

# TRIBUTE TO JUSTICE THEODORE R. BOEHM

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We had the privilege of serving as law clerks to Justice Boehm and offer this tribute, with analogies to another of his passions,<sup>1</sup> to his service on the Indiana Supreme Court.

## I. THE NUMBERS

Justice Boehm authored 485 majority opinions, 67 concurring opinions, and 81 dissenting opinions during his fourteen years on the Indiana Supreme Court. During most of those years, he wrote more opinions than any other justice.<sup>2</sup> Justice Boehm was also the go-to justice when an issue required a speedy resolution. For example, he authored, and the Court published, the opinion that allowed the lease of the Indiana Toll Road just one week after oral argument.<sup>3</sup>

## II. THE BIG PLAYS

Justice Boehm's opinions often accomplish what only good lawyers can do: they make the complex seem simple. Each opinion begins with a short narrative meant to convey the central issue and holdings to lawyers and non-lawyers alike, and each opinion often takes several distinct and at times contradictory concepts and weaves them together in an analysis that, at the end, often appears self-evident. This was accomplished by Justice Boehm's intellect and drive for perfection, resulting in a work product many of his clerks referred to as his "patina."

Justice Boehm served on the Court when, after the Indiana Constitution was amended to change its jurisdiction,<sup>4</sup> the Court was able to address a larger percentage of civil cases. Many of these issues, due largely to the Court's non-discretionary and mostly criminal docket, had not been addressed by the Court for some time. Justice Boehm was instrumental in updating and clarifying authority regarding various civil and constitutional issues. While this space is neither large enough to recite them all, nor is that the purpose of this tribute, a

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1. Justice Boehm was instrumental in helping make Indianapolis the amateur sports capital of the United States, not to mention he was a big fan of the Colts, Pacers, and Indians. See generally Joel M. Schumm, *Theodore R. Boehm*, in JUSTICES OF THE INDIANA SUPREME COURT 417, 417-18 (Linda C. Gugin & James E. St. Clair eds., 2011).

2. See IND. SUPREME COURT, 2009-2010 ANNUAL REPORT 7 (2010), available at <http://www.in.gov/judiciary/supremeadmin/docs/0910report.pdf>.

3. *Bonney v. Ind. Fin. Auth.*, 849 N.E.2d 473 (Ind. 2006).

4. IND. CONST. art. VII, § 4.

few instances representing the depth and breadth of the issues bear mentioning.

In *In re WTHR-TV v. Cline*,<sup>5</sup> Justice Boehm addressed various discovery and privilege issues and reminded practitioners that those who embark on discovery “fishing expeditions” should at least be aware of the “idea of the size, species, or edibility of the fish.”<sup>6</sup> In *City of Gary ex rel. King v. Smith & Wesson Corp.*, Justice Boehm updated Indiana Supreme Court jurisprudence regarding nuisance law in a manner that has been deemed worthy to be a teaching tool for law students.<sup>7</sup> In *R.L. McCoy, Inc. v. Jack*, the Court, via Justice Boehm, held that Indiana’s comparative fault regime does not allow a credit for severally liable settled defendants.<sup>8</sup> *Cheatham v. Pohle* upheld Indiana’s statute requiring a percentage of a punitive damage award to be sent to the State.<sup>9</sup> These examples are but a few.

Similarly, Justice Boehm’s tenure was marked by many landmark opinions regarding the Indiana Constitution. Analyzing special legislation will never be the same after *Municipal City of South Bend v. Kimsey*, which gave effect to article IV’s prohibition of certain special laws.<sup>10</sup> The legislature’s ability to create and eliminate causes of action was confirmed in *McIntosh v. Melroe Co.*, which again upheld Indiana’s statute of repose in product liability cases.<sup>11</sup> And in *State v. Kimco of Evansville, Inc.*, the State’s takings analysis was updated.<sup>12</sup> Again, these are but a small sample.

In the criminal realm, Justice Boehm’s opinions addressed a wide range of subjects and offered invaluable guidance for the future. Within a couple of years of his appointment, he resolved the longstanding confusion regarding the proper time to litigate a claim of ineffective assistance of counsel, holding in *Woods v. State* that it could be brought only once and should usually be pursued in a post-conviction proceeding when a supporting record exists.<sup>13</sup> More than a decade later, he wrote the opinion that rejected *Anders* briefs<sup>14</sup> in Indiana, concluding that indigent defendants were “entitled to a review by the judiciary, not by overworked and underpaid public defenders.”<sup>15</sup>

Notable opinions involving search and seizure issues include *Litchfield v. State*,<sup>16</sup> where the Court adopted more protective approach to Hoosiers’ trash,

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5. 693 N.E.2d 1 (Ind. 1998).

6. *Id.* at 7.

7. *See generally* *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003).

8. *R.L. McCoy, Inc. v. Jack*, 772 N.E.2d 987, 989-91 (Ind. 2002).

9. *Cheatham v. Pohle*, 789 N.E.2d 467, 472 (Ind. 2003).

10. *See generally* *Mun. City of South Bend v. Kimsey*, 781 N.E.2d 683 (Ind. 2003).

11. *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 980 (Ind. 2000).

12. *See generally* *State v. Kimco of Evansville, Inc.*, 902 N.E.2d 206 (Ind. 2009).

13. *Woods v. State*, 701 N.E.2d 1208, 1213-14 (Ind. 1998).

14. *See generally* *Anders v. California*, 386 U.S. 738, 744-45 (1967) (providing procedure to allow court-appointed counsel to withdraw from an appeal counsel believes is without merit).

15. *Mosley v. State*, 908 N.E.2d 599, 608 (Ind. 2009).

16. 824 N.E.2d 356 (Ind. 2005).

holding that

a search of trash recovered from the place where it is left for collection is permissible under the Indiana Constitution, but only if the investigating officials have an articulable basis justifying reasonable suspicion that the subjects of the search have engaged in violations of law that might reasonably lead to evidence in the trash.<sup>17</sup>

Justice Boehm also wrote for a unanimous Court in *Edwards v. State*,<sup>18</sup> which held that “routine, warrantless strip searches of misdemeanor arrestees, even when incident to lawful arrests, are impermissible under the Indiana Constitution and the United States Constitution.”<sup>19</sup>

Finally, other decisions were grounded in the Court’s supervisory power to craft prospective rules for the more orderly operation of lower courts. In *Tyler v. State*,<sup>20</sup> the Court held that “a party may not introduce testimony via the Protected Person Statute if the same person testifies in open court as to the same matters.”<sup>21</sup> In his final days on the Court, he authored a 3-2 opinion requiring trial courts to inform defendants who plead guilty that “an attorney is usually more experienced in plea negotiations and better able to identify and evaluate any potential defenses and evidentiary or procedural problems in the prosecution’s case.”<sup>22</sup>

Justice Boehm also left a legacy not published in the *North Eastern Reporter*. He championed rule changes to make appellate practice easier for practitioners and judges and was instrumental in bringing the Indiana Supreme Court to the world by webcasting oral arguments. He also constantly considered and implemented ways to administer justice more efficiently, without sacrificing quality.

### III. LEAGUE RELATIONS

Many of Justice Boehm’s opinions required the Court to address the actions of the other branches of state government. He always did so with respect. In *Kimsey*, decades of legislation based on population parameters that functioned as a legal sleight-of-hand were held no longer per se valid.<sup>23</sup> In *Bonney v. Indiana Financial Authority*, the controversial lease of Indiana’s toll road was upheld in a promptly issued, yet thorough, opinion.<sup>24</sup> In *Sholes v. Sholes*, the legislature’s attempt to force lawyers to work for free, no matter how laudable, was ruled

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17. *Id.* at 357.

18. 759 N.E.2d 626 (Ind. 2001).

19. *Id.* at 627-28.

20. 903 N.E.2d 463 (Ind. 2009).

21. *Id.* at 465.

22. *Hopper v. State*, 934 N.E.2d 1086, 1088 (Ind. 2010).

23. *See generally* *Mun. City of South Bend v. Kimsey*, 781 N.E.2d 683 (Ind. 2003).

24. *Bonney v. Ind. Fin. Auth.*, 849 N.E.2d 473, 476 (Ind. 2006).

unconstitutional.<sup>25</sup>

In sorting through the meaning of “percent” after the Indiana General Assembly amended the operating while intoxicated statute, Justice Boehm drew on humor and mathematics in explaining in *Sales v. State* that a contrary reading “would long since have produced not an impaired driver but a corpse, indeed one perhaps needing no embalming.”<sup>26</sup> In sum, Justice Boehm did not shirk the role a judge must perform, and he always acted with respect for the other branches. Indeed, Governor Mitch Daniels remarked upon Justice Boehm’s retirement that his “cooperative and practical temperament serves as a model for any who might come after him.”<sup>27</sup>

#### IV. A TEAM PLAYER

Most opinions during Justice Boehm’s service were unanimous. When he disagreed, though, he also did so respectfully and often memorably. Perhaps no better example exists than his concurrence in *In re Wilkins*,<sup>28</sup> a rehearing opinion he reluctantly joined because if he did not, then the punishment would be worse. Relying on the wisdom of Lewis Carroll, he noted what would happen if he continued to dissent:

Lewis Carroll would love that result: half the Court believes no sanction is appropriate, and half would impose a small sanction, so the result is a major penalty. Only those who love the law could explain that to their children. To free parents everywhere from that burden, I concur in the result of granting rehearing . . . .<sup>29</sup>

His dissents in death penalty cases were especially significant,<sup>30</sup> as both

25. *Sholes v. Sholes*, 760 N.E.2d 156, 159 (Ind. 2001).

26. *Sales v. State*, 723 N.E.2d 416, 421 (Ind. 2000).

27. Mitch Daniels, Governor, Remarks at the Retirement Ceremony to Honor Indiana Supreme Court Justice Theodore R. Boehm (Sept. 30, 2010), available at [http://media.ihets.org/vod/supremecourt/wmv/boehm\\_retirement.wmv](http://media.ihets.org/vod/supremecourt/wmv/boehm_retirement.wmv).

28. 782 N.E.2d 985 (Ind. 2003).

29. *Id.* at 988 (Boehm, J., concurring).

30. *State v. Azania*, 865 N.E.2d 994, 1010 (Ind. 2007) (Boehm, J., dissenting) (concluding that “further pursuit of the death penalty [after twenty-five years] . . . violates the Indiana Constitution by imposing punishment that is both cruel and unusual”); *State v. McManus*, 868 N.E.2d 778, 792 (Ind. 2007) (Boehm, J., dissenting) (concluding that “the majority’s review of the evidence does not give sufficient deference to the trial court’s finding of mental retardation”); *Baird v. State*, 833 N.E.2d 28, 33 (Ind. 2005) (Boehm, J., dissenting) (“In short, I think it is plain that Baird is insane by any ordinary understanding of that term.”); *Williams v. State*, 793 N.E.2d 1019, 1031 (Ind. 2003) (Boehm, J., dissenting) (“This is a death penalty case, and Williams seems to me to have presented a plausible claim that DNA testing would present a reasonable possibility of affecting the decision of a jury to recommend the death penalty.”); *Daniels v. State*, 741 N.E.2d 1177, 1191 (Ind. 2001) (Boehm, J., dissenting) (“I believe the majority places too high a premium on finality and discounts evidence that suggests Daniels may not have been the perpetrator of these

Democratic and Republican governors later granted clemency to three death row inmates relying at least in part on his dissent or its rationale.<sup>31</sup>

#### V. A MENTOR TO NEW PLAYERS

Justice Boehm's remarkable work on the Court also left a mark on about twenty-five new law graduates who had the privilege of beginning their legal careers by learning from a brilliant, patient, and generous teacher. Justice Boehm taught clerks how to take complicated issues and explain them in a way that was accessible, engaging, and just. He did this not only by scribbling editing marks in the margins of multiple drafts, but also by frequently discussing the issues from when the case was first assigned to him until it was handed down. Clerks learned that every word had meaning, and the seemingly innocuous placement of a word could make an enormous difference.<sup>32</sup> Clerks also learned the art of how to think about the law, and more specifically, how to combine a mixture of facts and legal doctrines in a way that allow for their distillation. Justice Boehm ran his chambers in a way that allowed new lawyers to begin their careers by learning the skill of how to think about the rule of law, and he inspired us to pursue careers that we hope allow us to leave the law better than we found it, as his tenure on the Court did.

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horrendous crimes.”).

31. *Schumm*, *supra* note 1, at 419.

32. The most notable example is “only.” As clerks were told, the placement of the word can completely change the meaning of a sentence, as made clear in this example: “Only she loves me.” “She only loves me.” “She loves only me.”

