SEPARATION OF POWERS: INDIANA CONSTITUTIONAL LAW TO THE FOREFRONT—2021-2022

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INTRODUCTION

The decisions from Indiana's appellate courts addressing Indiana constitutional law presented significant developments in areas of separation of powers, revisited long-standing precedents involving individual rights, and presented a variety of results in the areas of standing, ripeness, and redressability in an era of resurgent consideration of applicable standards.[1] A decision stemming from the COVID-19 pandemic played a significant role in shaping the General Assembly's constitutional power to call itself into emergency session in *Holcomb v. Bray*, while one Supreme Court decision raises questions about the constitutional foundations of the *Pirtle* doctrine's required right-to-counsel warnings for searches involving persons in custody.

During the survey period (September 2021 to September 2022), Indiana appellate courts substantively addressed twelve areas of Indiana Constitutional law.[2] The Court of Appeals addressed regular decisions regarding government

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1. The authors thank Maggie Kieffer for her invaluable assistance in gathering the materials for this Article.

2. The courts addressed eighteen topics in 2014, Jon Laramore & Daniel E. Pulliam, *Indiana*

searches and reversed a series of cases based on the rights of the accused. The Supreme Court's new double jeopardy analysis appears to have resulted in fewer appeals on that topic while developments in Internet-based activity has given rise to new factual circumstances for Article 1, Section 9 challenges based on freedom of thought and speech.

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

In *Ellis v. State*,[3] an individual was charged with felony stalking and intimidation of a local police officer who previously had assisted with the individual's arrest and detention.[4] Before trial, the defendant proposed a preliminary jury instruction regarding the State's obligation to prove that the defendant's behavior underlying the charges was not protected by the First Amendment of the United States Constitution.[5] The State objected to the proposed instruction, and the trial court refused it.[6]

On appeal, the defendant challenged her stalking conviction based on the trial court's refusal of the proposed jury instruction and an argument that the activity underlying the stalking charge was protected by the First Amendment or Article 1, Section 9 of the Indiana Constitution.[7] The court of appeals affirmed the trial court's refusal of the defendant's proposed jury instruction and then turned to the defendant's constitutional arguments.[8]

The Indiana Court of Appeals first rejected the State's contention that the defendant had waived the First Amendment defense by effectively abandoning

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Constitutional Developments: Small Steps, 47 IND. L. REV. 1015 (2014); ten in 2015, Jon Laramore & Daniel E. Pulliam, *Developments in Indiana Constitutional Law: A New Equal Privileges Wrinkle*, 48 IND. L. REV. 1223 (2015); fourteen in 2016, Scott Chinn & Daniel E. Pulliam, *Minimalist Developments in Indiana Constitutional Law—Equal Privileges Progresses Slowly*, 49 IND. L. REV. 1003 (2016); twelve in 2017, Scott Chinn & Daniel E. Pulliam, *Emerging Federal Reliance—Continued State Constitutional Minimalism: Indiana State Constitutional Law Summaries—2015-2016*, 50 IND. L. REV. 1215 (2017); ten in 2018, Scott Chinn & Daniel E. Pulliam, *Emerging Federal Reliance—Continued State Constitutional Minimalism: Indiana State Constitutional Law Summaries—2016-2017*, 51 IND. L. REV. 993 (2018); thirteen in 2019, 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 (2019); fifteen in 2020, Scott Chinn, Daniel E. Pulliam, & Elizabeth M. Little, *Continued Progressions Toward Irrelevance? Indiana State Constitutional Law Summaries—2018-2019*, 53 IND. L. REV. 865 (2021); and twelve in 2021, 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 (2022).

3. 194 N.E.3d 1205, 1218-19 (Ind. Ct. App. 2022).
4. *Id.* at 1211-12.
5. *Id.* at 1213.
6. *Id*.
7. *Id*. at 1214-15.
8. *Id*. at 1214.

it at trial.[9] The court reiterated that the First Amendment "provides 'sweeping protections to speech about public officials or issues of public or general concern, even if the speech is intemperate or caustic,'" including "profane commentary directed at law enforcement."[10] The court observed, however, that the First Amendment does not protect "true threat[s]."[11] And because the evidence adduced at trial established that the defendant's behavior rose to the level of a true threat, the court found that the First Amendment did not protect it.[12]

Unlike as to the defendant's First Amendment defense, the court concluded that the defendant had waived her defense under Article 1, Section 9 by failing to present it at any time before the trial court.[13] Nevertheless, the court applied the two-step inquiry that Article 1, Section 9 commands: (1) whether state action had restricted the defendant's expressive activity, and, if so, (2) whether the restricted activity was an abuse of the right to speak.[14] As to the second prong, the court observed that where the speech is political—i.e., if the speech is "exclusively directed at state actors and focused exclusively on the conduct or actions of state actors," or "if its point is to comment on government action, whether applauding an old policy or proposing a new one, or criticizing the conduct of an official acting under color of law"—then a higher level of scrutiny applies.[15] Conversely, speech that is not unambiguously political, "even if coupled with political statements," garners only rational basis review.[16] The State conceded that imposing criminal penalties for her expressive activity satisfied the first prong of the inquiry.[17] However, because the defendant's expressions did not articulate concerns with or complaints against the local police officer or his official conduct, and instead were simply profane insults and expressions of violence against him, the court concluded the speech was not unambiguously political and thus not protected by Article 1, Section 9.[18] Moreover, it held that even if the defendant's expressions had been deemed political, Article 1, Section 9 still would not have protected them because the defendant's activity inflicted harm on the police officer akin to the harm suffered as a result of the tort of intentional infliction of emotional distress, which rendered the speech outside the realm of constitutionally protected free speech.[19]

In *State v. Katz*, the Indiana Supreme Court considered the constitutionality of Indiana's recently enacted "non-consensual pornography" statute, Indiana Code section 35-45-4-8, "which criminalizes the non-consensual distribution of

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9. *Id*. at 1216.
10. *Id*. (citation omitted).
11. *Id*. at 1216-17.
12. *Id*. at 1217.
13. *Id*.
14. *Id*.
15. *Id*. at 1218 (quoting McGuire v. State, 132 N.E.3d 438, 444-45 (Ind. Ct. App. 2019)).
16. *Id.*
17. *Id.* at 1217-18.
18. *Id.* at 1218.
19. *Id.* at 1218-19.

an 'intimate image,'" also known as "revenge porn."[20] The defendant was charged with a misdemeanor under the statute after he sent a video of his significant other performing an intimate act, which he captured without the significant other's consent, to a third-party, also without her consent.[21] The defendant sought dismissal of the charge, in part, based on Article 1, Section 9 of the Indiana Constitution and the First Amendment of the United States Constitution.[22] After the trial court held the statute unconstitutional under the First Amendment and dismissed the charge, the State appealed directly to the Indiana Supreme Court.[23]

Adhering to the doctrine of judicial restraint, the court first examined whether the statute violated Article 1, Section 9 of the Indiana Constitution and concluded it did not.[24] The court recited the test for whether a state action has unconstitutionally imposed on protected speech under Article 1, Section 9 as requiring the defendant to "first demonstrate that the state action has, in the concrete circumstances of the case, restricted his or her opportunity to engage in expressive activity," and, if so, the court then decides "whether the restricted activity constituted an 'abuse.'"[25] It also reiterated that Article 1, Section 9 does not contemplate general overbreadth challenges, and a court's consideration of the constitutionality of state action under that provision should focus on the concrete dispute the parties raise.[26]

Applying the facts at hand, the court observed that because the video prompting the misdemeanor charge contained no words, the defendant could show that the conduct at issue was "expressive activity" only if it constituted "the free interchange of thought and opinion."[27] The court held that the free interchange clause is "broad," "reaches every conceivable mode of expression," including video, and encompasses "nonverbal expression . . . [including] something other than words."[28] It thus held that the video the defendant shared constituted "free interchange."[29] Finding that the "thought[s] and opinion[s]" protected by Article 1, Section 9 "encompass[es] the communication of any thought or opinion, on any topic, through 'every conceivable mode of expression,'" the court held that the video the defendant shared implicated the "free interchange of thought and opinion" protected by the Indiana Constitution.[30]

After concluding that the State's criminal prosecution of the defendant "impose[d] a direct and significant burden on [the defendant's] opportunity to express [his] thoughts and opinions," the court evaluated whether the video the

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20. 179 N.E.3d 431, 439 (Ind. 2022).
21. *Id.*
22. *Id.* at 440.
23. *Id.*
24. *Id.* at 442.
25. *Id.* (quoting Whittington v. State, 669 N.E.2d 1363, 1367 (Ind. 1996)).
26. *Id.*
27. *Id.* at 443 (quoting IND. CONST. art. I, § 9).
28. *Id.* at 444.
29. *Id.* at 446.
30. *Id.* at 443, 445-46.

defendant shared was an abuse of his expressive rights.[31] The court explained that Article 1, Section 9 permits State action that restrains expressive activity that injures the rights of others or interferes with the State's exercise of its police power.[32] However, the State may not materially burden core constitutional values.[33] Thus, it instructed that courts evaluating the nature of state restraint under an Article 1, Section 9 claim must first consider whether the expressive activity at issue implicates a core constitutional value to determine the appropriate standard of review for the State's restraint.[34]

Reasoning that the defendant's sharing of the video involved private, sexual activity, the court held no core constitutional value was at issue because no constitutional provision enshrines individuals' rights to engage in this type of expressive activity.[35] It thus assessed whether the State reasonably could have concluded that the benefits of applying the nonconsensual pornography statute to the defendant—promoting the health, safety, or welfare of others—outweighed the restraint imposed on the defendant's expressive rights.[36] Finding the benefits of the statute's application to the public "vastly outweighed" the burden of the restraint it imposed on the defendant's expressive activity, the court held that the defendant's sharing of the video constituted "an abuse" of his expressive activity rights and thus was not protected by Article 1, Section 9.[37]

The court went on to hold that the application of the statute to the defendant also did not violate the First Amendment.[38] It found that, although the First Amendment protected the defendant's activity, and the statute is content-based and thus necessitates strict scrutiny, the statute advances a compelling State interest in "protecting individuals from the unique and significant harms from the nonconsensual distribution of their intimate images, and it does so through means narrowly tailored to avoid unnecessarily abridging speech."[39] Having found it survived strict scrutiny, the court also rejected the defendant's First Amendment overbreadth challenge, concluding "there certainly is not a substantial amount of overbreadth in comparison to the statute's 'plainly legitimate sweep.'"[40] The court thus reversed and remanded.[41]

In *Bedtelyon v. State*,[42] an individual convicted of a felony challenged application of a term of his probation, which precluded him from "accessing, viewing, or using internet websites and computer applications that depict obscene

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31. *Id.* at 447.
32. *Id.* at 447-48.
33. *Id* at 448.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 449-51.
38. *Id.* at 452.
39. *Id.* at 455-56.
40. *Id.* at 461 (quoting United States v. Williams, 553 U.S. 285, 292 (2008).
41. *Id.*
42. 184 N.E.3d 1216 (Ind. Ct. App. 2022).

matter as defined by [Indiana Code section] 35-49-2-1."[43] After concluding that sexually suggestive anime cartoons the defendant had accessed on YouTube were obscene under Indiana Code section 35-49-2-1, the defendant's probation officer petitioned the court to find that the defendant had violated a term of his probation.[44] Finding by a preponderance of the evidence that the videos were obscene, the trial court revoked the defendant's probation and suspended sentence.[45]

While the defendant raised no challenge under Article 1, Section 9 of the Indiana Constitution or the First Amendment of the United States Constitution, the court observed that Indiana's obscenity statute has been deemed constitutional because it has been interpreted to prohibit only the narrow category of speech also held to be obscene and thus unprotected by the First Amendment.[46] To evaluate the defendant's challenge that the videos were not obscene under Indiana's obscenity statute, the court interpreted the statute's language so as to retain its narrow application only to speech also unprotected by the First Amendment.[47] In doing so, it concluded no evidence established that the videos the defendant had accessed actually "depict[ed] or describe[d] sexual conduct in a patently offensive manner", despite having "erotic themes," being "erotic in tone, and describ[ing] erotic feelings."[48] Thus, the court reversed the trial court's revocation of the defendant's probation.[49]

II. ARTICLE 1, SECTION 11– SEARCH AND SEIZURE

In *State v. Allen*, the Court of Appeals rejected a claim of spousal standing in a claim that a search of a husband's person and clothing violated Article 1, Section 11 of the Indiana Constitution.[50] The court recognized that contrary to Fourth Amendment jurisprudence, Indiana's constitutional protections place "significant focus on both the premises searched and the defendant's interest in the property seized."[51] The Fourth Amendment focuses on whether the defendant has an expectation of privacy in the premises searched.[52]

While patting down the husband at the door of an apartment, a law enforcement officer observed a bulge in the husband's sock.[53] He reached into the sock and found a baggie of suspected heroin.[54] The husband then claimed

43. *Id.* at 1217.
44. *Id.*
45. *Id.*
46. *Id.* at 1218.
47. *Id.*
48. *Id.* at 1219-21.
49. *Id.* at 1221.
50. 187 N.E.3d 221, 228-30 (Ind. Ct. App. 2022).
51. *Id.* at 228.
52. *Id.* at 227-28.
53. *Id.* at 225.
54. *Id.*

ownership of the baggie and said that "if anything is found in this house, it belongs to me."[55] Based on this evidence, law enforcement sought and obtained a search warrant of the apartment.[56] Law enforcement then found more illegal drugs and paraphernalia in the apartment, and the wife admitted to having more drugs in her vaginal canal.[57]

The wife challenged the search of the apartment based on an illegal search of the husband's person and defects in the search warrant.[58] But the court found no authority for the proposition that the spousal relationship allows one spouse to vicariously assert another spouse's Fourth Amendment rights.[59] Rather, the argument contradicted Indiana Supreme Court authority that determining the degree of privacy interest sufficient to confer standing is determined on a case-by-case basis.[60]

In *Ramirez v. State*, the Indiana Supreme Court held that a warrantless seizure of a security camera recorder was reasonable under Article 1, Section 11's totality of the circumstances test.[61] The degree of suspicion was high because law enforcement could see on the monitor connected to the recorder that the security camera displayed live surveillance footage with a clear view of the driveway of a home where a toddler was found dead of what was later determined to be multiple blunt force injuries.[62] The footage could be "clearly critical" to the investigation and potentially corroborate the timing of when the suspect arrived at the home.[63] The seizure of the recorder did not limit anyone's movements and law enforcement obtained a search warrant before viewing the footage lowering the degree of the intrusion.[64] Finally, leaving the home to obtain a search warrant could have compromised the evidence given that the owners of the home were not detained, and electronically stored evidence may be easily destroyed.[65] Given these factors, the seizure of the device did not violate the Indiana Constitution.[66]

The court also found that under Article 1, Section 16, the defendant's offense was so severe that his sentence of life without parole was not disproportionate even though the jury found that he had committed the murder knowingly but not intentionally.[67] A life sentence without the possibility of parole was proportional and graduated to the brutal murder of a toddler, who was put in his care, that

55. *Id.*
56. *Id.* at 225-26.
57. *Id.*
58. *Id.*
59. *Id.* at 228-29.
60. *Id.* at 229 (citing Lee v. State, 545 N.E.2d 1085, 1091 (Ind. 1989)).
61. 174 N.E.3d 181, 188-89, 191-92 (Ind. 2021).
62. *Id.* at 188.
63. *Id.* at 190, 192.
64. *Id.* at 191-92.
65. *Id.* at 192.
66. *Id.*
67. *Id.* at 201-02.

resulted from multiple severe blunt force injuries.[68]

In *McCoy v. State*, the Indiana Supreme Court reaffirmed the requirement under the Indiana Constitution that law enforcement advise arrestees of their right to legal counsel under *Pirtle v. State*,[69] before an arrestee may consent to a search.[70] Because there was no dispute over the arrestee's custodial status when the officer asked to search his home (he was in handcuffs), and because there was no dispute that the officer failed to advise McCoy of his *Pirtle* rights before requesting that consent (law enforcement escorted him to his second-floor bedroom), the court held that the trial court abused its discretion by admitting evidence obtained during the search.[71]

Justice Massa concurred in the result noting that the court dispassionately applied *Pirtle* to grant the defendant a new trial.[72] Yet if the case's "rare facts" resulted in a broader application of *Pirtle*, Justice Massa would be "open to reconsidering *Pirtle* in future cases."[73] Other states lack a *Pirtle* doctrine, and Justice Massa would find that an attempt to track *Pirtle*'s reasoning would be waived for "lack of cogent argument."[74] He argued that the doctrine rests in federal constitutional law—presumably as an outgrowth of application of *Miranda* to the facts at issue in *Pirtle*—that other states have declined to adopt.[75] *Pirtle* remains "good law" until the court overrules it, according to Justice Massa.[76]

In *Posso v. State*, the Court of Appeals held as a matter of first impression that law enforcement must first advise subjects of their *Pirtle* rights as part of seeking consent to search a cell phone.[77] Here, the subject had a smartphone, which the court noted "may contain substantially more evidence, both in kind and quantity, than a person's home or vehicle."[78] Thus, the court readily recognized that an unlimited, general search of the phone without probable cause was the "weighty intrusion for which a Pirtle advisement is required."[79]

The court then found that the subject was in custody when he signed the forms consenting to the search.[80] He had been advised of his *Miranda* rights and questioned by several officers about his son's death.[81] Multiple officers were in the room between him and the door, and he had surrendered his van keys and

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68. *Id.*
69. 323 N.E.2d 634 (1975).
70. McCoy v. State, 193 N.E.3d 387, 391 (Ind. 2022).
71. *Id*. at 388.
72. *Id.* at 392 (Massa, J., concurring).
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. 180 N.E.3d 326, 329, 335-38 (Ind. Ct. App. 2021).
78. *Id.* at 336.
79. *Id.*
80. *Id.* at 337-38.
81. *Id.* at 337.

driver's license.[82] Finally, the consent forms the subject signed contained written language advising him of his right to counsel, but law enforcement did not read the form to him out loud or otherwise advise him of his right to a lawyer.[83] The subject told law enforcement he did not understand what the consent form was, and the police officer failed to advise him of his right or read the form to him.[84]

In *Bunnell v. State*, the Indiana Supreme Court held that a trained and experienced law enforcement officer needs no exceptional ability to smell to identify the "distinctive scent of raw marijuana."[85] All law enforcement officers must attest to the judicial officer issuing the warrant that they possess the requisite training and experience to smell marijuana.[86] The court recognized all Indiana law enforcement officers receive specialized training for detecting and identifying raw marijuana and that they use that training frequently in the field.[87] Raw marijuana has its own unique smell that is both "ubiquitous and unlike any other substance."[88] Therefore, officers who assert their training and experience as the basis of their ability to smell raw marijuana satisfy the requirement that judges issuing warrants consider reasonable inferences from the totality of the evidence.[89]

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

In *McCain v. Town of Andrews*, an owner of a home ordered for demolition challenged the constitutionality of Indiana's Unsafe Building Law.[90] The statute provides an owner of a home ordered for demolition as a result of it being unsafe ten days to file a complaint appealing the decision.[91] The homeowner argued that because he received the notice of the order only one day prior to the statutory deadline, the deadline as applied was "arbitrarily unreasonable."[92]

In analyzing the homeowner's challenge under Article 1, Section 12, the Court of Appeals considered two questions: "Was there a deprivation of a constitutionally protected property interest? And what process is due?"[93] Here, the court found that while a protected property interest was at stake, the homeowner was not denied due process.[94] Over the course of ten months, the Town mailed copies of five orders related to the enforcement of the Unsafe Building Law to the

82. *Id*.
83. *Id.* at 337-38.
84. *Id.* at 338.
85. 172 N.E.3d 1231, 1233 (Ind. 2021).
86. *Id.* at 1235-36.
87. *Id.*
88. *Id.* at 1235.
89. *Id.* at 1237.
90. 182 N.E.3d 229 (Ind. Ct. App. 2021); *see* IND. CODE § 36-7-9-8(b) (2023).
91. IND. CODE § 36-7-9-8(b).
92. *McCain*, 182 N.E.3d at 233.
93. *Id.*
94. *Id.*

addresses of the home and the homeowner.[95] Despite the number of notices concerning the home's safety risks, no one with a property interest attended most of the meetings.[96] Only when the Town ordered solicitation of demolition bids did the homeowner raise an issue.[97] "In other words, [the homeowner's] due process argument amounts to an attempt to circumvent his own inaction."[98]

In *McClendon v. Triplett*, a mother argued that the trial court's procedure of allowing a sixteen-year-old child to testify outside the presence of her parents in a custody hearing violated the mother's due process rights.[99] The trial court excluded the parents from the hearing to allow the child to "feel more free to speak," but the trial court allowed the parents' counsel to remain in the courtroom to question and cross-examine the child.[100] "The decision concerning whether to conduct an *in-camera* interview pursuant to Indiana Code section 31-17-2-9 is within the trial court's discretion."[101] Here, the Court of Appeals found that the trial court did not abuse its discretion when it excluded the parents while permitting counsel for the parents to cross-examine the child and that the mother's due process rights were not violated.[102]

In *Miller v. Patel*, the Court of Appeals reversed the trial court's grant of summary judgment in favor of mental healthcare providers who provided treatment to a patient who pled "guilty but mentally ill" to voluntary manslaughter.[103] After the patient pled guilty to the criminal charges, he filed a civil action against her mental healthcare providers, asserting claims of medical malpractice.[104] The healthcare providers filed a motion for summary judgment—which the trial court granted—arguing the patient's guilty plea estopped the patient from litigating his medical malpractice claim.[105] The Court of Appeals found the trial court's application of collateral estoppel to preclude the patient's medical malpractice claim was in error.[106] Although the court recognized that the holding "allows for potentially inconsistent determinations of fact in a criminal trial and a subsequent civil action," the court "nonetheless believe[d] that, in the circumstances before [them], affording [the patient] the opportunity to have his day in court to fully litigate his medical malpractice claim overrides [the] apprehension about the potential for inconsistent determinations."[107] Additionally, the court was mindful that the open courts clause mandates, "[a]ll

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95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. 184 N.E.3d 1202, 1210-11 (Ind. Ct. App. 2022).
100. *Id.*
101. *Id.* at 1211.
102. *Id.* at 1212-13.
103. 189 N.E.3d 216, 219 (Ind. Ct. App.), *vacated*, 197 N.E.3d 823 (Ind. 2022).
104. *Id.* at 219.
105. *Id.* at 219-20.
106. *Id.* at 222-26.
107. *Id.* at 226.

courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."[108] Thus, the clause "guarantees access to the courts to redress injuries to the extent the substantive law recognizes an actionable wrong."[109]

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

In *Carmouche v. State*, the Court of Appeals reversed a misdemeanor conviction after a bench trial because the record lacked any evidence that the defendant was advised of his rights to a jury.[110] Rather, the court advised him as follows: "[y]ou have the right to a public and a speedy trial. You can request a jury trial but at this point you're charged with a misdemeanor."[111] The defendant was then tried by the court and found guilty.[112] With the State conceding that the defendant was not informed that his jury trial right was not automatic and was given no explanation on how to assert it, the Court of Appeals reversed his conviction.[113]

In *Strack v. State*, the Indiana Supreme Court found that the defendant who testified and was cross-examined about his alcohol use related to domestic battery would not have received a different sentence had he not testified.[114] The defendant sought to present the facts "in summation" but the State sought, and received, the right to cross-examine him.[115] Yet common law, and statute, recognize that defendants may speak in allocution.[116] The defendant failed to object to the State's cross examination, which elicited the fact that he had driven with his daughter while intoxicated and continued using alcohol.[117] Because other sentencing testimony had already introduced that information, the Supreme Court found harmless error.[118] The defendant could not show that his sentence of six years would have been different.[119]

In *Church v. State*, the Indiana Supreme Court upheld a statute regulating the depositions of alleged child victims of sex offenses as constitutional.[120] The statute limits depositions of child victims of sex offenses if they are younger than

108. *Id*. (quoting IND. CONST. art. I, § 12).
109. *Id*. (quoting Escamilla v. Shiel Sexton Co., Inc., 73 N.E.3d 663, 666 (Ind. 2017)).
110. 188 N.E.3d 482, 485 (Ind. Ct. App. 2022).
111. *Id*. at 484.
112. *Id*.
113. *Id*. at 485.
114. 186 N.E.3d 99, 101-02, 104 (Ind. 2022).
115. *Id*. at 101-02.
116. *See* IND. CODE § 35-38-1-5.
117. *Strack*, 186 N.E.3d at 101-02.
118. *Id*. at 104.
119. *Id*.
120. 189 N.E.3d 580 (Ind. 2022); *see* IND. CODE § 35-40-5-11.5 (2023).

sixteen.[121] If the prosecution objects, a court may only authorize such depositions if there is a reasonable likelihood the child would be unavailable for trial and the deposition is needed to preserve the child's testimony, or if there are extraordinary circumstances and is in the interest of justice.[122]

The court first found that the rule was substantive and not procedural, and thus the rule did not infringe on the judicial branch's authority over rules of procedure.[123] Methods and timing are procedural rules, but the right to do something is substantive and can be regulated by statute even if it conflicts with rules of procedure.[124] The statute here furthered public policy objectives by protecting child victims of sex crimes, implicating substantive and constitutional rights.[125] The statute did not address the method or time of the use of the right; rather it explained a procedure for determining which person's right prevails—"the defendant's right to depose or the child victim's right not to be."[126]

The court also found that the statute did not violate the defendant's right.[127] There is no constitutional right to depositions in a criminal case and both the federal system and forty-four states prohibit or limit them.[128] Article 1, Section 12 of the Indiana Constitution does not confer a general due process right and only applies in civil cases based on its plain language.[129] Rather, Article 1, Section 12 only confers a right to a speedy trial in criminal cases.[130]

In *Partee v. State*, the Court of Appeals found that a trial court did not commit fundamental error in failing to explicitly advise a defendant he could return to the courtroom if he promised to behave.[131] The decision rested largely on the federal Confrontation Clause provision of the Sixth Amendment to the U.S. Constitution, but the court did note in a footnote that Article 1, Section 13 of the Indiana Constitution affords a defendant in a criminal proceeding the right to be present at all stages of his trial.[132] But because the defendant did not raise the issue in the trial court, the Court of Appeals found fundamental error review applicable under both the federal and the Indiana constitutions.[133]

Here, the defendant's counsel acknowledged why the defendant could not be in the courtroom but made no objection on the basis "that the trial court did not inform the defendant that he could return to the courtroom if he promised to

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121. *Church,* 189 N.E.3d at 584.
122. *Id.* at 585.
123. *Id.* at 588-92.
124. *Id.* at 588-89.
125. *Id.*
126. *Id.* at 591.
127. *Id.* at 592-97.
128. *Id.* at 592.
129. *Id.* at 593; *see* IND. CONST. art. I, § 12.
130. *Church,* 189 N.E.3d at 593.
131. 184 N.E.3d 1225, 1233-36 (Ind. Ct. App.), *trans. denied*, 189 N.E.3d 163 (Ind. 2022).
132. *Id.* at 1234 n.3; *see* U.S. CONST. amend. VI; IND. CONST. art. I, § 13.
133. *Partee*, 184 N.E.3d at 1234.

behave."[134] "Nor did Partee's counsel ever request that the trial court inform Partee that he could return if he promised to behave.[135] Because the defendant failed to give any indication that he was willing to conform his behavior to that required in judicial proceedings, the trial court did not commit fundamental error.[136]

In *Wells v. State*, the Court of Appeals reversed a trial court's exclusion of the defendant from his trial because of a positive drug test.[137] At his first trial setting, the court found that the defendant was being "very contentious with" his lawyer and that "the clerk's office believed [the defendant] was impaired by drugs or alcohol.[138] After the defendant then admitted he might have tested positive for residual marijuana, the court ordered pretrial supervision testing and warned that if the defendant tested positive before his next trial, the court would proceed with his trial without the defendant's presence.[139]

After the defendant tested positive for THC, and in an increased amount after having tried to "flush stuff out" of his system, the court announced the jury would be called in five minutes and excused the defendant from the proceedings without objection from defense counsel.[140] The defendant was then found not guilty of cocaine possession but guilty of invasion of privacy.[141] On appeal, the Court of Appeals rejected the State's argument that the defendant "voluntarily waived his right to" be in the courtroom by appearing in court under the influence of a controlled substance because there was no evidence the defendant was being unruly.[142] The defendant had not engaged in any disruptive conduct the day of his rescheduled trial and thus, under both a federal constitutional analysis and Article 1, Section 13 of the Indiana Constitution, the trial court's exclusion of the defendant's right to be present "blatantly violated basic and elementary principles" of fundamental due process.[143]

V. ARTICLE 1, SECTION 16 – EXCESSIVE BAIL, CRUEL AND UNUSUAL PUNISHMENT, PROPORTIONALITY CLAUSE

In *Jones v. State*, the Court of Appeals found that a $200,000 bail bond with a ten percent cash option did not violate the Indiana Constitution's prohibition against excessive bail in Article 1, Section 16.[144] Although the defendant had no criminal history, the bail amount was not excessive because it was designed to

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134. *Id.* at 1233.
135. *Id.*
136. *Id.* at 1236.
137. 176 N.E.3d 977, 978 (Ind. Ct. App. 2021).
138. *Id.* at 979.
139. *Id.*
140. *Id.* at 981.
141. *Id.*
142. *Id.* at 985.
143. *Id.* at 985-86; *see* IND. CONST. art. I, § 13.
144. 189 N.E.3d 227, 230 (Ind. Ct. App. 2022).

secure the defendant's attendance at trial.[145] Although he did not have a lengthy criminal history, the defendant was "accused of committing forty-one felonies against at least twenty different victims over" three years with some of those felonies allegedly occurring while he was out on bail in another case.[146] This showed that the defendant distained authority and suggested he might not appear at trial.[147] The offenses' gravity and nature, with the resulting potential consequences, also supported the concern that the defendant would not appear at trial.[148] Finally, the bond amount fit the county's guidelines.[149]

VI. ARTICLE 1, SECTION 21 – COMPENSATION FOR SERVICES AND PROPERTY

In *Town of Linden v. Birge*, the Court of Appeals reversed the trial court's taking determination when the trial court applied the wrong legal standard.[150] Property owners brought an inverse condemnation against the town, county, and county officials after improvements to a regulated agricultural drain caused temporary flooding on their property.[151] On remand, the trial court found that the improvements led to a regulatory taking of a "permanent physical invasion of the property."[152]

In determining whether the flooding of their property constituted a compensable taking, the Court of Appeals applied the same analysis as federal constitutional eminent domain law.[153] Under this analysis, "[r]equiring a landowner to suffer 'permanent physical invasion of her property—however minor' is a per se regulatory taking."[154] Different than the trial court, the Court of Appels found that the property owners' evidence established frequent, periodic flooding of their land, which does not constitute a "permanent physical invasion" and a per se taking.[155] Instead, the Court of Appeals remanded the case for the trial court to analyze the frequent, temporary flooding under the *Penn Central*[156] factors as expanded in *Arkansas Game & Fish Commission v. United States*.[157]

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145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. 187 N.E.3d 918, 927-928, 930-931 (Ind. Ct. App. 2022), *vacated*, 204 N.E.3d 229 (Ind. 2023).

151. *Id.* at 930.

152. *Id.* at 921.

153. *Id.* at 928.

154. AAA Federal Credit Union v. Indiana Department of Transportation, 79 N.E.3d 401, 405 (Ind. Ct. App. 2017) (quoting Lingle, 544 U.S. 528, 537 (2005)).

155. *Birge*, at 930.

156. *See* Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

157. *Birge*, 187 N.E.3d at 930-31 ("the Court clarified that there was no 'blanket temporary-flooding exception to our Takings Clause jurisprudence[.]'" (quoting Arkansas Game & Fish Comm'n v. United States, 568 U.S. 23, 34 (2012))).

Under *Arkansas Game*, the trial court is to consider the following factors in determining whether a taking occurred: "(1) the duration of the interference; (2) 'the degree to which the invasion is intended or is the foreseeable result of authorized government action,' (3) 'the character of the land at issue,' (4) 'the owner's reasonable investment-backed expectations regarding the land's use,' and (5) the '[s]everity of the interference[.]'"[158]

In *Duke Energy Indiana, LLC v. Bellwether Properties*, *LLC,* the Court of Appeals reversed the trial court's denial of the electric utility's motion for summary judgment, finding the electric utility's enforcement of horizontal clearance regulations did not constitute a compensable regulatory taking.[159] A landowner brought a claim for inverse condemnation against an electric utility when the utility expanded its lines from the easement to the landowner's property.[160] This expansion caused the landowner to reduce the size of its proposed warehouse by 150 square feet.[161] The Court of Appeals found this expansion did not constitute a compensable regulatory taking because, upon considering the factors set forth in *Penn Central*, the evidence showed that the economic impact of the regulation was minimal (given the landowner had to downsize his warehouse by only 150 square feet), the enforcement of the regulation did not interfere with the landowner's expectation of the land (given a clearance requirement had been in place when the landowner purchased the land), and the character of the regulation intended to protect the life and property from risk of harm weighs against determining a taking occurred.[162]

In *701 Niles, LLC v. AEP Indiana Michigan Transmission Co.,* the Court of Appeals found that the placement of a private electric line through a company's property constituted an impermissible taking and enjoined the installation of the private line.[163] A landowner agreed to allow a publicly regulated utility to install an underground electric transmission line for public purpose, but filed a motion to enjoin the utility from additionally installing a separate private transmission line for private use by a university.[164] While the landowner acknowledged that the public utility has the right to take private property rights for public use, these "eminent domain powers . . . are not unlimited, and a private property owner . . . has a 'right constitutionally to defend against subterfuge and bad faith in the

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158. *Id.* at 931 (quoting *Arkansas Game*, 568 U.S. at 34). In March 2023, after the survey period, the Indiana Supreme Court vacated this opinion in part and found the Court of Appeals misapplied *Arkansas Game* in its ruling there was only a "temporary physical invasion." Town of Linden v. Birge, 204 N.E.3d 229, 234 (Ind. 2023). "[W]e analyze a flooding-related takings claim as follows: (1) if the flooding is continuous or 'intermittent but inevitably recurring,' and the invasion is 'substantial,' then it results in a per se taking; (2) if, on the other hand, the flooding is temporary or of 'finite duration,' then the *Arkansas Game* factors apply." *Id.* at 235.

159. 192 N.E.3d 1003, 1009 (Ind. Ct. App. 2022).

160. *Id.* at 1006.

161. *Id.*

162. *Id.* at 1008-09.

163. 191 N.E.3d 931, 942 (Ind. Ct. App. 2022).

164. *Id.* at 933-34.

seizure of his property, and may show that it is not to be applied to the public purpose and use as alleged.'"[165] The Court found that "where the distinct public and private uses can be so easily separated without any harm to the public interest, the condemnation proceedings can be allowed only as to the public use."[166] "In other words, the University cannot be allowed to piggyback on the easements acquired by [the utility provider] through the power of eminent domain and install an entirely separate line on the Land, which is private and offers no material benefit to the public."[167]

VII. ARTICLE 1, SECTION 23 – EQUAL PRIVILEGES AND IMMUNITIES

In *Swopshire v. State*, the defendant challenged the application of an amended state statute of limitations to him based on federal and state constitutional prohibitions on ex post facto laws and Indiana's Equal Privileges and Immunities Clause in Article 1, Section 23 of the Indiana Constitution.[168] In November 2019, the State charged the defendant with four counts of sexual misconduct with a minor and one count of attempted sexual misconduct with a minor for repeated acts occurring between March 2009 and March 2011.[169] The defendant moved to dismiss on statute of limitations grounds because the statute of limitations in effect at the time the defendant committed the alleged offenses would have precluded the State's charges.[170] 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.[171]

The Indiana Court of Appeals reaffirmed 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] But the court reiterated that "the State cannot revive an expired offense by way of amending the statute of limitations."[173] Thus, the court affirmed in part the trial court's denial of the defendant's motion to dismiss the charges on the basis of an ex post facto violation and reversed in part for 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 confirmed that the application of the amended statute of

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165. *Id.* at 939 (quoting Derloshon v. City of Fort Wayne, 234 N.E.2d 269, 271 (1968)).
166. *Id.* at 941.
167. *Id.*
168. 177 N.E.3d 98, 101 (Ind. Ct. App. 2021).
169. *Id.* at 101-02.
170. *Id.* at 102-03.
171. *Id.* at 102.
172. *Id.* at 103.
173. *Id.* at 105.
174. *Id.* at 105-06.

limitations period to the defendant did not violate the Equal Privileges and Immunities Clause in Article 1, Section 23 of the Indiana Constitution.[175] It held that someone that "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 committed the same offense but on a different date requiring the application of a different statute of limitations."[176] The court thus rejected the defendant's argument that the amended statute's application to him—but not to others who may have committed the same offense but were subject to a different statute of limitations than he—treated like citizens disparately in contravention of the Equal Privileges and Immunities Clause.[177] Consequently, the court affirmed the trial court's denial of the motion to dismiss on this ground.[178] In January 2022, the Indiana Supreme Court denied the defendant's petition for transfer.[179]

In *Smith v. State*, the Indiana Court of Appeals affirmed a trial court's denial of a defendant's motion to dismiss felony charges for failing to register as a sex or violent offender, which he contended violated his rights under the Equal Privileges and Immunities Clause in Article 1, Section 23 of the Indiana Constitution.[180] At the time he was convicted, Indiana law required the defendant to register as a sex or violent offender for the rest of his life.[181] A few years later, the legislature amended the applicable registration statute to require offenders convicted of the offenses of which the defendant had been convicted to register for only ten years.[182] When the defendant stopped registering as a sex or violent offender after the ten-year post-conviction period had passed, the State charged him with felonies associated with his failure to register.[183] The defendant sought dismissal of the charges, arguing that the State's attempt to hold him criminally liable for failing to register after the legislature reduced the registration period for the crimes for which he had been convicted violated his constitutional rights.[184]

The court rejected the defendant's argument.[185] Citing *Swopshire*, the court reiterated that individuals who commit criminal offenses at different times are not similarly situated for purposes of analyzing the application of changes to penal statutes.[186] Therefore, the court held that the State's refusal to apply the amended registration statute to the defendant, while conceding its application to offenders who had committed the same offense after the amendment's enactment, did not

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175. *Id*. at 106.
176. *Id*.
177. *Id*. at 106-07.
178. *Id*.
179. Swopshire v. State, 180 N.E.3d 932 (Ind. 2022), *denying transfer to* 177 N.E.3d 98.
180. 194 N.E.3d 118, 121-22 (Ind. Ct. App. 2022).
181. *Id*. at 122-23.
182. *Id*. at 123.
183. *Id*. at 123-24.
184. *Id*. at 124.
185. *Id*. at 128-29.
186. *Id*.

violate Indiana's Equal Privileges and Immunities Clause.[187]

VIII. ARTICLE 1, SECTION 24 – EX POST FACTO CLAUSE

In *Crowley v. State*, the Court of Appeals upheld a requirement for the petitioner to register as a sex offender.[188] The petitioner had argued that requiring him to register as a sex offender constituted an ex post facto punishment in violation of the Indiana Constitution.[189] When he was convicted in 1988, neither Michigan, where he was convicted, nor Indiana, required registration.[190] In 2006, the Indiana General Assembly amended Indiana's sex offender registration laws to require newly arriving out-of-state residents to register.[191] Yet the petitioner had moved to Indiana in 2004 with no warning that he would be required to register.[192]

Based in part on the Seventh Circuit's en banc decision in *Hope v. Commissioner of Indiana Department of Correction*,[193] the court found that requiring the petitioner to register as a sex offender did not impose a burden so punitive as to override the legislature's intent in enacting a civil law.[194] He was required to register in Michigan starting years before he moved to Indiana and thus continuing to require him to register did not violate the Indiana Supreme Court's "intent-effects" test established in *Wallace v. State*,[195] and then narrowed in *Tyson v. State*[196] and *State v. Zerbe*,[197] where the court found that maintaining registration was not punitive regardless of when or where the crime was committed.[198]

IX. ARTICLE 3, SECTION 1 – SEPARATION OF POWERS

In *Holcomb v. Bray*,[199] the Indiana Supreme Court held that the legislature acted unconstitutionally when it enacted a law purporting to allow it to call an emergency session through resolution passed by a small subset of legislators termed the Legislative Council.[200]

After the legislature passed the law in 2021, the Governor vetoed it, but the

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187. *Id*. at 129.
188. 188 N.E.3d 54, 57, 59-63 (Ind. Ct. App. 2022).
189. *Id*. at 56.
190. *Id*.
191. *Id*. at 58.
192. *Id*. at 56.
193. Hope v. Comm'r of Ind. Dep't of Correction, 9 F.4th 513, 519 (7th Cir. 2021).
194. *Crowley*, 188 N.E.3d at 63.
195. Wallace v. State, 905 N.E.2d 371 (Ind. 2009).
196. Tyson v. State, 51 N.E.3d 88 (Ind. 2016).
197. State v. Zerbe, 50 N.E.3d 368 (Ind. 2016).
198. *Crowley*, 188 N.E.3d at 56 n.2, 63.
199. 187 N.E.3d 1268, 1273-74 (Ind. 2022).
200. *Id*. at 1291.

legislature overrode the veto.[201] When the law took effect, the Governor, represented by outside counsel, sued various members of the legislature, the Legislative Council, and the legislature itself.[202] Shortly thereafter, the Attorney General appeared on behalf of both the legislature defendants and the Governor and sought to strike the appearances and filings of the Governor's outside counsel.[203] The trial court rejected the Attorney General's motion, finding that "no legal authority prevent[ed] the Governor from hiring his own counsel under th[e] circumstances" of the case; it also denied the Attorney General's motion for an interlocutory appeal of that order.[204] On competing summary judgment motions, the trial court found the law constitutional, and the Governor directly appealed that judgment to the Indiana Supreme Court.[205]

The Indiana Supreme Court began its analysis of the law's constitutionality by recognizing Article 3, Section 1 of the Indiana Constitution's requirement that no branch of Indiana's government "exercise any of the functions of another, except as in this Constitution expressly provided."[206] It then analyzed Article 4, Section 9 of the Indiana Constitution, which it described as making "legislative sessions . . . inherently a legislative-branch function," including by giving the legislature authority to fix "by law" the "length and frequency of its sessions," except by prescribing to the Governor authority to call a "special session."[207]

Applying these provisions to the statute the legislature had passed, the court held it was unconstitutional.[208] First, the court explained that Article 4, Section 9 requires the legislature to set any session it intends to convene "through a properly enacted bill, not a simple resolution."[209] The statute's provision authorizing the Legislative Council to convene an emergency session of the legislature through resolution while the legislature was not in session thus violated this constitutional requirement.[210] Second, the court held that the statute violated Article 3, Section 1's separation-of-powers mandate because Indiana's Constitution gives only to the Governor the power to call the legislature into session at a time when it otherwise is not in session.[211]

The court also rejected the myriad of procedural arguments the legislature defendants argued barred the Governor's suit.[212] The court held that, under the facts of the case, the Governor was a "person" entitled to bring suit under

201. *Id*. at 1274.
202. *Id*.
203. *Id*.
204. *Id*.
205. *Id*. at 1275.
206. *Id*. (quoting Ind. Const. art. III, § 1).
207. *Id*. at 1275-76 (quoting IND. CONST. art. IV, § 9).
208. *Id*. at 1282.
209. *Id*. at 1281.
210. *Id*. at 1281-82.
211. *Id*. at 1283-84.
212. *Id*. at 1284-89.

Indiana's Declaratory Judgment Act.[213] The court also found that the Governor had standing, and his claims were ripe.[214] The court held that the Governor's reliance on Indiana Code section 4-3-1-2, which permits the Governor to "employ counsel to protect the interest of the state in any matter of litigation where the same is involved," in hiring outside counsel did not impermissibly interfere with Indiana Code sections 4-6-2-1(a) and 4-6-5-3(a), which give the Attorney General exclusive authority to prosecute and defend state agencies, and that Indiana law permits the Governor to "brin[g] a suit and hir[e] outside counsel to do so."[215] The court also rejected application of the legislative-immunity and political-question doctrines as barring the Governor's suit.[216]

In *Lake County Board of Commissioners v. State*, the Indiana Supreme Court was tasked with deciding which unit of Indiana government is responsible for defending and indemnifying probation officers in a lawsuit—the State, which, through the judicial branch and state law, employs the officers, or the counties, which, pursuant to statute, are responsible for paying the officers' salaries and certain of their expenses.[217] Based on a plain reading of the statutes governing probation officers' appointment and authority, the court held that probation officers are State employees because the legislature "has vested the State—through the judiciary—with primary authority over probation departments and their operation," notwithstanding counties' obligations to pay probation officers' salaries and certain of their expenses, in consultation with the courts.[218] The court thus held that the Attorney General must defend and indemnify probation officers in lawsuits, consistent with state law.[219]

In *PNC Bank, National Association v. Page*, the Indiana Court of Appeals held that the interest-tolling provision in the Indiana Supreme Court's Emergency COVID-19 relief orders, issued pursuant to Indiana Administrative Rule 17(A), did not toll the automatic interest to which a bank was entitled under a private loan agreement upon default.[220] The court concluded that a contrary reading of the administrative order would cause the judicial branch's procedural rule to change

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213. *Id*. at 1285-86; *see* IND. CODE ch. 34-14-1.

214. *Holcomb*, 187 N.E.3d at 1286-87.

215. *Id*. at 1288-89 (while "procedural" on the surface because of the statute involved, the question of whether the Governor could be limited in selecting legal counsel of his choice in a case he brought affirmatively in an attempt to vindicate his vested powers under the Indiana Constitution itself presented a serious separation-of-powers issue); *see id.* at 1289 ("[R]equiring the Attorney General to consent to the Governor bringing this action would effectively give that office veto power over any suit by the Governor it doesn't agree with. The Attorney General's authority, statutorily granted by the General Assembly, simply cannot trump the Governor's implied power to litigate in executing his enumerated power under the take-care clause without violating our Constitution's careful distribution of powers.")

216. *Id*. at 1289-91.

217. 181 N.E.3d 960, 961, 967-69 (Ind. 2022).

218. *Id.* at 963, 966-67.

219. *Id.* at 966-67, 970.

220. 186 N.E.3d 633, 634, 637, 639 (Ind. Ct. App. 2022).

substantive Indiana law enacted by the legislature, contrary to Article 3, Section 1 of the Indiana Constitution.[221]

In *E.F. v. St. Vincent Hospital & Health Care Center, Inc.*,[222] the Indiana Supreme Court revisited its decision in *T.W. v. St. Vincent Hospital & Health Care Center, Inc.*,[223] to clarify that Indiana's appellate courts have "broad discretion to decide when the public interest exception to mootness applies," should evaluate the application of the exception "on a case-by-case basis," and "may readily [apply the exception in the context of temporary civil commitment decisions] to address novel issues or close calls, or to build the instructive body of law to help trial courts make these urgent and difficult decisions."[224] Justice Slaughter dissented based on his view that the Indiana Supreme Court's holding "applie[d] a broader mootness exception than . . . [was] consistent with [the Indiana] constitution's structural limits on judicial power" under Article 3, Section 1 because it permitted courts to issue opinions when there was neither an actual live case or controversy nor a showing of any actual likelihood that the same parties would be faced with the same dispute.[225]

In *WTHR-TV v. Hamilton Southeastern Schools*,[226] the Indiana Supreme Court examined, in part, whether the provision in Indiana's Access to Public Records Act requiring public agencies to make available certain information in employee personnel files requires the agencies to disclose the original underlying documents containing that information or permits them to compile the information into a new document and make only that newly created document available to the requestor.[227] The court held that because the Act repeatedly specifies that "information," rather than "documents" must be disclosed under the personnel-file exception, public agencies that compiled the specified personnel information in a new document and disclosed only that document, and not the underlying records, satisfied the statute's requirements.[228] The court recognized that a number of public policy reasons support requiring an agency to disclose the underlying personnel records but explained that it could not amend the law and, consistent with Article 1, Section 3 of the Indiana Constitution, "it is the General Assembly's job to consider the benefits of transparency, authenticity, and accuracy that arise from an agency turning over preexisting documents and act (or not)."[229]

In *Serbon v. City of East Chicago*, the Indiana Court of Appeals concluded that plaintiffs challenging a city ordinance, but "who [did] not live in the City, [did] not pay taxes to the City, and ha[d] shown no cognizable harm to either

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221. *Id.* at 637-39.
222. 188 N.E.3d 464, 468 (Ind. 2022).
223. 121 N.E.3d 1039, 1042 (Ind. 2019).
224. *St. Vincent Hosp.*, 188 N.E.3d at 465-66.
225. *Id.* at 468 (Slaughter, J., dissenting).
226. 178 N.E.3d 1187, 1189-92 (Ind. 2022).
227. *Id.* at 1190; *see* IND. CODE § 5-14-3-4(b)(8) (2023).
228. *Id.* at 1191-92.
229. *Id.* at 1192.

themselves or the public," lacked standing to pursue their challenge.[230] The court observed that the plaintiffs had failed to allege any redressable injury to them, "a constitutionally irreducible minimum requirement"[231] to establish standing, including public standing and statutory standing, and allowing plaintiffs to proceed "would extend standing to such an extent that it would violate the separation-of-powers provision of the Indiana Constitution"[232] because even "the legislature *cannot expand*—or restrict—beyond constitutional limits the class of persons who possess standing."[233]

Another challenge to a city ordinance in *City of Gary v. Nicholson*[234] garnered unusual agreement among the Justices on standing issues that have divided the court in recent years in cases like *Horner v. Curry*[235] and *Holcomb v. City of Bloomington*.[236] In *Nicholson*,[237] four Indiana residents sued to enjoin the City of Gary from enforcing portions of an ordinance that limited law enforcement assistance to federal immigration enforcement—a so-called "welcoming ordinance."[238] When challenged, the plaintiffs alleged they had standing under both a state statute that provided a cause of action for such suits and the public standing doctrine.[239] Writing for a unanimous Court, Justice Slaughter rejected both standing arguments, noting that while the public standing doctrine remains "unsettled in Indiana, at a minimum it requires some type of injury."[240]

X. ARTICLE 4, SECTION 24 – RIGHT TO SUE THE STATE

In *Ladra v. State*,[241] the Indiana Supreme Court modified its rule in *Catt v. Board of Commissioners*,[242] concluding "when the government knows of an existing defect in a public thoroughfare, and when it has ample opportunity to respond, immunity does **not** apply simply because the defect manifests during recurring inclement weather."[243] In making this determination, the court analyzed the history of actions against the state, including Article 4, Section 24 of the Indiana Constitution, which authorizes "general statutes permitting a party to

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230. 194 N.E.3d 84, 87 (Ind. Ct. App. 2022).
231. *Id.* at 92.
232. *Id.* at 97.
233. *Id.* (quoting Solarize Ind., Inc. v. S. Ind. Gas & Elec. Co., 182 N.E.3d 212, 217 n.2 (Ind. 2022)).
234. 190 N.E.3d 349 (Ind. 2022).
235. 125 N.E.3d 584 (Ind. 2019).
236. 158 N.E.3d 1250 (Ind. 2020).
237. *Nicholson*, 190 N.E.3d 349.
238. *Id.* at 350.
239. *Id.* at 352.
240. *Id.*
241. 177 N.E.3d 412, 413-14, 416, 418 (Ind. 2021).
242. 779 N.E.2d 1 (Ind. 2002).
243. *Ladra*, 177 N.E.3d at 425.

bring 'suit against the State.'"[244]

In this case, a motorist who was injured when her vehicle hydroplaned on an interstate brought suit against the Indiana Department of Transportation ("INDOT"), alleging that INDOT failed to post adequate warnings and drain the roadway.[245] INDOT filed a motion for summary judgment, arguing it was entitled to immunity under the Indiana Tort Claim Act ("ITCA").[246] Under the ITCA, a governmental entity is not liable for an injury resulting from the "temporary condition of a public thoroughfare . . . that results from weather."[247] Applying the modified *Catt* rule, the Indiana Supreme Court found that INDOT had received multiple complaints that the drains in the area were constantly clogged and that INDOT had to call maintenance crews to clear the area numerous times.[248] Nevertheless, INDOT failed to fix the underlying issue.[249] Even if INDOT was unaware the roadway was flooded the night of the accident, the court found that INDOT failed to meet its burden showing it was entitled to immunity under the ITCA because the "condition resulted from INDOT's failure to rectify a known problem."[250]

XI. ARTICLE 7, SECTIONS 4 AND 6 – APPELLATE JURISDICTION

In *James v. State*, the Court of Appeals reversed and reduced a sixty-three-year sentence of a minor who murdered an eighteen-year-old friend when he was thirteen-years-old over an X-Box trade gone wrong.[251] After the shooting, one of the first things the defendant did was contact his mother.[252] Indiana law allows minors over the age of twelve who are charged with murder to be prosecuted as adults, but under Article 7, Sections 4 and 6, the courts may revise sentences.[253] The court found that the sentence needed to reflect the defendant's extreme youth and the other facts that set the stage for the offense.[254] The court found that the trial court correctly rejected sentencing the defendant as a juvenile but found a fifty-five-year sentence more appropriate.[255]

XII. ARTICLE 8, SECTION 1 – COMMON SCHOOLS SYSTEM

In *Culver Community Teachers Ass'n v. Indiana Education Employment Relations Board*, the Indiana Supreme Court affirmed the trial court, finding that

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244. *Id.* at 416.
245. *Id.* at 415.
246. *Id.*
247. *Id.* (quoting IND. CODE § 34-13-3-3(3) (2023)).
248. *Id.* at 425.
249. *See id.*
250. *Id.* at 426.
251. 178 N.E.3d 1236, 1238, 1242, 1244-45 (Ind. Ct. App. 2021).
252. *Id.* at 1239.
253. *Id.* at 1244.
254. *Id.* at 1245.
255. *Id.*

"the plain language of the relevant statutes prohibits [teachers associations and school corporations] from bargaining over what constitutes an ancillary duty."[256] In this case, the Indiana Education Employment Relations Board found the parties violated Indiana law when they bargained over ancillary duties.[257] The teachers associations petitioned for judicial review, which the trial court denied.[258] The Indiana Supreme Court affirmed the trial court.[259]

"Our Constitution guarantees the citizens of Indiana a tuition-free, 'general and uniform system of Common Schools . . . equally open to all.'"[260] Thus, "[b]ecause public schools ensure these constitutional rights, the citizens of Indiana have a fundamental interest in the 'development of harmonious and cooperative relationships between school corporations and their certificated employees.'"[261] Recognizing an obligation to protect the public, "the General Assembly has enacted statutes to govern the collective bargaining process between schools and teachers, with the objective of 'alleviat[ing] various forms of strife and unrest.'"[262] Under these statutes, the Indiana Supreme Court found that teachers and schools are permitted to "bargain on wages, salary, and benefits, but nothing else."[263] Accordingly, the court determined that the "provisions impermissibly bargained over what constitutes an ancillary duty and improperly curtailed the authority of schools to direct their teachers."[264]

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256. 174 N.E.3d 601, 603 (Ind. 2021).

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 605 (quoting IND. CONST. art. VIII, § 1).

261. *Id.* (quoting Jay Classroom Teachers Ass'n v. Jay School Corp., 55 N.E.3d 813, 816-17 (Ind. 2016); IND. CODE § 20-29-1-1(1) (2023)).

262. *Id.* (quoting IND. CODE § 20-29-1-1(2)).

263. *Id.* at 607 (citing IND. CODE §§ 20-29-6-4(a), -4.5(a)(5)).

264. *Id.* at 608.