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Indiana Law Blog Newsletter

Thank you for subscribing to the ILB Newsletter. Invite your friends and colleagues to sign up to receive this free weekly newsletter, emailed every Monday morning. The issues are intended to bridge the gap between the former **Indiana Law Blog** and its anticipated replacement (more about which will be coming later). Because it is a weekly, the **ILB Newsletter** (unlike the blog) will not be able to bring you the news *as it happens*. But it will highlight news you may have missed, and provide some depth on news you may have had questions about. Because it is a newsletter, length will be limited to what I believe the normal reader can tolerate. (BTW, feedback and suggestions are encouraged - send to ilb.newsletter@indianalawblog.com.)

Deer hunting: Overlooked 2016 legislative prohibition not implemented by DNR until this fall

November 18th is the start of the 2017 firearms deer hunting season. But this year, according to a widely-published news report:

> … a mistake in recently passed legislation now prohibits hunters from using any kind of rifle to hunt deer on public property, which includes state and federal land.
>
> Rep. Sean Eberhart, R-Shelbyville, authored House Bill 1415. He said the bill was meant to clarify rules regarding the use of high-velocity ammunition on private property. But an error in the bill means hunters will only be able to use rifles to hunt deer on private grounds.
>
> The bill was reviewed by many individuals and departments, but no one caught the inadvertent change when the bill first passed, Eberhart said.

But HEA 1415-2017 is not to blame. A look at SECTION 7, at p. 4 of HEA 1415-2017 shows that the only change that was made to IC 14-22-2-8 in 2017 was to rifle cartridge requirements. The other language in Sec. 8, including the limitation that:

> (1) The use of a rifle is permitted only on privately owned land.

was not changed by the General Assembly in 2017. That limitation was added in 2016 and it appears that *no one, including DNR, noticed it until this fall.*

The result. Deer hunting with rifles was permitted on public property during the 2016 deer season despite the statutory prohibition simply because no one noticed the 2016

change.

Recent statements like this, from 10-16-17 OutdoorHub, are therefore incorrect:

> House Enrolled Act 1415 allows some additional rifle cartridges to be used on private land during the deer firearms season, but removed the ability for any rifle to be used on public land for deer hunting**.** "Public land" includes both state and federal property.

Another story (10-13-17 WANE) reports the Indiana Department of Natural Resources issued the following correction to its *2017-2018 Hunting and Trapping Guide*:

> Due to recent legislation passed this year by the Indiana General Assembly, hunters can no longer use rifles when hunting deer on public land. "Public land" includes both state and federal property. Before the change, the use of rifles on public land had been legal. It remains legal to use a muzzleloader, shotgun or handgun when hunting deer on public land in accordance with deer hunting regulations.

Although I could not locate that precise quote on the DNR site, I did find this somewhat ambiguous statement:

> Rifles.
> A state law passed in 2016 that allowed certain rifle cartridges to be used for deer hunting on private land was amended earlier this year to allow additional cartridges. This law also prohibits the use of rifles on public land for deer hunting.

The legislative background. The lead-in language to the 2017 amendment: SECTION 7, at p. 4 of HEA 1415-2017 identifies the origin of IC 14-22-2-8:

> SECTION 7. IC 14-22-2-8, **AS ADDED BY** P.L.110-2016, SECTION 1, IS AMENDED TO READ AS FOLLOWS

So Sec. 8 was added to the Indiana Code in 2016, by PL 110-2016. The 2016 "PL to HEA table" shows that PL 110-2016 was identified as HEA 1231 during the 2016 session.

This 2016 law, which took effect July 1, 2016 and applied to the 2016 deer hunting season as well as this year's and several future years' seasons, begins with this language, which was not changed in 2017:

> Sec. 8. (a) This section applies to a hunting season beginning after June 30, 2016, and ending before January 1, 2020.
> (b) A hunter may use a rifle during the firearms season to hunt deer subject to the following:
> (1) The use of a rifle is permitted only on privately owned land.

One reporter comes close. I did see one story, reported by columnist Jack Spaulding of the Greensburg Daily News on Oct. 20th, that correctly referenced a "HEA 1231."

What is not recognized in the otherwise well-reported story, however, is that HEA 1231 was a *2016 change*, the consequences of which apparently were not understood by DNR until this fall, *after* they published the latest hard-copy *Hunting and Trapping Guide*.

Implications. Had DNR applied the prohibition on the use of rifles for deer hunting on public property to the 2016 firearms deer hunting season, as the law required, the restriction might have been changed in the 2017 session. But they didn't, and it wasn't.

Some might argue that because the General Assembly amended IC 14-22-2-8 this year without modifying the 2016 public property restriction, they were endorsing or ratifying the earlier language. In other words, the argument would go, the legislature was acquiescing in, or doubling-down on, the earlier change.

For ILB Newsletter subscribers, what are the lessons to be learned? The Oct. 9th issue included an article that asked: *"What if language disappears from the Indiana Code?"* and pointed out that sometimes major errors in laws have not been recognized for several years (if at all). My point was, and is, exercise due diligence, never take any statute at face value.

Indiana pays hefty price for enacting unconstitutional laws

This is a great story from Dan Carden of the NWI Times, last updated Oct. 20th. A few quotes from the long story:

> The exact amount Hoosier taxpayers will send to the ACLU to cover attorneys' fees for its most recent constitutional challenge on behalf of Planned Parenthood of Indiana and Kentucky likely won't be determined until the appeal promised by Republican Attorney General Curtis Hill is concluded.
>
> But a review of state auditor records by The Times Media Co. found that Indiana already has shelled out $2,831,532.99 in legal fees to the ACLU since 2011, including $302,889.87 during the 2017 budget year, $668,385.13 in 2016, and $433,675.92 in 2015.
>
> Federal law allows judges to require the government to pay a plaintiff's legal fees in some civil rights cases as an incentive to challenge potentially unconstitutional statutes, while also deterring frivolous lawsuits, since only successful litigants are eligible for payment.

Citing the NWI Times story, a Fort Wayne Journal Gazette editorial dated Oct. 17th began:

> “Indiana Constitutional Law” is the topic of a continuing legal education course scheduled for Wednesday at the Indiana Statehouse. Registration is free for members of the Indiana General Assembly, but the $75 fee for other participants would be worth it if it made even one lawmaker think twice about filing unconstitutional legislation. Since 2011, taxpayers have been saddled

with more than $2.8 million in legal fees for laws the American Civil Liberties Union of Indiana has successfully sought to overturn.

Federal Judge Unseals New York Crime Lab's Software for Analyzing DNA Evidence

From the lengthy ProPublica report Oct. 20th:

> Judge Valerie Caproni of the Southern District of New York lifted a protective order in response to a motion by ProPublica, which argued that there was a public interest in disclosing the code. ProPublica has obtained the source code, known as the Forensic Statistical Tool, or FST, and published it on GitHub; two newly unredacted defense expert affidavits are also available [here and here]. * * *
>
> Caproni's ruling comes amid increased complaints by scientists and lawyers that flaws in the now-discontinued software program may have sent innocent people to prison. Similar legal fights for access to proprietary DNA analysis software are ongoing elsewhere in the U.S.

The ProPublica story also discusses:

> [A NYC proposal] calling for all city agencies to publish online the source codes for algorithms that they use in decision-making. As an example of the danger of relying on algorithms, witnesses and a committee report cited ProPublica's 2016 investigation that found racial bias in a software program used by courts to decide whether it's safe to let defendants out on bail.
>
> "These tools seem to offer objectivity, but we must be cognizant of the fact that algorithms are simply a way of encoding assumptions, and their design can be biased, and that the very data they possess can be flawed," the bill's author and the committee chair, James Vacca, said at the hearing. "I have proposed this legislation not to prevent city agencies from taking advantage of cutting-edge tools, but to assure that when they do, they remain accountable to the public."

Regarding the use of risk-assessment algorithms challenged in bail, sentencing and parole decisions, the ABA Journal, in an Oct. 20th story, notes that:

> The debate over the use of algorithms in criminal proceedings has heated up in the past couple of years. Last year, the Wisconsin Supreme Court ruled against a defendant seeking access to an algorithm that deemed him a public safety risk. The Indiana Supreme Court ruled similarly in 2010. Regarding genotyping software, courts have been more mixed.

For much more on the Forensic Statistical Tool (FST), see this Sept. 4th Pro Publica article, *"Thousands of Criminal Cases in New York Relied on Disputed DNA Testing Techniques."*

Antoinette Dakin Leach Award Luncheon

From the Indianapolis Bar Association:

> The Antoinette Dakin Leach Award, which recognizes the significant accomplishments of female attorneys in Indiana, is presented by the Indianapolis Bar Association's Women & the Law Division in honor of Antoinette Dakin Leach, one of the first women admitted to the Indiana Bar.
>
> The 2017 ADL Award recipient is Marcia Oddi, founder of the Indiana Law Blog. Join us in celebrating one of Indiana's finest legal professionals and help us make this day memorable! A luncheon and ceremony will take place at the Skyline Club-we expect to sell out soon so reserve your place today!

Past recipients of the award are listed in this Indiana Lawyer story from June 14th.

When I learned that I had been named the 2017 recipient of the Antoinette Dakin Leach Award, I was surprised and honored. Although I am definitely a "behind-the-scenes" type, this luncheon will mark an exception. I hope to see many of you there.

The event ($35.00, Individual Registration | $350.00, Table of 10) will be Wed, November 29, 2017, 11:30 AM - 1:00 PM ET. at the Skyline Club. Register here.

Articles in the first six issues of the weekly ILB Newsletter

Oct. 16, 2017 ILB Newsletter

- In Banc?" Did the pre-1970 Court of Appeals decide some cases en banc?
- Tracing the history of an Indiana Code provision

Oct. 9, 2017 ILB Newsletter

- A look at a per curiam (short, unsigned) Supreme Court opinion: *Miller v. State*
- Some statistics on per curiam opinions
- Update on: An issue with the 2017 Supreme Court decision in *Underwood v. Bunger*
- What if language disappears from the Indiana Code?

Oct. 2nd ILB Newsletter

- An issue with the 2017 Supreme Court decision in *Underwood v. Bunger*?
- Governments turn tables by suing public records requesters
- The blockchain. What is it and why does it matter?
- Today is the "First Monday in October"

Sept. 25th ILB Newsletter

- Southern District of Indiana grieves the loss of Senior Judge Larry J. McKinney
- "As Foxconn heads to Wisconsin, Indiana is a lucky loser"
- Update to earlier story involving PPINK lawsuit
- Petition for transfer argued that a litigant who receives a memorandum decision instead of published one does not enjoy the same "meaningful opportunity" for review by the Supreme Court: *Danny Burton v. State*
- Indiana's Uniform Fiduciary Access to Digital Assets Act and the Indiana Code

Sept. 18th ILB Newsletter

- Amicus briefs: How do Indiana's attorneys general decide when to author or sign on to amicus briefs, and where can we learn about them?
- Amicus briefs: What could possibly go wrong?
- Indiana University opposes 2016 fetal tissue law in federal court: *Trustees of Indiana University et al v. Prosecutor of Marion County*
- Updates to earlier stories
    - Judge Posner's abrupt retirement
    - Suits by Attorneys General against the Trump administration over DACA

Sept. 11th ILB Newsletter

- Judge Posner abruptly retires; the pro se problem; and the status of the 7th Circuit
- A CA 7 ruling we are anticipating any day now: *Henderson v. Adams*
- Looking a little deeper: DOJ buckles under state AGs' threatened lawsuit

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Oral arguments before the Indiana Supreme Court this month of October, 2017

Currently, only one more case is scheduled to be argued this month before the Supreme Court, and it doesn't take place until **Monday, Oct. 30th**. Notably, the argument will be held at the University of Southern Indiana, a public university located just outside Evansville in Vanderburgh County.

- 10:30 AM - ***B.A. v. State of Indiana*** (49S02-1709-JV-00567) (Marion) A thirteen-year-old student was questioned in the assistant principal's office in the presence of school resource officers about a bomb threat written on a middle school wall, and the student made statements about the threat. After the State alleged him to be a delinquent child, the student moved to suppress his statements and argued he had been subjected to custodial interrogation without *Miranda* warnings and without waiving his rights. The Marion Superior Court denied the motion to suppress and found the student to be a delinquent child. The Court of Appeals affirmed, finding no error in admission of the statements. *B.A. v. State*, 73 N.E.3d 720 (Ind. Ct. App. 2017), *vacated*. The Supreme Court has granted transfer and has assumed jurisdiction over the appeal.

The briefs and lower court opinions may be accessed via the links above. Notice that the filings include an amicus brief, filed by the Center on Wrongful Convictions of Youth.

Webcasts of the Supreme Court's oral arguments are available here. However, in this case only the live argument will be videocast via this link.

Recommended this week

- *How to stop those annoying, endless robocalls to your smartphone* - **USA Today**, 4-16-17.
- *The Judge's Code: Meet the judge who codes — and decides tech's biggest cases* - **The Verge** - 10-19-17. A sample:

> By sheer coincidence, these major cases have wound up in the docket of maybe the one judge in America capable of understanding their technical details: a judge who can code. Alsup's long-cherished hobby illuminated issues at the very heart of *Oracle v. Google*, and his off-hours tinkering with photography, lenses, and the science of light will inform him in *Waymo v. Uber*, a case involving LIDAR, a laser-based technology for self-driving car navigation.

- *How to Look As Hot As Possible Using the New iPhone Camera* - **NYMag**, 10-20-17
- Boomerang Finally Comes To iOS - **LifeHacker**, 10-21-17. Schedule your emails.
