper person. The inclusion of language from section c in an expungement order does not operate to restore rights to a person, it merely articulates that the expunged convictions no longer preclude a person from exercising the rights listed. The trial court erred by omitting a portion of the expungement statute's language from its order granting expungement and the Court reversed and remanded with instructions to re-issue the order and either include the omitted proper person language or exclude the list of restored civil rights altogether. Held, reversed, and remanded.

TITLE: Payne v. State
INDEX NO.: W.4.b.1.
CITE: (1st Dist. 12/5/88), Ind. App., 531 N.E.2d 216
SUBJECT: Expungement - ground for denial
HOLDING: Tr. Ct. erred in denying D's petition for expungement on ground that probable cause existed. D was charged with resisting law enforcement in connection with speeding charge. Pursuant to plea agreement, prosecutor dropped resisting charge & filed joint petition for expungement. Attorney General opposed expungement on behalf of state police, & Tr. Ct. denied on ground that probable cause existed for charge. D argues on appeal that Ind. Code 35-38-5-1 required Tr. Ct. to grant expungement. Subsection (f) requires that petition be granted unless conditions of subsection (a) are not met, D has record of arrests other than minor traffic offenses, or additional criminal charges are pending against D. State argues that Tr. Ct.'s reason for denial is equivalent to finding that conditions of subsection (a) are not met, since lack of probable cause is condition listed in subsection (a). However, conditions in subsection (a) are listed in alternative. Since Tr. Ct. failed to find that all conditions were not met, it erred in denying D's petition for expungement.

Note: On rehearing, remanded to Tr. Ct. for more complete findings.

TITLE: Pittman v. State
INDEX NO: W.4.b.1.
CITE: (4/30/2014), 9 N.E.3d 179 (Ind. Ct. App 2014)
SUBJECT: Restricted Access - must have no probation violations
HOLDING: Tr. Ct. did not abuse its discretion by denying D's Petition to Restrict Access to his Records. Before a Tr. Ct. may restrict access to records of a person's conviction, one of the conditions is that the person must have "satisfied any other obligation imposed on the person as part of the sentence." Ind. Code § 35-38-8-3 and 35-38-8-4.

Here, in December 2000, D was convicted of misdemeanor OWI and was placed probation with the conditions that he abstain from alcohol and not commit any additional offenses. While on probation, D was arrested and charged with a Class D felony OWI. He eventually admitted to the probation violation and Tr. Ct. extended his probation for one year. Thus, he failed to satisfy the obligations imposed as part of his sentence and does not qualify to have access to his conviction records restricted. Held, judgment affirmed.

RELATED CASES: Alvey, 10 N.E.3d 1031 (Ind. Ct. App. 2014) (Tr. Ct properly denied D's petition to expunge his conviction, because he admitted to violating the terms of his probation twice, thus rendering him ineligible to meet the requirements of then-existing expungement statute; on rehearing at 15 N.E.3d 72, Ct. held that the three-year waiting period for filing a new petition does not apply to any new petition D may file to expunge his Class A misdemeanor conviction under the new, more liberal standards of Ind. Code 35-38-9-2).

TITLE: Ryan v. State
INDEX NO.: W.4.b.1.
CITE: (2nd Dist., 01-28-09) 900 N.E.2d 43 (Ind. Ct. App. 2009)
SUBJECT: Expungement - procedure; improper summary denial
HOLDING: Trial court erred in denying petition for expungement without a hearing. The trial court shall: (1) summarily grant a petition for expungement; (2) set the matter for hearing; or (3) summarily deny the petition, if the court determines that: (A) the petition is insufficient; or (B) based on information contained in sworn statements submitted by individuals who represent an agency, the petitioner is not entitled to expungement of records. Ind. Code 35-38-5-1(d). After a hearing is held, the petition shall be granted unless the court finds: (1) the conditions in subsection (a) have not been met; (2) the individual has a record of arrests other than minor traffic offenses; or (3) additional criminal charges are pending against the individual. Ind. Code 35-58-5-1(f).

Here, Ryan filed a petition for expungement of his arrest and charges for Class C felony child molesting which were ultimately dismissed. State filed a response asserting that Ryan was ineligible for expungement due to his prior arrest and conviction for OWI, a class A misdemeanor. Trial court denied the petition without a hearing. Because trial court did not make a finding that the petition was insufficient and State's response did not include a sworn statement, trial court's summary denial was not statutorily authorized. Thus, trial court was required to have a hearing on the matter. Held, judgment reversed and remanded; Vaidik, J., concurring on basis that the mere fact State did not verify its response is a technicality that can be overlooked; however, a single arrest is not sufficient to justify the denial of an expungement petition because Ind. Code 35-38-5-1(f) refers to previous "arrests."

TITLE: State v. Bergman
INDEX NO.: W.4.b.1.
CITE: (8/27/90), Ind. App., 558 N.E.2d 1111
SUBJECT: Penalties -- adult expungement conviction based on gubernatorial pardon
HOLDING: In 1975, D was convicted of attempting to obtain controlled substance & sentenced to term of imprisonment for one to five years. In 1981, he received pardon for offense from governor. Six years later, D petitioned to expunge record of his conviction & Tr. Ct. granted petition. State & Indiana State Police Department appealed, claiming that Tr. Ct. erred in expunging D's criminal record by failing to follow Ind. Code 35-38-5-1(a) which relates to expungement of criminal records. Ct. held that statute applies only to expungement of records prior to conviction & makes no reference to expungement of criminal convictions based on gubernatorial pardons after conviction. Tr. Ct. did not err in expunging record based on gubernatorial pardon. Thus, Tr. Ct. did not err in expunging record based on gubernatorial pardon. Held, judgment affirmed.

TITLE: State ex rel. Ind. State Police v. Arnold

INDEX NO.: W.4.b.1

CITE: 906 N.E.2d 167 (Ind. 2009)

SUBJECT: Discretion to grant expungement even if D has record of arrests/additional pending charges

HOLDING: If, after conducting a hearing, trial court finds that an individual has a record of arrests other than minor traffic offenses, court has discretion to either grant or deny that individual's petition for expungement. Ind. Code 35-38- 5-1(a) provides that whenever a person is arrested but no criminal charges are filed or all charges are dropped because of mistaken identity, no offense was in fact committed, or there was absence of probable cause, the person may petition for expungement. Subsection (f)(2) and (f)(3) provide that a petition for expungement must be granted unless the individual has a record of arrests other than minor traffic offenses or individual has additional pending criminal charges. Statute is silent regarding whether the factors listed in subsection (f)(2) and f(3) dictate a denial of a petition for expungement where the petitioner also meets the requirements of subsection (a).

Court agreed with Court of Appeals' holding that, given legislature's omission of language mandating the denial of a petition for expungement, legislature intended the granting or denial of the petition to be within trial court's sound discretion where petitioner meets requirements of (a) but falls within subsection (f)(2) or (f)(3). Mandatory language of subsection (f) applies only to the granting of expungement, it is not a directive regarding the denial of a petition for expungement. Moreover, Ind. Code 35-38-5-1(d) gives trial court almost unfettered discretion to grant summarily or deny summarily a petition for expungement without considering any statutory factors. Application of State's interpretation of subsection (f) is inconsistent with intent of legislature and would bring about unjust results. To the extent State v. Reynolds, 774 N.E.2d 902 (Ind. Ct. App 2002), holds to the contrary, it is disapproved. Held, transfer granted, judgment granting expungement affirmed; Dickson, J., concurs in result; Shepard, C.J., dissents with separate opinion.

TITLE: Taylor v. State
INDEX NO: W.4.b.1.
CITE: (4/17/2014), 7 N.E.3d 362 (Ind. Ct. App 2014)
SUBJECT: Expungement mandatory under statute; Tr. Ct. need not consider victim statement
HOLDING: In an issue of first impression, the Court found that if a person meets all requirements of the expungement statute, Ind. Code § 35-38-9-2(d), the Tr. Ct. must grant a petition for expungement because the word "shall" is mandatory; thus, the Tr. Ct. need not consider a victim's statement. See Ind. Code § 35-38-9-9(d). This interpretation does not render Ind. Code § 35-38-9-9(d) meaningless because victim impact statements may apply for discretionary expungement which was not the case here. Held, judgment reversed.

RELATED CASES: Marshall, 52 N.E.3d 41 (Ind. App.2016) (even though expungment seemed mandatory under IC § 35-38-9-2(b), -3(c) because D hadn't been convicted of new crimes, Tr. Ct. properly denied petition because, per IC § 35-38-9-8(b)(6), D committed an offense that was later dismissed through pretrial diversion) (see full review, this section); Mallory, 15 N.E.3d 112 (Ind. Ct. App. 2014) (Tr. Ct. erroneously concluded that it had discretion to deny D's petition because version of Ind. Code § 35-38-9-9(d) in effect provided that it "shall consider the victim's statement before making its determination").

TITLE: Trout v. State
INDEX NO.: W.4.b.1.
CITE: (3/16/2015), 28 N.E.3d 267 (Ind. Ct. App. 2015)
SUBJECT: D was entitled to mandatory expungement
HOLDING: The Tr. Ct. erred in ruling that D was not entitled to mandatory expungement under Ind. Code 35-38-9-3 because it mistakenly relied on bodily injury resulting from a charged offense for which D was acquitted. Ind. Code 35-38-9-3(b)(3) excludes only a person from mandatory expungement only if "[the] person [is] convicted of a felony that resulted in bodily injury to another person." In a 1997 incident at the Clinton County Fairgrounds, D shot his 45-caliber handgun into the air, pointed it at two people, and pointed it at a third person, Kimberly Langkop; the gun accidently discharged, wounding Langkop. D was convicted of two D felonies, criminal recklessness with a deadly weapon and pointing a firearm. Neither offense resulted in bodily injury to another person. D was acquitted of the only charged offense resulting in bodily injury, attempted murder. The Tr. Ct. should have ruled D was entitled to mandatory expungement. Held, judgment reversed.

TITLE: Willford v. State
INDEX NO.: W.4.b.1.
CITE: (12/6/2022), 199 N.E.3d 825 (Ind. Ct. App. 2022)
SUBJECT: Consent to expungement for felony convictions resulting in serious bodily injury
HOLDING: Under Indiana's expungement statutes, convictions that resulted in serious bodily injury may be expunged only if the prosecutor has consented. Here, after hitting a man with his vehicle and fleeing the scene, Defendant was convicted of battery by means of a deadly weapon and leaving the scene of an accident. The Class C felony battery statute under which Defendant was convicted contains two separate and distinct offenses—one requires proof of resulting serious bodily injury and the other requires proof of commission by a deadly weapon. Noble v. State, 734 N.E.2d 1119 (Ind. Ct. App. 2000). In the expungement proceeding, trial court found "no indication from the available record that serious bodily injury was proven" at Defendant's trial. Thus, Defendant was correct to petition for expungement under Ind. Code Section 35-38-9-4, which does not require consent from the State. Trial court abused its discretion in denying the petition and finding that it was barred by lack of prosecutorial consent. Held, reversed, and remanded for reconsideration on the merits.

TITLE: Zagorac v. State
INDEX NO.: W.4.b.1.
CITE: (01-31-11), 943 N.E.2d 384 (Ind. Ct. App. 2011)
SUBJECT: Summary dismissal of petition for expungement - no error
HOLDING: Trial court did not abuse its "almost unfettered discretion" in summarily denying D's petition to expunge an arrest for child molesting, as the charge was dropped because the alleged victim became ill from his fear of testifying in the presence of D, not because of mistaken identity, lack of probable cause, or that no offense was committed. Ind. Code § 35-38-5-1(a). D's petition for expungement did not challenge this characterization. Ind. Code § 35-38-5-1(1)(d)(3)(A), (B) requires summary denial if the Tr. Ct. finds that the petition is insufficient or based on information contained in sworn statements submitted by individuals who represent an agency that the petitioner is not entitled to an expungement of records. The Lake County Prosecuting Attorney filed such a statement.

D is incorrect that the expungement statute requires that the sworn statements establish probable cause. D is also incorrect in arguing that because the State dropped the charge, no offense was committed, satisfying Ind. Code § 35-38-5-1(a)(2)(B). This interpretation would make expungement automatic any time charges were dismissed, rather than the reasons for expungement listed in the statute: mistaken identity, lack of probable cause, or no offense was actually committed. Held, judgment affirmed.

W. PENALTIES/ DISABILITIES/ FORFEITURE AND REMEDIES

W.4. Remedies

W.4.b.2. Juvenile

TITLE: Dubois County Office of Family & Children v. Adams
INDEX NO.: W.4.b.2.
CITE: (10/22/96), Ind. App., 671 N.E.2d 202
SUBJECT: Jurisdiction to expunge juvenile records -- must relate to proceedings before court
HOLDING: On interlocutory appeal, Dubois County Office of Family & Children (DCOFC) claimed that juvenile Ct. lacked subject matter jurisdiction to order agency to expunge its records in absence of ongoing juvenile proceedings in that Ct. Specifically, DCOFC argued that Ind. Code 31- 6-8-2, which permits juvenile Ct. to order records expunged, only gives Ct. jurisdiction to enter such order when records relate to proceedings before that juvenile Ct. DCOFC argued that Tr. Ct. erred in refusing to dismiss Adams' petition for expungement. Ind. Code 31-6-8-2 provides in part that any person may petition juvenile Ct. at any time to remove from its files, from files of law enforcement agencies, & from files of any other person who has provided services to child under Ct. order those records pertaining to his involvement in juvenile Ct. proceedings. Statute gives juvenile Ct. jurisdiction to order expungement of records relating to person's involvement in juvenile Ct. proceedings. However, neither children who accused Adams of molesting them nor child removed from Adams' home by agency were involved in juvenile Ct. proceedings before Dubois Juvenile Ct. As result, juvenile Ct. lacked jurisdiction to order records relating to those children expunged & erred in denying DCOFC's motion to dismiss for lack of subject matter jurisdiction. Held, denial of motion to dismiss reversed.

TITLE: Jordan v. State
INDEX NO.: W.4.b.2.
CITE: (9/1/87), Ind., 512 N.E.2d 407
SUBJECT: Juvenile cases are civil & not criminal
HOLDING: Cause came to Ct. on Petition to Transfer from First District Ct. App. In 1965, Jordan, then juvenile, was adjudged to be delinquent child, having committed act which would be crime if committed by adult. He was committed to Indiana Boys School. He served term of that commitment. In 1985, Jordan filed Petition for Post-Conviction Relief with Marion County Juvenile Division. Tr. Ct., without referring his petition to Indiana Public Defender & without holding any hearing, summarily denied his petition because "post-conviction relief is not a procedure used in the juvenile Ct. process." Tr. Ct. also denied Jordan's motion to refer his petition to Public Defender on ground it was not timely filed. Ct. App. found Ind. R.P.C. 1 was available to juvenile adjudged to be delinquent for having committed act which would constitute crime if committed by adult. State sought transfer, arguing that juvenile adjudications are not convictions & therefore post-conviction remedies are not intended for their review & due process does not require application of post-conviction remedies to delinquency adjudications because juvenile code affords adequate protections & remedies. Ct. held that because P.C. 1 provides post-conviction remedy for "any person who has been convicted of or sentenced for crime by Ct. of this State," it concerns only persons convicted of or sentenced for crime. It cannot be interpreted to refer in any manner to juvenile because juvenile case is civil & not criminal matter. Juvenile adjudications do not constitute criminal convictions. Pallett, 381 N.E.2d 452. Held, Tr. Ct.'s denial of Jordan's petition was affirmed; Shepard, J., concurring; DeBruler, J., dissenting.

TITLE: Owens v. State
INDEX NO.: W.4.b.2.
CITE: (10/20/89), Ind., 544 N.E.2d 1375
SUBJECT: Expunged juvenile record - consideration at subsequent sentencing
HOLDING: Tr. Ct. erred in considering expunged juvenile record as aggravating circumstance in sentencing D. D received consecutive sentences for burglary, theft, & voluntary manslaughter convictions. Among reasons stated by Tr. Ct. for imposing consecutive sentences was D's past criminal record. On appeal, D argues that Tr. Ct. erroneously considered D's expunged juvenile record. When court grants expungement, it shall order each law enforcement agency & each person who provided treatment for child to send records to court. Ind. Code 31-6-8-2(d). Once records reach court, they may be destroyed or given to person to whom they pertain. Ind. Code 31-6-8-2(e). Properly implemented, these procedures render expunged juvenile records unavailable for later consideration as aggravating sentencing factors. At D's sentencing hearing, juvenile probation officer testified that Tr. Ct. had earlier granted D expungement of juvenile records so that he could apply for military service, & that juvenile probation office had destroyed its copy of record. However, officer who prepared pre-sentence report testified that he had obtained copy of juvenile record from prosecutor's office. Tr. Ct. stated on record that it would not disregard juvenile record, noting that expungement was granted for limited purpose of allowing D to enter military service & did not extend beyond juvenile probation office. However, Ind. S. Ct. finds that statute does not provide for partial or conditional expungement, & that Tr. Ct. erred in considering record. While remaining aggravating circumstances support imposition of consecutive sentences, they do not support additional enhancement of voluntary manslaughter sentence. Held, remanded for imposition of standard term for manslaughter; affirmed in all other respects.

TITLE: T.A. v. State
INDEX NO.: W.4.b.2.
CITE: (10/19/2016), 62 N.E.3d 436 (Ind. Ct. App 2016)
SUBJECT: Erroneous denial of motion to expunge juvenile records
HOLDING: Tr. Ct. should have granted D's petition to expunge his juvenile records, even though a criminal charge was pending when the Tr. Ct. heard the petition, because Ind. Code § 35-38-9-1(e) precludes relief only if a charge is pending at the time a petition is filed.

D, an adult, filed a petition to expunge records from six separate juvenile matters. At the time, D had no pending criminal charges. Later, but before the Tr. Ct. heard the petition for expungement, the State charged D with a criminal offense. In denying D's petition, the Tr. Ct. agreed with the State that the new charge prevented D from obtaining relief. The Court ruled, however, that while Ind. Code § 35-38-9-1(e) does say that pending charges bar relief, the statute precludes relief only if charges were pending when the D filed the petition: "Upon receipt of a petition for expungement, the court . . . shall grant the petition unless . . . criminal charges are pending against the person." "The use of the phrase 'upon receipt' establishes that, for purposes of determining whether a petition meets the statutory requirements, the crucial time frame is when the petition was filed, rather than a later date." Held, judgment reversed.

TITLE: Taylor v. State
INDEX NO.: W.4.b.2.
CITE: (4/17/2014), 7 N.E.3d 362 (Ind. Ct. App 2014)
SUBJECT: Expungement mandatory under statute; T.Ct. need not consider victim statement
HOLDING: In an issue of first impression, the Court found that if a person meets all requirements of the expungement statute, IC 35-38-9-2(d), the Tr. Ct. must grant a petition for expungement because the word "shall" is mandatory; thus, the Tr. Ct. need not consider a victim's statement. See IC 35-38-9-9(d). This interpretation does not render IC 35-38-9-9(d) meaningless because victim impact statements may apply for discretionary expungement which was not the case here. Held, judgment reversed.

W. PENALTIES/ DISABILITIES/ FORFEITURE AND REMEDIES

W.4. Remedies

W.4.c. Pardon

TITLE: State v. Bergman
INDEX NO.: W.4.c.
CITE: (8/27/90), Ind. App., 558 N.E.2d 1111
SUBJECT: Pardons -- can expunge conviction based on gubernatorial pardon
HOLDING: In 1975, D was convicted of attempting to obtain controlled substance & sentenced to term of imprisonment for one to five years. In 1981, he received pardon for offense from governor. Six years later, D petitioned to expunge record of his conviction & Tr. Ct. granted petition. State & Indiana State Police Department appealed, claiming that Tr. Ct. erred in expunging D's criminal record by failing to follow Ind. Code 35-38-5-1(a) which relates to expungement of criminal records. Ct. held that statute applies only to expungement of records prior to conviction & makes no reference to expungement of criminal convictions based on gubernatorial pardons after conviction. Thus, Tr. Ct. did not err in expunging record based on gubernatorial pardon. Held, judgment affirmed.

TITLE: Nunn v. State
INDEX NO.: W.4.c.
CITE: (10/23/92), Ind., 601 N.E.2d 334
SUBJECT: Pardons -- using conviction for which pardon has been granted to impeach witness
HOLDING: On appeal of murder conviction, D argued that it was improper for Tr. Ct. to preclude defense from using evidence of prior convictions to impeach State witness, even though there was pardon for crime. Ct. held that purpose of pardon is to give person new start by blocking out existence of guilt. When pardoned conviction is used to impeach person, purpose for granting pardon may be diminished. Even though Federal Rule of Evidence 609(c) protects purpose of pardon by permitting impeachment by pardoned conviction, it does so in only limited circumstances. Here, pardon granted in favor of witness stated that he had led crime-free life since his release from probation, he had earned confidence & support from his peers in community, & that pardon was requested so that he could become full-time police officer. Ct. held that Tr. Ct. properly refused to permit impeachment by pardoned conviction in this case. Held, remanded with instructions on other grounds; Givan, J., dissenting.

W. PENALTIES/ DISABILITIES/ FORFEITURE AND REMEDIES

W.4. Remedies

W.4.d. Other

TITLE: H.M. v. State
INDEX NO.: W.4.d.
CITE: (9/10/2013), 993 N.E.2d 1162 (Ind. Ct. App 2013)
SUBJECT: Tr. Ct. properly denied petitions to restrict disclosure of arrest records
HOLDING: Tr. Ct. properly denied D's petition to restrict disclosure of four arrests. Ind. Code § 35-38-5-5.5 (now repealed), restricts disclosure to charges under some circumstances. Because D was arrested but never charged, he is not entitled to relief under the statute. Court also found D was not entitled to relief under Administrative Rule 9(G)(1)(g) because relief under the Rule is available only when a person is entitled to relief under Ind. Code § 35-38-5-5.5, which D is not. Court noted that under Ind. Code § 35-38-9-1 (effective July 1, 2013), arrest records can be sealed if "the arrest did not result in a conviction or juvenile adjudication." Held, judgment affirmed.

TITLE: Lucas v. State
INDEX NO.: W.4.d.
CITE: (8/27/2013), 993 N.E.2d 1159 (Ind. Ct. App 2013)
SUBJECT: Tr. Ct. should have restricted access to D's arrest records for dismissed charges
HOLDING: The now repealed statute that restricted access to a person's arrest records, Ind. Code § 35-38-5.5, applied to any dismissed charge, not just to cases where all charges were dismissed. Here, the State charged D with three felonies, one misdemeanor, and several infractions. D pled to two of the charges, and the State dismissed the rest. When D later asked Tr. Ct. to restrict access to arrest records for the dismissed charges, Tr. Ct. denied the request, claiming the statute provided relief only when all charges were dismissed.

The Tr. Ct. erred; nowhere does the statute say all charges must be dismissed before a person may obtain relief under the statute. Held, judgment reversed.

TITLE: San Francisco v. Sheehan
INDEX NO.: W.4.d.
CITE: (5/18/2015), 135 S. Ct. 1765 (U.S. 2015)
SUBJECT: Officers who shot mentally ill person entitled to qualified immunity
HOLDING: Officers who shot Teresa Sheehan, a woman suffering from a schizoaffective disorder and who had threatened to kill them, were entitled to qualified immunity against her claim under 42 U.S.C. § 1983 that they violated her Fourth Amendment rights. The officers were dispatched to Sheehan's group home because she had threatened to kill a social worker with a knife. When they first entered Sheehan's room, she grabbed a knife and threatened to kill them. They retreated and closed the door. Because they worried about what Sheehan might do next, they reentered her room. Sheehan, brandishing a knife, threatened the officers and approached them. After pepper spray proved ineffective, the officers shot Sheehan several times. She survived.

The officers are entitled to qualified immunity because they did not violate any clearly established Fourth Amendment rights. Plumhoff v. Rickard, 134 S. Ct. 2012 (2014). An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it," id., at 2023, meaning that "existing precedent . . . placed the statutory or constitutional question beyond debate." Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011). This exacting standard "gives government officials breathing room to make reasonable but mistaken judgments" by "protect[ing] all but the plainly incompetent or those who knowingly violate the law." Id. at 2085.

The officers did not violate the Fourth Amendment when they opened Sheehan's door the first time. Their use of force was also reasonable. The only question is whether they violated the Fourth Amendment when they reopened Sheehan's door rather than trying to accommodate her disability. Even if such a Fourth Amendment right exists, it was not clearly established at the time, so the officers are entitled to qualified immunity. Held, cert. granted, Ninth Circuit opinion at 743 F.3d 1211 reversed in part, and remanded. Alito, J., joined by Roberts, C.J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ; Scalia, J., concurring and dissenting in part, joined by Kagan, J.; Breyer, J., took no part in the consideration or decision of the case.