STASIS: PREMATURE TO DECLARE THE END OF INDIANA CONSTITUTIONAL LAW—2020-2021

SCOTT CHINN*
DANIEL E. PULLIAM**
STEPHANIE L. GUTWEIN***
ELIZABETH M. LITTLE****

The decisions from Indiana's appellate courts addressing Indiana constitutional law saw minimal doctrinal developments.[1] Decisions related to the COVID-19 pandemic were largely absent during the survey period, with one exception related to the accrual of post-judgment interest, while the prior survey period's decision in *Wadle v. State* produced a series of decisions wrestling with how to apply what has to date been a robust and practical framework for addressing claims of constitutional double jeopardy violations.[2]

The Court of Appeals reversed in a series of cases including a conviction for disorderly conduct involving an arrest for yelling at law enforcement;[3] the denial of a motion to suppress the evidence from a search warrant that rested solely on the basis of the smell of marijuana;[4] a life sentence to a seventeen-year-old

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* Scott Chinn is a partner at Faegre Drinker Biddle & Reath LLP practicing public sector law and litigation. B.A. 1991, Indiana University; J.D. 1994, *magna cum laude*, Indiana University Robert H. McKinney School of Law. He is an adjunct professor at the McKinney School where he teaches Indiana Constitutional Law and former Editor-in-Chief of the *Indiana International and Comparative Law Review*. He clerked for Judge David F. Hamilton, then District Judge, U.S. District Court for the Southern District of Indiana.

** Daniel Pulliam is a partner in the business litigation group at Faegre Drinker Biddle & Reath LLP. B.A. 2004, *cum laude*, Butler University, Indianapolis; J.D. 2010, *magna cum laude*, Indiana University Robert H. McKinney School of Law. He is also a former Editor-in-Chief of the *Indiana Law Review* and *The Butler Collegian* and a former law clerk for Judge John Daniel Tinder on the U.S. Court of Appeals for the Seventh Circuit.

*** Stephanie Gutwein is an associate in the business litigation group at Faegre Drinker Biddle & Reath LLP. B.S. 2010, Indiana University; J.D. 2013, *summa cum laude*, Indiana University Robert H. McKinney School of Law. She is a former Executive Notes Editor of the *Indiana Law Review* and extern for the Honorable Judge William T. Lawrence of the U.S. District Court for the Southern District of Indiana.

**** Elizabeth Little is an associate in the finance and restructuring group at Faegre Drinker Biddle & Reath LLP. B.A. 2011, Indiana University-Purdue University of Indianapolis; J.D. 2016, *summa cum laude*, Indiana University Robert H. McKinney School of Law. She is a former Executive Notes Editor of the *Indiana Law Review*.

1. The Authors thank Virginia Speck for her invaluable assistance in gathering the materials for this Article.

2. 151 N.E.3d 227 (Ind. 2020); *see* Chinn et al., *Practicing Pragmatism During a Pandemic: Indiana's Appellate Courts Practically Apply Indiana's Constitution in 2020,* 54 IND. L. REV. 827 (2022).

3. *See infra* Part I.

4. *See infra* Part II.

without the possibility of parole based on ineffective assistance of counsel;[5] the denial of a bond reduction and pretrial release motion because of inadequate basis in the record showing that the defendant posed a risk to the alleged victim's safety.[6]

On the right to a speedy trial, the Supreme Court found that a six-and-a-half-year delay violated the right to a speedy trial and the Court of Appeals found that the exclusion of a defendant from his own trial based on a positive drug result violated the right to be present for all stages of one's trial proceedings.[7]

The Court of Appeals decided a pair of cases that addressed when, in pretrial proceedings, the defendant may raise self-defense as a basis for their actions that resulted in the death of the alleged victim. In both cases, the Court of Appeals seems reticent to require trial courts to credit self-defense claims.[8]

During the survey period, Indiana appellate courts substantively addressed fourteen areas.[9] Regular decisions addressing government searches and protection of the rights of the accused continued to issue along with arguments based on equal privileges and immunities that continue to fail in the Court of Appeals.

I. ARTICLE 1, § 9 – FREEDOM OF THOUGHT AND SPEECH

In *McCoy v. State*,[10] the Indiana Court of Appeals addressed a challenge by a woman who was convicted of disorderly conduct after she attempted to involve herself in local police officers' handling of a domestic dispute occurring at her neighbor's residence. The woman argued that her conviction violated Article 1,

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5. *See infra* Part III.

6. *See infra* Part VI.

7. *See infra* Part III.

8. *See infra* Part VII.

9. The courts addressed eighteen topics in 2014—see Jon Laramore & Daniel E. Pulliam, *Indiana Constitutional Developments: Small Steps*, 47 IND. L. REV. 1015, 1042 (2014); ten in 2015—see Jon Laramore & Daniel E. Pulliam, *Developments in Indiana Constitutional Law: A New Equal Privileges Wrinkle*, 48 IND. L. REV. 1223, 1240 (2015); fourteen in 2016—see Scott Chinn & Daniel E. Pulliam, *Minimalist Developments in Indiana Constitutional Law—Equal Privileges Progresses Slowly*, 49 IND. L. REV. 1003, 1004 (2016); twelve in 2017—see Scott Chinn & Daniel E. Pulliam, *Emerging Federal Reliance—Continued State Constitutional Minimalism: Indiana State Constitutional Law Summaries—2015-2016*, 50 IND. L. REV. 1215, 1238 (2017); ten in 20180—see Scott Chinn & Daniel E. Pulliam, *Emerging Federal Reliance—Continued State Constitutional Minimalism: Indiana State Constitutional Law Summaries—2016-2017*, 51 IND. L. REV. 993, 1012 (2018); thirteen in 2019—see Scott Chinn, Daniel E. Pulliam, & Elizabeth M. Little, *Stuck in a Rut or Merely Within the Lines? Indiana State Constitutional Law Summaries—2017-2018*, 52 IND. L. REV. 689, 711 (2019); fifteen in 2020—see Scott Chinn, Daniel E. Pulliam, & Elizabeth M. Little, *Continued Progressions Toward Irrelevance? Indiana State Constitutional Law Summaries—2018-2019*, 53 IND. L. REV. 865, 893 (2021); and twelve in 2021—see Scott Chinn, Daniel E. Pulliam, Stephanie L. Gutwein, & Elizabeth M. Little, *Practicing Pragmatism During A Pandemic: Indiana's Appellate Courts Practically Apply Indiana's Constitution In 2020*, 54 IND. L. REV. 827, 828 (2022).

10. 157 N.E.3d 28, 31, 33, 34 (Ind. Ct. App. 2020).

Section 9 of the Indiana Constitution because she was prosecuted for protected political expression.[11]

Engaging in a multi-step inquiry to evaluate her claim, the court first agreed that the police officers' arresting her for yelling at them restricted her expressive activity.[12] Next, the court found that the woman's restricted expressions were political in nature, for purposes of Article 1, Section 9, because she had been commenting on and criticizing government action.[13] Specifically, the court found that the woman's statements to the police officers protesting how they were interacting with her were directed at "the appropriateness and legality" of the officers' conduct, which it found was "conduct of . . . official[s] acting under color of law."[14] Finally, the court held that the State had materially burdened the woman's expressive activity because it had failed to show that the woman's expressive activity "inflicted particularized harm analogous to tortious injury on readily identifiable private interests."[15] In particular, no evidence showed that the woman's speech had caused actual discomfort to any of the individuals present at or around the scene of the woman's conduct.[16]

Accordingly, the court reversed the woman's disorderly conduct conviction.[17]

II. ARTICLE 1, § 11 – SEARCH AND SEIZURE

In *State v. Ellis*,[18] the Indiana Supreme Court held that the defendant unambiguously waived his right against searches without reasonable suspicion by signing a contract stating that he waived his rights against search and seizure by Marion County Community Corrections ("MCCC"). Additionally, the contract permitted MCCC staff to search defendant's "person, residence, and motor vehicle . . . to ensure compliance with the requirements of community corrections."[19]

After suspicions were raised regarding defendant's financial situation, a compliance check was completed on his residence.[20] Upon execution of this compliance search, officers found weapons, suspected cocaine, paraphernalia consistent with drug dealing, digital scales, and a large amount of cash.[21] Based on these findings, the defendant was convicted on multiple charges ranging from Level 2 to Level 6 felonies.[22]

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. 167 N.E.3d 285, 286-89 (Ind. 2021).
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*

The defendant filed a motion to suppress evidence arguing that the search on his home violated his rights under Article 1, Section 11 of the Indiana Constitution.[23] The trial court granted defendant's motion holding that the contract "did not include a waiver of searches without reasonable suspicion."[24]

On transfer, the Indiana Supreme Court noted that generally Article 1, Section 11 of the Indiana Constitution requires a search warrant to be supported by probable cause; however, "neither probable cause nor reasonable suspicion is required if a person on probation or home detention unambiguously consents to a warrantless and suspicionless search."[25] Although the Court of Appeals held in *Jarman v. State*,[26] that a contract did not permit a search without reasonable suspicion because the contract specifically only mentioned waiver of searches with or without probable cause, here the Court held that *Jarman* was not applicable because the broader contractual language informed the defendant that he was waiving all of his rights against search and seizure—absent reasonable suspicion or otherwise.[27] Based on the foregoing reasons, the Court held that "the trial court erred when it suppressed the evidence obtained from the search of [defendant's] home" as he unambiguously consented to searches absent reasonable suspicion.[28]

In *Bunnell v. State*,[29] the Court of Appeals reversed on interlocutory appeal the denial of a motion to suppress evidence because the search-warrant affidavit failed to provide the warrant-issuing judge with a substantial basis for its probable cause determination. The court recognized that the smell of marijuana from a residence, by itself, can establish probable cause.[30] But if that smell is the only evidence, the search warrant must include some information regarding the officers' relevant qualifications, experience, or training in identifying and distinguishing the odor.[31]

Because this search warrant only included information relating to odor and no information regarding the deputies' relevant qualifications, experience, or training that demonstrates either deputy can identify or distinguish the smell of raw marijuana, the officers lacked a substantial basis for probable cause.[32] Notably, the Court did not analyze the issue under the Indiana Constitution's *Litchfield* factors[33] and instead relied on U.S. Supreme Court precedent and its progeny.[34]

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23. *Id.*
24. *Id.*
25. *Id.*
26. 114 N.E.3d 911, 915 (Ind. Ct. App. 2018).
27. *Id.*
28. *Id.*
29. 160 N.E.3d 1142 (Ind. Ct. App. 2020).
30. *Id.*
31. *Id.*
32. *Id.*
33. Litchfield v. State, 824 N.E.2d 356, 359 (Ind. 2005).
34. The Indiana Supreme Court, on transfer, affirmed the trial court's denial of the motion to

In *Brown v. Eaton*,[35] the Court of Appeals reversed a trial court order excluding an iPhone's data because the search warrants used to extract that data expired. The defendant did not argue that the search warrants lacked probable cause.[36] Instead, the defendant maintained that the delay in obtaining a vendor to unlock the iPhone to extract the data under the search warrant meant that it expired under State statute.[37] The Court of Appeals first found that the statute's 10-day deadline to execute the search warrant was merely remedial and that the challenges in extracting the data were not unreasonable.[38]

In *Harris v. State*,[39] the Court of Appeals affirmed the trial court's decision that the defendant did not have a reasonable expectation of privacy in his jeans that were on the floor and therefore did not have standing to challenge the search under the Indiana Constitution. After officers arrived at defendant's apartment to respond to a domestic incident, defendant consented to a protective sweep.[40] During their search, the officers recovered 38 grams of methamphetamine from the jeans.[41] Because the defendant told the officers that the methamphetamine recovered from the jeans was "not his" and belonged to "the female that was in the apartment," he "extinguished any objective expectation of privacy that he might have had in the jeans.[42]

In *State v. Stone*,[43] the Court of Appeals reversed a trial court's grant of a motion to suppress evidence found following the execution of a search warrant at a residence because the warrant lacked probable cause. The Court of Appeals found that the trial court erred in determining whether a reasonably prudent person would make a "practical, common-sense determination" given the circumstances in the officer's testimony, that a stolen weapon would be found in the defendant's home.[44]

In *Combs v. State*,[45] the Indiana Supreme Court found that the defendant waived his state constitutional argument while reversing the decision of the Court of Appeals that the trial court erroneously admitted evidence in violation of the federal constitution. Because of the waiver of the Article 1, Section 11 argument, the Court only addressed whether law enforcement conduct fit within recognized exceptions to the Fourth Amendment's warrant requirement.[46]

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suppress in a decision issued just after the survey period. Bunnell v. State, 172 N.E.3d 1231, 1238 (Ind. 2021). This decision will be addressed in the next survey issue.

35. 164 N.E.3d 153, 165, 166 (Ind. Ct. App. 2021).
36. *Id.*
37. *Id.*
38. *Id.*
39. 156 N.E.3d 728, 729, 730, 733 (Ind. Ct. App. 2020).
40. *Id.*
41. *Id.*
42. *Id.*
43. 151 N.E.3d 815, 817, 818, 820, 821 (Ind. Ct. App. 2020).
44. *Id.*
45. 168 N.E.3d 985, 991 (Ind. 2021).
46. *Id.*

III. ARTICLE 1, § 12 – OPENNESS OF THE COURTS, SPEEDY TRIAL

In *K.G. by Next Friend Ruch v. Smith*,[47] the Indiana Court of Appeals found that Article 1, Section 12 of the Indiana Constitution does not mandate that the plaintiff be able to recover for emotional distress arising from alleged sexual abuse of plaintiff's daughter at school. The plaintiff argued for recovery of emotional distress under Section 12, which provides that "every person, for injury done to him in his person, property, or reputation shall have a remedy by due course of law."[48] However, the Court found where "the law provides no remedy, Section 12 does not require that there be one."[49] In *K.G. by Next Friend Ruch v. Smith*,[50] the Indiana Supreme Court reversed the Court of Appeals but did not address the Indiana Constitution in its decision.

In *Watson v. State*,[51] the Court found that a six-and-a-half-year delay between the State being granted permission to retry a defendant's habitual offender allegation and a trial violated the defendant's right to a speedy trial. Article 1, Section 12 of the Indiana Constitution protects a defendant's right to have "speedy administration of justice."[52] "This constitutional guarantee [of a speedy trial] primarily protects three interests of criminal defendants: (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern; and (3) limiting the possibility that the defense will be impaired."[53]

In considering whether a defendant's right to a speedy trial under the Article 1 is violated, Indiana courts employ the *Barker* balancing test. "This requires an examination of four nonexclusive factors: (1) was the delay uncommonly long; (2) who is more responsible for the delay; (3) did the defendant assert their right to a speedy trial; and (4) did the defendant suffer prejudice because of the delay."[54] The Court found all four factors weighed in favor of the defendant: (1) the delay was more than six times the length of the presumptive prejudicial threshold, (2) the government was responsible for the delay, (3) the defendant asserted his rights to a speedy trial by writing four letters to the court and objecting to continuances, and (4) the delay caused defendant substantial anxiety.[55] Accordingly, the Court found that defendant's rights to a speedy trial under Section 12 were violated and vacated the defendant's habitual offender enhancement.[56]

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47. 164 N.E.3d 829 (Ind. Ct. App. 2021).
48. *Id.*
49. *Id.*
50. 178 N.E.3d 300 (Ind. 2021).
51. 155 N.E.3d 608, 611, 616, 620 (Ind. 2020).
52. IND. CONST. art. 1, § 12.
53. *Watson*, 155 N.E.3d at 611.
54. *Id.*
55. *Id.*
56. *Id.*

In *Department of Business and Neighborhood Services v. H-Indy, LLC*,[57] the court affirmed judgment granting declaratory relief to an entity seeking to open a retail store that was blocked by the Board of Zoning Appeals ("BZA"). The BZA found that the proposed use of the retail site was an adult entertainment business, so it imposed a litigation hold on permit applications relating to the site until the completion of judicial review.[58] The retail entity argued this litigation hold violated its due process rights.[59] "The Due Process Clause of the U.S. Constitution and the Due Course of Law Clause of the Indiana Constitution prohibit state action that deprives a person of life, liberty, or property without a fair proceeding."[60] Here, the Court found that the BZA failed to carry its burden to show that the due process rights of the retail entity were not violated by the litigation hold.[61] Accordingly, the court affirmed judgment for the retail entity, concluding that BZA violated the retail entity's constitutional rights.[62]

In *Harris v. State*,[63] the juvenile defendant argued that when the court excluded his mother's presence from his criminal proceedings it violated the defendant's due process rights under Article 1, Section 12. The Court noted that while the Section 12's "due course of law" language shares "certain commonalities" with the Federal Due Process Clause, Section 12's language applies only in the civil context.[64] "That is not to say our state constitution doesn't provide protections to criminal defendants. To the contrary, these protections have developed" through "more specific provisions that make up our constitution's counterpart to the Bill of Rights."[65] Regardless, the Court did not determine whether Section 12 was violated because the defendant had waived this argument.[66]

In *Brodnik v. Cottage Rents LLC*,[67] plaintiff appealed the trial court's dismissal of his claims based on the cancellation of his vacation rental as a result of the COVID-19 pandemic. The trial court granted the defendant vacation rental company's motion to dismiss without providing the plaintiff an opportunity to respond, based on a lack of subject matter jurisdiction and because plaintiff failed to state a claim upon which relief could be granted.[68] By doing this, the plaintiff argued that the trial court violated his due process rights under Article 1, Section 12 of the Indiana Constitution.[69] The Court of Appeals found that the trial court's

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57. 166 N.E.3d 347 (Ind. Ct. App. 2021).
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. 165 N.E.3d 91, 100 (Ind. 2021).
64. *Id.*
65. *Id.*
66. *Id.*
67. 165 N.E.3d 126, 129 (Ind. Ct. App. 2021).
68. *Id.*
69. *Id.*

immediate dismissal did not violate the constitution because the lack of subject matter jurisdiction can be raised at any time and plaintiffs are not required to have an opportunity to respond to motions for failure to state a claim.[70] Accordingly, plaintiff's due process rights were not violated.[71]

In *Abbott v. State*,[72] the state brought an in rem civil forfeiture action against defendant arising out of convictions relating to drugs. The defendant requested a public defender, asserting that he did not have the means to hire counsel.[73] The court denied his request, and the Court of Appeals affirmed, finding the defendant not indigent.[74] Specifically, the court considered the $7,000 seized from defendant's pocket when he was arrested.[75] Defendant argued that the $7,000 could not be forfeited because it was not connected to his criminal activity, and the State's interest in a defendant's property only extends "insofar as that property has a nexus to criminal activity."[76] The Court found "allowing use of the *res* to fund a defense comports with Article 1, Section 12 of the Indiana Constitution, which mandates that 'every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law" and that "[j]ustice shall be administered freely, and without purchase; completely, and without denial."[77]

In *Conley v. State*,[78] the defendant—a seventeen-year-old who was sentenced to life without the possibility of parole—argued he received ineffective assistance of trial counsel in violation of, *inter alia*, Article 1, Section 12 of the Indiana Constitution.[79] "To prevail on his ineffective assistance of counsel claims, [the defendant] must show that: (1) his counsel's performance fell short of prevailing professional norms; and (2) his counsel's deficient performance prejudiced his defense."[80] The Court of Appeals first found the defendant's counsel's performance "wholly deficient" because he failed to present mitigating evidence relating to the defendant's age and failed to argue the application of Indiana case law and historical treatment of juvenile defendants, to present expert testimony relating to the diminished culpability of juveniles, and to present evidence relating to defendant's mental health.[81] As a result of these deficiencies, the Court

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70. *Id.*

71. *Id.*

72. 164 N.E.3d 736, 745, 746 (Ind. Ct. App. 2021).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Additionally, on May 20, 2021, the Indiana Supreme Court granted transfer in this case thereby vacating the Court of Appeals decision. The Supreme Court's decision will be addressed in a subsequent survey article.

79. 164 N.E.3d 787, 812 (Ind. Ct. App. 2021).

80. *Id.*

81. *Id.*

found that the defendant was prejudiced.[82] "A reasonable probability exists that, but for defense counsel's errors, the proceedings at the trial level would have resulted in the imposition of less than the maximum [life without the possibility of parole] sentence especially in light of the substantial mitigating factors[.]"[83] Accordingly, the court concluded that the defendant had a valid ineffective assistance of trial counsel claim.[84]

IV. ARTICLE 1, § 13 – RIGHTS OF ACCUSED, RIGHTS OF VICTIMS

In *Wright v. State*,[85] the Indiana Supreme Court recognized that although Article 1, Section 13 provides broader rights than the Sixth Amendment to the U.S. Constitution, that right does not address the right of self-representation or provides an "unlimited right" for a pro se defendant to conduct their own trial proceedings.

In *Arrowood v. State*,[86] the Court of Appeals affirmed the trial court's decision that Indiana's constitutional right to counsel at all criminal prosecutions does not apply to hearings regarding revocation of placement in community corrections. The defendant argued that Article 1, Section 13 of the Indiana Constitution guaranteed her a right to counsel at her revocation hearing.[87] In support of her argument, defendant cited *Vicory v. State* in which the Indiana Supreme Court held that "a probationer has a right to allocution at a probation revocation hearing."[88] However, in this case, the court did not interpret the holding in *Vicory* to extend to a right to counsel at revocation hearings.[89] Although the court did recognize that Article 1, Section 13 is broader than the Sixth Amendment to the U.S. Constitution, the Court re-affirmed that the right to counsel at all criminal prosecutions does not apply to civil revocation hearings.[90]

In *Wells v. State*,[91] the Court of Appeals held that the trial court's exclusion of the defendant from his own trial based on a positive drug test violated his Sixth Amendment and Article 1, Section 13 right to be present for all stages of his trial proceedings. Under Article 1, Section 13, a defendant may be tried in absentia based on a determination that the defendant knowingly and voluntarily waived that right.[92] An unruly defendant may trigger a waiver finding, but here appearing under the influence of a controlled substance for a second time did not support

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82. *Id.*
83. *Id.*
84. *Id.*
85. 168 N.E.3d 244, 252, 277 (Ind. 2021).
86. 152 N.E.3d 663, 664-67 (Ind. Ct. App. 2020).
87. *Id.*
88. *Id.* (quoting Vicory v. State, 802 N.E.2d 426 (Ind. 2004)).
89. *Id.*
90. *Id.*
91. No. 21A-CR-612, 2021 WL 4302704, at *8 (Ind. Ct. App. Sept. 22, 2021).
92. *Id.*

such a finding.[93] The record lacked support for the finding that Wells disrupted the proceedings and the trial court foreclosed the defendant the ability to reclaim his right to be present.[94]

Yet in *Lappin v. State*,[95] the Court of Appeals found that the defendant failed to rest the denial-of-a-public-trial claim on the language or history of the State Constitution. Thus, the Court resolved the claim against the defendant based on federal constitutional doctrine and expressed no opinion whether the result might have been different under Article I, Section 13 of the Indiana Constitution.[96]

V. ARTICLE 1, § 14 – DOUBLE JEOPARDY AND SELF-INCRIMINATION

In *Wisdom v. State*,[97] the Court of Appeals held that a defendant acquitted by a jury in a bifurcated trial of criminal-organization activity could receive a gang-related sentencing enhancement in the trial's second phase. The defendant argued that the gang enhancement constituted double jeopardy under the Indiana Constitution because it gave the State "a second bite at the apple" to prove the fact of his gang involvement.[98] The Court found that because the criminal-organization activity and the gang enhancement have different elements, the State did not violate double jeopardy.[99]

Criminal-organization activity requires committing an offense with an intent to benefit, promote, or further the interests of a gang, while the gang enhancement requires committing an offense while a "member of a gang" and at the direction of or in affiliation with a gang.[100] Further, the State's evidence on criminal-organization activity rested on the presence of baggies and the amount of the drugs.[101] For gang membership and affiliation, the State relied on bedroom wall art, gang-related clothing, rap lyrics, and social media posts.[102] Thus, there was no reasonable possibility the jury relied on the same evidentiary facts to acquit the defendant of criminal-organization activity and to find him guilty of the gang enhancement.[103]

In *Hendricks v. State*,[104] the Court of Appeals vacated a conviction under the newly established *Wadle v. State*,[105] test for determining violations of double jeopardy. The defendant had joined a group in robbing two people they knew

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93. *Id.*
94. *Id.*
95. No. 20A-CR-2208, 2021 WL 2408327, at *1, *4 (Ind. Ct. App. June 14, 2021).
96. *Id.*
97. 162 N.E.3d 489, 496-98 (Ind. Ct. App. 2020).
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. 162 N.E.3d 1123, 1128, 1138, 1140 (Ind. Ct. App. 2021).
105. 151 N.E.3d 227, 237 (Ind. 2020).

who dealt marijuana.[106] Someone was fatally shot during the attempted robbery and the defendant was charged with murder and conspiracy to commit robbery resulting in serious bodily injury.[107] The court first determined that neither offense's statute authorized multiple punishments and then deemed the conspiracy charge an included offense within the murder charge because the charges only differed with respect to the seriousness of the harm.[108] Because the facts underlying the offenses were so compressed in terms of time, place, singleness of purpose, and continuity of action as to qualify as a single transaction under *Wadle*, the Court found that both convictions could not stand and vacated the conspiracy to commit robbery charge.[109]

In both *Woodcock v. State*[110] and *Diaz v. State*,[111] the Court of Appeals declined to decide whether the decision in *Wadle* is retroactive. Instead, the court found no double jeopardy violation under both the *Richardson* and the *Wadle* analysis.[112]

In *Madden v. State*,[113] the Court of Appeals vacated a felony kidnapping conviction because a separate conviction for criminal confinement violated double jeopardy. There was no question that the defendant had only removed the victim from a car to a basement a single time.[114] That single action could not support both convictions for criminal confinement and kidnapping because the only difference in the two was the result and the defendant's motive—the underlying action was the same.[115]

In *Jarrett v. State*,[116] the Court of Appeals readily found that convictions for murder and felony attempted robbery did not violate double jeopardy. The court's analysis demonstrates the effectiveness of *Wadle*'s analytical framework.[117] The defendant had been convicted of both counts based on evidence showing that he approached the victim with a gun, demanded money, and then shot him in the chest, killing him.[118] The court first found that no statutory language clearly permitted more than one punishment, but then determined that neither offense was included in the other.[119] Put simply, murder requires a killing and felony attempted robbery does not.[120] That the felony attempted robbery took place at the

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106. *Hendricks,* 162 N.E.3d at 1128.
107. *Id.*
108. *Id.*
109. *Id.*
110. 163 N.E.3d 863, 868, 872, 876 (Ind. Ct. App. 2021).
111. 158 N.E.3d 363, 366, 370 (Ind. Ct. App. 2020).
112. *Woodcock,* 163 N.E.3d at 868.
113. 162 N.E.3d 549, 554, 560-62 (Ind. Ct. App. 2021).
114. *Id.*
115. *Id.*
116. 160 N.E.3d 526, 534 (Ind. Ct. App. 2020).
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*

same moment as the murder did not factor into the analysis.[121]

In *Phillips v. State*,[122] the Court of Appeals raised sua sponte whether convictions for possessing and dealing methamphetamine violated double jeopardy. The Court's analysis started with whether possession was included within dealing because neither statute expressly authorized multiple punishments.[123] Consistent with the Court's decisions pre-*Wadle*, the court found that dealing and possession are included because the material elements of possession are established through proof of a material element of dealing: possession with intent to deliver.[124] For the final step of the analysis, the Court found that the prosecutor unquestionably used evidence of possession to prove both crimes.[125] For example, the prosecutor advised the jury in closing statements that if "you're dealing you're in possession" and the allegations and proof assumed that possession was inseparably part of his dealing.[126]

VI. ARTICLE 1, § 16 – EXCESSIVE BAIL, CRUEL AND UNUSUAL PUNISHMENT, PROPORTIONALITY CLAUSE

In *Shepherd v. State*,[127] the Court of Appeals found no violation of the proportionality clause where the trial court sentenced him to 35 years for aggravated battery. The defendant argued that his sentence was more severe than the sentence for voluntary manslaughter where "sudden heat" mitigates the sentence.[128] The court found that the General Assembly "could have rationally chosen to impose a more severe punishment where knowing and intentional action results in death . . . than where death has resulted when action was not fully knowing and intentional because of sudden heat" in voluntary manslaughter.[129] Thus, there was not violation of the proportionality clause.[130]

In *DeWees v. State*,[131] the Court of Appeals reversed the denial of a motion for bond reduction and pretrial release where the trial court's finding that the defendant posed a risk to physical safety to the alleged victim lacked support in the record. The trial court's findings rested on the milage between the defendant and the alleged victim's home and that the victim testified that the attempted

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121. *Id.*

122. No. 20A-CR-1962, 2021 WL 3557199, at *7 (Ind. Ct. App. Aug. 12, 2021).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* Notably, the decisions in *Madden*, *Jarrett*, and *Phillips* are not decisions under the Indiana constitution because they are analyzed under the post-*Waddle* unitary framework that focuses on statutory interpretation and not Article 1, Section 14. Future survey articles will thus contain less discussion of court decisions addressing multiple punishments.

127. 157 N.E.3d 1209, 1222-24 (Ind. Ct. App. 2020).

128. *Id.*

129. *Id.*

130. *Id.*

131. 163 N.E.3d 357, 363-65 (Ind. Ct. App. 2021).

robbery frightened and disturbed him.[132] That fear alone could not sustain a finding that the defendant posed a risk to the alleged victim's physical safety.[133]

VII. ARTICLE 1, § 17 – BAILABLE OFFENSES

In *Doroskzo v. State*,[134] the Court of Appeals affirmed the denial of bail of a defendant charged with murder. The defendant failed to present sufficient evidence at the bail hearing establishing his self-defense claim.[135] Under Article 1, Sections 13 and 17, courts are prohibited from setting excessive bail, but a murder defendant may also be held without bail "when the proof is evident, or the presumption strong."[136] Yet during the commission of a crime, a person may not claim self-defense.[137] Here, the defendant was charged with engaging in a criminal act when he shot someone who got in the backseat of his car to purportedly buy marijuana but was then allegedly trying to steal the marijuana.[138] Because the defendant was engaged in a criminal act that caused death, the trial court reasonably found that the defendant's self-defense claim did not apply.[139]

In *Hall v. State*,[140] the Court of Appeals affirmed a trial court's denial of bail following an arrest and charge for murder. The defendant, an on-duty security guard, argued that the State failed to rebut his claims that he acted in self-defense or sudden heat.[141] The Court of Appeals recognized it was a close case, but it also qualified as a "classic question of fact" to be determined by the trial court.[142] The defendant argued that he had a professional obligation to be present and that there was no allegation he started the underlying dispute.[143] Rather, he believed that force was necessary to prevent injury to himself or others because the victim was threatening violence towards a crowd and had a gun in her hand moving in his direction.[144] The state presented evidence that no one took the victim seriously, that she proclaimed that she had no bullets, and that the defendant over-reacted when she returned to her car where the gun was.[145] The fact that the gun was actually loaded could not be used as a post-hoc justification for the shooting particularly where she never threatened or otherwise actually pointed the gun at

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132. *Id.*
133. *Id.*
134. 154 N.E.3d 874, 875-77 (Ind. Ct. App. 2020).
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. 166 N.E.3d 406, 409, 411, 415 (Ind. Ct. App. 2021).
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*

anyone.[146]

VIII. ARTICLE 1, § 21 – COMPENSATION FOR SERVICES AND PROPERTY

In *ResCare Health Services, Inc. v. Indiana Family and Social Services Administration – Office of Medicaid Policy and Planning*,[147] the Indiana Court of Appeals addressed an appeal of a judicial review upholding Indiana Family and Social Services Agency's construction of its Medicaid statute as precluding reimbursement for the costs of over-the-counter medications prescribed to patients in private facilities.[148] The private facility argued, among other things, that if the State's Medicaid statutes require it to pay for over-the-counter medications for patients without reimbursement, the State is effecting a taking in violation of Article 1, Section 21 of the Indiana Constitution.[149]

The Court of Appeals disagreed because it found that the private facility had voluntarily assumed the obligation to pay for the over-the-counter medications out of pocket when it voluntarily agreed to enroll as a provider in Indiana's Medicaid program and accepted the program's terms, which included the challenged restriction on reimbursement for over-the-counter medications.[150]

Steele v. Steuben Lakes Regional Waste District,[151] concerned a dispute about the constitutionality of a regional waste district's attempt to require property owners within its service area to pay to connect themselves to the district's sewer system. After the property owners refused to grant the district easements to install equipment on their properties and connect the properties to an expansion of the district's sewer system, the district notified the owners of the deadline by which they needed to connect their properties to the system.[152] When the property owners failed to connect their properties to the system within the allotted time, the district obtained a court order requiring the owners to pay (i) to purchase the necessary equipment and have it installed, (ii) to connect their properties to the system, and (iii) the district back user fees, penalties, and attorneys' fees.[153]

On appeal, the property owners argued that Article 1, Section 21 of the Indiana Constitution precluded the district from requiring them to connect to the district's sewer system at their own expense when the district completed the work at no cost to property owners who granted it easements to their property.[154]

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146. *Id.*

147. No. 20A-MI-1025, 2021 WL 1398167, at *1, *5, *6 (Ind. Ct. App. 2021).

148. After granting transfer in this case, the Indiana Supreme Court affirmed the Court of Appeals in part and reversed in part. *See* ResCare Health Servs., Inc. v. Ind. Fam. & Soc. Servs. Admin. – Off. of Medicaid Pol'y & Plan., 184 N.E.3d 1147, 1149 (Ind. 2022). Due to its date of issuance, we will summarize that opinion in the next installment.

149. No. 20A-MI-1025, 2021 WL 1398167.

150. *Id.*

151. 168 N.E.3d 1000-02, 1005-06 (Ind. Ct. App. 2021).

152. *Id.*

153. *Id.*

154. *Id.*

The Indiana Court of Appeals agreed in part.[155] It concluded that because the district could not lawfully enter the property owners' properties without an easement, the district's requiring the owners to connect their properties to the district's system at their own expense was appropriate.[156] However, the court found that because the district could provide the necessary equipment to the property owners even absent an easement and was providing the equipment to property owners who granted the district an easement at no expense, the district also had to provide the equipment to the non-easement-granting property owners at no expense.[157] And because it concluded that the property owners had no obligation to connect to the system until the district provided them with the necessary equipment, it also reversed the portion of the trial court's order requiring the owners to pay the user fees, penalties, and attorneys' fees to the district.[158]

IX. ARTICLE 1, § 23 – EQUAL PRIVILEGES AND IMMUNITIES

In *Hampton v. Barber*,[159] the Indiana Court of Appeals considered a challenge under Article 1, Section 23 of the Indiana Constitution to Indiana Code § 3-8-1-5, which, in part, precludes any person who has been convicted of a felony from assuming or being a candidate for an elected office even if that felony was later reduced to a misdemeanor.

After discovering that a candidate who had been selected to fill a vacant seat on a city council had two prior felony convictions, which had been reduced to misdemeanors, another candidate, who had lost the bid to fill the vacant council seat, filed a verified complaint and information for ouster of an unlawful office holder and for a permanent injunction citing Indiana Code § 3-8-1-5.[160] The trial court rejected the successful candidate's argument that the petitioner had no standing to challenge his election because the petitioner had placed third in the election and, thus, was not next in line to hold the office should the elected candidate be removed from it.[161] Instead, the trial court held that the petitioner had standing by virtue of his having been a lawful candidate for that office.[162] The Indiana Court of Appeals upheld that determination.[163]

On appeal, the successful candidate also argued Indiana Code § 3-8-1-5 was unconstitutional as applied to him because it treated individuals who had been convicted of felonies that were later reduced to misdemeanors differently from individuals who had been convicted of misdemeanors, despite, he argued, there

155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. 153 N.E.3d 1204, 1206 (Ind. Ct. App. 2020).
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*

being no meaningful distinctions between the two.[164] But the appellate court refused to reach the argument because it found the successful candidate had waived it by failing to advance it before the trial court.[165] Accordingly, the court of appeal affirmed the trial court's order ousting, and permanently enjoining the successful candidate from holding, the office.[166]

In *Swopshire v. State*,[167] the Indiana Court of Appeals considered a challenge to a trial court's order denying a motion to dismiss criminal charges against a defendant who argued that the application of amended statutes of limitation violated Indiana's constitutional prohibition against ex post facto laws and the Equal Privileges and Immunities Clause.[168] The statute of limitations in effect at the time the defendant committed the alleged offenses would have precluded the State's charges.[169] However, after the defendant engaged in the allegedly criminal conduct, the Legislature twice expanded the limitations period through statutory amendments, enabling his prosecution for the alleged offenses.[170]

The Court of Appeals largely affirmed the trial court on both issues.[171] First, it reiterated that application of an enlarged statute of limitations period to an alleged criminal offense does not violate Article 1, Section 24 of the Indiana Constitution so long as the original statute of limitations for the offense has not yet expired at the time the limitations period is extended.[172] It confirmed, however, that "the State cannot revive an expired offense by way of amending the statute of limitations."[173] Thus, it upheld the trial court's denial of the defendant's motion to dismiss the charges on the basis of an ex post facto violation, except as to the narrow set of charges premised on alleged criminal acts that the defendant committed for which the limitations period had expired before the Legislature had extended it.[174]

The court also rejected the defendant's argument that application of the amended statute of limitations period as to him violated the Equal Privileges and Immunities Clause in Article 1, Section 23 of the Indiana Constitution because it treated him differently than those who are alleged to have committed offenses during the original limitations period but would not have been captured by the Legislature's amendments.[175] Rather, the court held that "a person who is alleged to have committed an offense on a date that requires the application of one statute of limitations is not similarly situated to a person who is alleged to have

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164. *Id.*
165. *Id.*
166. *Id.*
167. No. 21A-CR-224, 2021 WL 4398240, at *5 (Ind. Ct. App. Sept. 27, 2021).
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*

committed the same offense but on a different date requiring the application of a different statute of limitations."[176] It thus affirmed the trial court's denial of the motion to dismiss on Equal Privileges and Immunities grounds.[177]

X. ARTICLE 3, § 1 – SEPARATION OF POWERS

In *Holcomb v. City of Bloomington*,[178] the Indiana Supreme Court considered the propriety of the City of Bloomington's suit against Indiana Governor Eric Holcomb seeking a declaration that a statute passed by the Indiana General Assembly purporting to preclude the City from moving forward with a proposed annexation of certain territories for five years was unconstitutional.

The Governor first argued that he was not the proper defendant to the City's suit because he did not enforce the challenged statute and so a judgment against him would provide no relief to the City.[179] Rather, he asserted that property owners, as potential remonstrators in any annexation process under Indiana's statutory annexation procedures, were the proper enforcers of the challenged law.[180]

The Indiana Supreme Court disagreed.[181] It held that the challenged statute had no relation to Indiana's statutory annexation and remonstrance process because it provided for no remonstrance procedure and, instead, unilaterally voided the City's efforts to initiate the annexation process before any remonstrance opportunity even could have been triggered.[182] While the Court recognized that, very often, "general law provides an insufficient connection between the Governor and enforcement of a particular statute to give rise to the ripening seeds of a controversy required for a declaratory judgment action," it instructed that "under rare circumstances, unique aspects of the statute combine with the general law to provide enforcement or implementation authority to the Governor."[183] The Court explained that Article 5, Sections 1 and 16, which vest the State's executive power in the Governor and require him to "take care that the laws are faithfully executed," confer broad authority in the Governor and include incidental powers and duties, including the "duty to act to ensure the proper execution of laws, even absent specific statutory language directing the Governor to do so."[184] Because the challenged statute concerned annexation—a process the Court characterized as affecting "citizens' 'civil relation to certain public authority' rather than specific private rights"—and cut off any potential for other enforcement mechanisms, such as remonstrance, the Court found that "it created

176. *Id.*
177. *Id.*
178. 158 N.E.3d 1250, 1260-62 (Ind. 2020).
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*

a situation where the Governor was uniquely situated to exercise his executive power and enforce the statute," and thus a proper defendant to the City's suit.[185]

The Court also rejected the Governor's argument that prudential concerns counseled in favor of finding the City's challenge nonjusticiable.[186] It observed that the statute's terminating the City's proposed annexation efforts before the City had formalized the annexation plans deprived the City of a ripe controversy against any other defendant and that, even if it could sue another defendant, requiring the City to do so would result in significant delay and cost to taxpayers.[187] The Court also recognized that its failure to reach the merits of the dispute would "leave an alleged constitutional violation unaddressed" in a manner that would "create a blueprint for the legislature to enact allegedly unconstitutional laws beyond judicial review."[188] Finally, it concluded that the separation of powers doctrine compelled it to act as a check on an allegedly unconstitutional act by another branch of government.[189]

The Court then turned to the merits of the City's claim that the challenged statute was special legislation that violated Article 4, Section 23 of the Indiana Constitution.[190] Because the parties agreed that the statute was a special law, the Court sought to evaluate whether any unique characteristics of the identified class subject to the law warranted the special treatment the law directed, or whether, instead, the statute could have been made general and, thus, was unconstitutional.[191]

The Court first assessed whether the Governor had met his burden of demonstrating that the challenged statute's special treatment of the City had some relation to the alleged unique aspects of the City warranting the special treatment.[192] The Court rejected the Governor's arguments that the speed at which the City's annexation process was moving despite opposition to it and its consideration of remonstrance waivers rendered it unique, finding that the timeline of that process and the City's approach to it was consistent with Indiana's statutory annexation process and previous annexations by other municipalities.[193] Concluding that no unique circumstances warranted special treatment of the City's proposed annexation process, the Court held that the special law could have been made general and thus violated Article 4, Section 23.[194]

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185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* Justice Slaughter, joined by Justice Massa, dissented, arguing that the City lacked standing to sue the Governor, who was not a proper defendant under these circumstances. *Id.* at 1267. Thus, notwithstanding this opinion, differing views on standing, including as a facet of separation

In *Mehringer v. State*,[195] a stepfather challenged the sufficiency of the evidence to support his felony conviction for molesting his teenage stepdaughter, the trial court's sentencing determination, and its finding that he was a sexually violent predator under Indiana Code § 35-38-1-7.5. After affirming the conviction and the sentence, the Indiana Court of Appeals turned to the offender's argument that Indiana's sexually violent predator statute, which renders an individual a sexually violent predator by operation of law under certain circumstances, violates the separation of powers requirement in Article 3, Section 1 of the Indiana Constitution because it divests the trial court of its traditional function of "determining the status of offenders and their likelihood to reoffend."[196]

Finding that the statute merely establishes a "default" status for individuals convicted of certain offenses for a specified period before allowing the courts, upon petition by an offender, to reevaluate the appropriateness of that status designation, the appellate court held that the sexually violent predator statute does not unconstitutionally encroach on judicial authority.[197]

In *Health & Hospital Corporation of Marion County v. Dial*,[198] the Court of Appeals considered, as a matter of first impression, whether a deceased administrator of an estate can initiate a medical malpractice action by filing, through her attorney and on behalf of the estate, a proposed complaint with the Indiana Department of Insurance. The court first recognized that "a party must be alive to initiate a complaint in a state or federal court" because the Indiana Trial Rules "require a living plaintiff to file [the] complaint."[199] It also acknowledged that "Indiana courts are limited by the doctrine of judicial restraint to the resolution of 'concrete disputes' between litigants" and that the courts' addressing questions that do not present live disputes "ris[k] encroaching on the powers properly entrusted to the legislative and executive branches."[200]

But the court concluded that a proposed complaint before the Department of Insurance's medical review panel need not be filed by a living person as an administrator of the estate of a deceased victim of alleged medical malpractice, because the identity of the administrator of the estate was not relevant to the question of whether the medical provider acted within the standard of care, and the provider identified no prejudice that it purportedly suffered because the complaint was filed with the panel after the administrator's death.[201]

In *Denman v. St. Vincent Medical Group, Inc.*,[202] the Indiana Court of Appeals considered, among other things, a prevailing plaintiff's challenge to the

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of powers, remain in the Indiana Supreme Court. *See also, e.g.*, Horner v. Curry, 125 N.E.3d 584 (Ind. 2019) (three opinions on standing requirements).

195. 152 N.E.3d 667, 671, 676-77 (Ind. Ct. App. 2020).

196. *Id.*

197. *Id.*

198. No. 20A-CT-2382, 2021 WL 3234929, at *4 (Ind. Ct. App. July 30, 2021).

199. *Id.*

200. *Id.*

201. *Id.*

202. No. 20A-PL-1236, 2021 WL 3641944, at *17 (Ind. Ct. App. Aug. 18, 2021).

trial court's tolling the accrual of post-judgment interests for several months pursuant to an emergency order of the Indiana Supreme Court in connection with the COVID-19 pandemic. Indiana Code § 24-4.6-1-101 automatically imposes post-judgment interest on judgments from the date of the return of a verdict or finding of the court until the judgment is satisfied.[203] But, in connection with providing Indiana courts emergency relief due to the COVID-19 pandemic, the Indiana Supreme Court issued an emergency order providing that "no interest shall be due or charged during" the period of time tolled by the Indiana Supreme Court.[204] The trial court presiding over the prevailing plaintiff's trial construed the Indiana Supreme Court's emergency order to require the tolling of post-judgment interest on the plaintiff's verdict through the end of the period tolled by the Court.[205]

The Court of Appeals explained that, because the legislature has enacted a statute mandating the automatic application of post-judgment interest, the Indiana Supreme Court's emergency order could not have tolled post-judgment interest.[206] Recognizing that Article 3, Section 1 of the Indiana Constitution separates the power of the legislative branch to make law from the power of the judicial branch to decide cases, and that Indiana's post-judgment interest statute creates a substantive, rather than procedural, right, the appellate court explained that the Indiana Supreme Court is without authority to change Indiana's substantive laws without a case before it.[207] Presuming that the Indiana Supreme Court was aware of, and intended to abide by, this constitutional limitation, the Court of Appeals found that the Court's emergency order did not apply to post-judgment interest.[208]

XI. ARTICLE 4, § 1 – GENERAL ASSEMBLY

In *City of Bloomington Board of Zoning Appeals v. UJ-Eighty Corp.*,[209] a property owner disputed the propriety of a City of Bloomington zoning ordinance that permitted certain real property to be used as a fraternity or sorority house but, by definition, limited qualifying fraternities and sororities to, among other things, only those that Indiana University had sanctioned or recognized. The property owner argued that the zoning ordinance violated Article 4, Section 1 of the Indiana Constitution because it unlawfully delegated the City of Bloomington's zoning authority to the university.[210] The Indiana Supreme Court agreed with the property owner that, under Article 4, Section 1, "[o]nly Bloomington through its legislative body—acting pursuant to powers granted by the General

203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. 163 N.E.3d 264, 265-68 (Ind. 2021).
210. *Id.*

Assembly—can make or amend its zoning laws."[211] But it held that Bloomington, not the university, exercised its zoning authority to define fraternities and sororities in the ordinance, and it rejected the property owner's argument that Bloomington had improperly delegated any of that zoning authority to IU merely by defining fraternities and sororities, in part, based on their relationship with the school.[212]

XII. ARTICLE 6 § 4 – QUALIFICATIONS OF COUNTY OFFICERS

In *Allsup v. Swalls-Thompson*,[213] the Indiana Court of Appeals considered a losing incumbent's post-election contest of her challenger's election to county treasurer under Indiana Code ch. 3-12-8 based on her assertion that the winning candidate had not "be[en] an inhabitant of" the county for one year before the election as Article 6, Section 4 of the Indiana Constitution requires. The court first held that Article 6, Section 4's reference to being an inhabitant is synonymous with the concepts of residency and domicile "for purposes of the constitutional and statutory requirements for county officer residency."[214]

Applying the domicile test from *State Election Board v. Bayh*,[215] the Court of Appeals next evaluated whether the trial court reasonably could have concluded that the undisputed facts established that the winning candidate had manifested the "definite intention," through conduct, to return to Indiana for domicile at least one year prior to the election and remain there.[216] Though it observed that "reasonable minds could draw conflicting inferences from the facts and circumstances demonstrating [whether the winning candidate] reestablished residency," and it reiterated that "residency is not a mere formal or technical requirement for office," the court "decline[d] to overturn the will of the voters because [it could not] say that the trial court's decision denying [the incumbent's] post-election contest petition was clearly erroneous."[217]

XIII. ARTICLE 7, § 4/6 – APPELLATE JURISDICTION

In *Wilson v. State*,[218] the defendant argued on post-conviction review that he received ineffective assistance of counsel when his attorney failed to bring an independent claim for appellate review under Indiana Appellate Rule 7(B) which "derives from Article 4 of the Indiana Constitution, and includes the power to either reduce or increase a criminal sentence on appeal." Appellate Rule 7(B) permits the court to "revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is

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211. *Id.*
212. *Id.*
213. No. 20A-MI-2333, 2021 WL 1681322, at *1, *5, *12 (Ind. Ct. App. April 29, 2021).
214. *Id.*
215. 521 N.E.2d 1313 (Ind. 1988).
216. No. 20A-MI-2333, 2021 WL 1681322.
217. No. 20A-MI-2333, 2021 WL 1681322.
218. 157 N.E.3d 1163 (Ind. 2020).

inappropriate in light of the nature of the offense and the character of the offender."[219] Here, the court reduced the defendant's sentence in light of defendant's age of sixteen when he committed his offenses, the defendant's character, and the nature of the offense.[220] And the court found the defendant's counsel provided inadequate assistance of counsel when he failed to bring a claim under Indiana Appellate Rule 7(B).[221]

XIV. PROPERTY TAXATION AND EQUAL PRIVILEGES AND IMMUNITIES CLAUSE

In *Convention Headquarters Hotels, LLC v. Marion County Assessor*,[222] a hotel owner, in its motion for summary judgment, alleged that the tax assessment of its partially complete hotel violated, *inter alia*, the Property Taxation[223] and Equal Privileges and Immunities Clauses[224] of the Indiana Constitution. With respect to the Property Taxation Clause, the hotel owner argued that the assessor's failure to assess partially complete buildings of all similarly situated taxpayers resulted in the hotel owner bearing a disproportionate share of the tax burden.[225] Under the Property Taxation Clause, "assessment and taxation require a 'uniform, equal, and just system' wherein 'each taxpayer's property wealth bears its proportion of the overall property tax burden.'"[226] The Tax Court found that because reasonably conflicting inferences may be drawn from the hotel owner's designated evidence, it had not demonstrated that the assessor failed to assess the similarly situated properties, and therefore denied the hotel owner's motion for summary judgment.[227]

With respect to the Equal Privileges and Immunities Clause, the hotel owner argued the designated evidence demonstrated the tax assessor's disparate treatment by assessing its property while not assessing all other similarly situated properties.[228] To prevail on a claim under this provision, a challenger must show "(1) the disparate treatment is reasonably related to inherent characteristics that distinguish the unequally treated classes, and (2) the preferential treatment is uniformly applicable and equally available to all persons similarly situated."[229] In denying the hotel owner's motion for summary judgment, the Tax Court found "there is a real dispute about whether [the hotel owners]'s property was assessed and other similarly situated properties were not.[230] Accordingly, without

219. *Id.*
220. *Id.*
221. *Id.*
222. 175 N.E.3d 1212 (Ind. T.C. 2021).
223. IND. CONST. art. 10, § 1.
224. IND. CONST. art. 1, § 23.
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*

definitive disparate treatment, it is premature for the Court to consider whether there are inherent differences between [the hotel owner]'s property and other similarly situated properties or whether preferential treatment is uniformly applicable and equally available to all those similarly situated."[231]

231. *Id.*