EMERGING FEDERAL RELIANCE—CONTINUED STATE CONSTITUTIONAL MINIMALISM: INDIANA STATE CONSTITUTIONAL LAW SUMMARIES—2015-2016

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In the survey period, Indiana courts showed signs of relying increasingly on federal case law to interpret Indiana constitutional principles.[1] Like previous years, the survey period saw only minimal developments in constitutional law, marked notably by the lack of dissents in cases involving Indiana constitutional law.[2] The courts' decisions covered thirteen provisions of the Indiana Constitution, a figure that has been higher in some years, and lower in others.[3,4]

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1. *See, e.g.*, Garcia v. State, 47 N.E.3d 1196, 1200-03 (Ind. 2016) (relying on U.S. Supreme Court case law in holding a police officer could reasonably open a container found on a defendant after a pat-down search incident to arrest); Tiplick v. State, 43 N.E.3d 1259, 1263-66 (Ind. 2015) (relying on U.S. Supreme Court case law in holding the synthetic drug and the look-a-like statutes were not unconstitutionally vague); Hodges v. State, 54 N.E.3d 1055, 1058-60 (Ind. Ct. App. 2016) (relying on the Fourth Amendment to hold a lack of reasonable suspicion is no longer a legitimate objection to the constitutionality of probation searches).

2. In fact, two of the six Indiana Supreme Court opinions dissenting in at least one part came from retiring Justice Rucker. *See, e.g.*, Citizens Action Coalition of Ind. vs. Koch, 51 N.E.3d 236, 243-45 (Ind. 2016) (Rucker, J., dissenting), *reh'g denied*, No. 49S00-1510-PL-607, 2016 Ind. LEXIS 490 (Ind. July 12, 2016); State v. Buncich, 51 N.E.3d 136, 145-50 (Ind. 2016) (Rucker, J., dissenting).

3. Eighteen topics were addressed in 2014, Jon Laramore & Daniel E. Pulliam, *Indiana Constitutional Developments: Small Steps*, 47 IND. L. REV. 1015, 1042 (2014); ten were addressed in 2015, Jon Laramore & Daniel E. Pulliam, *Developments in Indiana Constitutional Law: A New Equal Privileges Wrinkle*, 48 IND. L. REV. 1223, 1240 (2015); and fourteen were addressed in 2016, Scott Chinn & Daniel E. Pulliam, *Minimalist Developments in Indiana Constitutional Law—Equal Privileges Progresses Slowly*, 49 IND. L. REV. 1004, 2021 (2016).

4. The authors thank Allison Schten for her tremendous contribution in gathering material for this Article.

I. SEPARATION OF POWERS

In *Consumer Attorney Services, P.A. v. State*,[5] the court of appeals held if the General Assembly makes any "intrusions" on the Indiana Supreme Court's exclusive jurisdiction to regulate the practice of law, the legislature must do so in express terms and with clear and unmistakable language.[6] A Florida-based limited partnership sought to provide consumer advocacy services for homeowners facing foreclosure in Indiana; however, they never obtained a license to practice law in Indiana.[7] Instead, the partnership associated with Indiana-licensed attorneys to provide legal representation.[8] An attorney general investigation of consumer complaints resulted in a lawsuit against the limited partnership for violations of various state laws governing credit services, mortgage fraud, and deceptive consumer sales practices, but the suit did not name any of the Indiana attorneys.[9]

The court of appeals found the Indiana Credit Services Organization Act[10] failed to expressly intrude upon the supreme court's authority to police lawyers and their firms.[11] Thus, due to the partnership's affiliation with Indiana lawyers, it was exempt from the statute.[12] Although the law did not exempt law firms—just attorneys—the court recognized that "clear and unmistakable language" was required for the General Assembly to show that it did not "entrust our supreme court to adequately police lawyers and their firms in this area."[13] The court's construction of the law avoided an executive branch intrusion upon the supreme court's exclusive jurisdiction over the regulation of attorneys and what could have been a significant conflict between the executive and judicial branches of the government.

In *Citizens Action Coalition of Indiana vs. Koch*,[14] the Indiana Supreme Court held the Indiana Access to Public Records Act ("APRA") applies to the General Assembly and its members, but the determination of whether certain correspondence constituted work product was a non-justiciable question under article 3 of the Indiana Constitution.[15] A clean energy think-tank sought records of Indiana House Representative Eric Koch and his staff related to certain

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5. 53 N.E.3d 599 (Ind. Ct. App. 2016), *reh'g denied*, No. 49A05-1504-PL-274, 2016 Ind. App. LEXIS 288 (Ind. Ct. App. Aug. 4, 2016), *trans. denied*, 64 N.E.3d 1205 (Ind. 2016).

6. *Id.* at 606.

7. *Id.* at 601.

8. *Id.* at 602.

9. *Id.* at 602-03.

10. IND. CODE §§ 24-5-15 (2016).

11. *Consumer Atty. Servs.*, 53 N.E.3d at 606-07.

12. *Id.* at 608.

13. *Id.* at 606.

14. 51 N.E.3d 236 (Ind. 2016), *reh'g denied*, No. 49S00-1510-PL-607, 2016 Ind. LEXIS 490 (Ind. July 12, 2016).

15. *Id.* at 238-39, 242-43.

legislation.[16] The Republican Caucus in the House of Representatives denied the request on the basis that the APRA did not apply to the General Assembly.[17]

As initial matters, the supreme court held it had subject matter jurisdiction to hear the case and that APRA applied to the General Assembly.[18] Under article 7, section 4, the supreme court "shall exercise appellate jurisdiction under such terms and conditions as specified by rules" and Rule 4 of the Indiana Appellate Rules gave the court "discretionary jurisdiction over cases in which it grants Transfer under Rule 56."[19] The court distinguished subject matter jurisdiction from justiciability, which is the "quality or state of being appropriate or suitable for adjudication by a court."[20] Because the court granted transfer under Rule 56, the court had subject matter jurisdiction.[21]

However, article 3, section 1's separation of powers principles gave the court the ability to find an issue non-justiciable. For "prudential reasons," the court noted it could leave a question to another branch of government.[22] But the court deemed the question of whether the APRA applies to the General Assembly and its members justiciable.[23] No constitutional provision expressly reserved to the legislative branch the authority to determine whether a statute applies to the legislature.[24] Although the General Assembly could create an exception by statute or rule, it failed to exercise that power.[25] Indeed, the exception for "work product of individual members and the partisan staff of the general assembly" clearly contemplated that the APRA applied to the General Assembly and its members.[26]

But the court then found the central claim regarding whether documents were exempt from disclosure as legislative work product non-justiciable.[27] The General Assembly did not define "work product" and so if the court were to define "work product," it could result in court-ordered disclosure of records under a court-created rule.[28] The court held finding otherwise would violate the separation of powers by the court intruding on the General Assembly's core power to define work product.[29]

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16. *Id.* at 239.
17. *Id.*
18. *Id.* at 240-41.
19. *Id.* at 240.
20. *Id.* (citing Berry v. Crawford, 990 N.E.2d 410, 418 (Ind. 2013)).
21. *Id.*
22. *Id.* at 241.
23. *Id.*
24. *Id.* at 241-42.
25. *Id.* at 241.
26. *Id.* at 242.
27. *Id.* at 242-43.
28. *Id.* at 242.
29. *Id.* at 239. Representing the House Republican Caucus was Geoffrey Slaughter who was at the time of the argument awaiting a decision from then-Governor Mike Pence on whether he would be appointed to the Indiana Supreme Court to replace Justice Dickson. *See Indianapolis Attorney Chosen to Fill Indiana Supreme Court Vacancy*, INDIANAPOLIS BUS. J. (May 9, 2016),

Justice Rucker concurred in part, agreeing the APRA applied to the legislature and the court had subject matter jurisdiction, but dissented on the basis that the merits of the work product exemption were never addressed by the trial court, the supreme court, or the parties.[30] Thus, the court weighed in on a significant separation of powers issues without an adequate record.[31]

In *State v. Buncich*,[32] the supreme court held an abnormal number of small precincts in the county was a sufficiently distinct defining characteristic to justify a special law to create a committee to consolidate precincts.[33] The court also held precinct committee persons at risk of being eliminated by the committee were not state officers within the ambit of separation of powers doctrine because they did not perform state government functions.[34]

A state law, Indiana Code section 3-11-1.5-3.4, created the "Small Precinct Committee" for Lake County to identify precincts with fewer than 500 active voters for purposes of consolidation and reduction of election costs.[35] Precinct committeepersons at risk for elimination sued the State challenging the statute.[36]

Under article 4, section 23, the General Assembly is instructed that "where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State."[37] The court placed emphasis on the word "can" and found that the provision's purpose was to prevent the General Assembly from providing benefits or imposing burdens on a single locality and not others in attempt to prevent "logrolling" and "an irregular system of laws."[38] But there are cases where general laws cannot be made applicable statewide and this was one of them. Under the two-step analysis of determining (1) whether the law was general or special and (2) if it is a special law, whether it is a constitutionally permissible special law, the court determines whether the act's subject is amenable to a general law of uniform operation through the State, and if so, deems it constitutional.[39] The court found Lake County's inherent characteristics of "an exceptionally high number of small precincts" imposing "significant and unnecessary costs on the election system" was sufficient to not second-guess the legislature's decision "not to set up a Small Precinct Committee in counties that don't need it."[40] Lake County not only had a high number of small precincts, it

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http://www.ibj.com/articles/58510-indianapolis-attorney-chosen-to-fill-indiana-supreme-court-vacancy [perma.cc/N5RG-PQ84]. Justice Slaughter's appointment came May 9, 2016, less than a month after the court's April 19, 2016 decision in *Koch*. *See id.*

30. *Citizen's Action Coalition*, 51 N.E.3d at 244-45 (Rucker, J., dissenting in part).
31. *Id.* at 245.
32. 51 N.E.3d 136 (Ind. 2016).
33. *Id.* at 138-39.
34. *Id.* at 144.
35. *Id.* at 139.
36. *Id.* at 140.
37. *Id.* at 141.
38. *Id.*
39. *Id.* (citing Williams v. State, 724 N.E.2d 1070, 1085 (Ind. 2000)).
40. *Id.* at 142-43.

had twice as many as the next highest county.[41] Although the court recognized that statistics may be pliable, the court felt "bound to throw the benefit of the doubt in favor of the constitutionality of the law."[42]

The court also found committeepersons were not state officers because their duties involved setting up polling locations, registering voters, hiring poll workers, and other work on behalf of a political party.[43] Although the committeepersons would vote on behalf of the party to fill certain vacancies, putting someone in the position to perform state government functions is not the same as performing that function.[44] Thus, the committeepersons were not protected by article 3, section 1's separation of powers clause.[45]

Justice Rucker dissented on the basis that "the high number of small precincts based on one compilation of voter counts does not constitute the kind of inherent or distinctive characteristics needed to justify the special legislation imposed upon Lake County."[46]

II. EQUAL PRIVILEGES

In *Whistle Stop Inn, Inc. v. City of Indianapolis*,[47] the Indiana Supreme Court held Indianapolis's ordinance barring smoking at bars and restaurants, with an exception for state-licensed satellite gambling facilities, did not violate the equal privileges and immunities clause of the Indiana Constitution.[48] The disparate application of the anti-smoking ordinance was reasonably related to inherent characteristics differentiating bars and restaurants from state-licensed and regulated gambling facilities.[49] Additionally, the court found bars and restaurants were also not similarly situated to the gambling facilities.[50]

Article 1, section 23 of the Indiana Constitution provides the government "shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."[51] Under *Collins v. Day*,[52] a statute's validity is determined by first looking at whether the disparate treatment accorded by the legislation is reasonably related to inherent characteristics distinguishing the unequally treated class and second whether the preferential treatment is uniformly applicable and equally available to all

41. *Id.*
42. *Id.* at 143 (quoting Ind. Gaming Comm'n v. Moseley, 643 N.E.2d 296, 300 (Ind. 1994)).
43. *Id.* at 144.
44. *Id.*
45. *Id.*
46. *Id.* at 150 (Rucker, J., dissenting).
47. 51 N.E.3d 195 (Ind. 2016).
48. *Id.* at 197.
49. *Id.* at 201-02.
50. *Id.* at 203-04.
51. IND. CONST. art. 1, § 23.
52. 644 N.E.2d 72, 80 (Ind. 1994).

similarly situated persons.[53]

The decision in *Whistle Stop* demonstrates that although legislative "purpose" is not strictly a part of the *Collins* test, the nuance in a governmental entity's proffer of the justification for the disparate treatment may make all the difference. The court of appeals had held in 2015 that the City's proffered justification for treating the state-licensed gambling facilities and the bar and restaurant owners differently—the state regulation of the facilities—was too attenuated from the statutes at issue and from the ordinance's stated purpose.[54] That 3-0 lower court decision in *Whistle Stop* found the ordinance unconstitutional under Indiana Supreme Court's decision in *Paul Stieler Enterprises, Inc. v. City of Evansville*,[55] which struck down an Evansville smoking ordinance excepting the gaming riverboat from coverage but, like the Indianapolis ordinance, still applied to bars and restaurants.[56] The argument in *Paul Stieler* was that not exempting the riverboat would cost the city millions of tax dollars if patronage at riverboat fell.[57]

But in *Whistle Stop*, the arguments were different. The City of Indianapolis justified its exemption of the gambling facility, not by reference to the money derived from the facility, but on the basis that the State of Indiana already regulated smoking at the facilities.[58]

Under the first *Collins* prong, the court analyzed two disparately treated classes: satellite gambling facilities (exempted from the ban) and bars and restaurants (smoking prohibited).[59] The court found inherent characteristics did not necessarily refer to immutable or intrinsic attributes but to any characteristic that sufficiently related to the class's subject matter.[60] The fact that Indiana law required the satellite gambling facilities to hold licenses and submit an application to the Indiana Horse Racing Commission that includes a description of the heating and air conditioning units, smoke removal equipment, and other climate control devices served as a distinguishing, inherent attribute.[61] Without that application and the air control requirement, a satellite gambling facility could not exist.[62] This inherent characteristic of the satellite gambling facilities also reasonably related to the class differentiator—the Horse Racing Commission could consider the impact of smoking on its licensing decisions.[63]

The court also found the ordinance did not violate the second prong of *Collins* because satellite gambling facilities were sufficiently distinct from bars

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53. *Whistle Stop*, 51 N.E.3d at 198-99 (citing *Collins*, 644 N.E.2d at 80).

54. *Id.* at 198.

55. 2 N.E.3d 1269 (Ind. 2014).

56. *Whistle Stop*, 51 N.E.3d at 198-99.

57. 2 N.E.3d at 1275.

58. *Whistle Sto*p, 51 N.E.3d at 200.

59. *Id.* at 199.

60. *Id.*

61. *Id.* at 201.

62. *Id.*

63. Paul Stieler Enters., Inc. v. City of Evansville, 2 N.E.3d at 1278 (clarifying the inherent distinguishing characteristic does not have to be specifically stated in the ordinance).

and restaurants with different licensing requirements and providing different services.[64] The exception was not based on economics as in *Paul Stieler*.[65] Because the City could justify the different treatment, the ordinance did not violate the equal privileges and immunities clause.[66]

In *Monarch Beverage Co. v. Cook*,[67] the court of appeals held a state alcohol statute's prohibited interest provisions did not violate article 1, section 23 of the Indiana Constitution, because the plaintiff failed to identify two of similarly situated groups that were treated disparately—a threshold requirement of such challenge.[68] In Indiana, a beer wholesaler can also hold a wine wholesaler permit and a liquor wholesaler can hold a wine wholesaler permit, but a beer wholesaler cannot hold a liquor wholesaler's permit.[69] The beer wholesaler argued it was treated disparately because anyone who does not hold a beer permit may hold a liquor permit—even wine permit holders may hold a liquor permit.[70]

The plaintiff, a wholesaler of beer and wine, argued that being prohibited from wholesaling liquor violated the equal privileges and immunities clause.[71] The court of appeals held the disparate treatment alleged by plaintiff failed to include a similarly situated and preferentially treated group.[72] Without reaching the two-pronged *Collins* test, the court of appeals found the Indiana law treated all persons and all alcohol wholesalers alike—anyone who wants to wholesale alcohol must simply choose which type of alcohol it wants to wholesale.[73] The law treats each the same at the time of the decision and afterward—all beer and liquor wholesalers are equally prohibited from obtaining permits to distribute any other alcohol except for wine.[74] "There can be no Equal Privileges and Immunities claim where all classes of person are treated equally."[75]

Unlike the unanimous decision in *Whistle Stop*, a sharply divided supreme court in *Myers v. Crouse-Hinds Division of Cooper Industries, Inc.*,[76] held "the Indiana Product Liability Act's statute of repose does not apply to cases . . . where the plaintiffs have had protracted exposure to inherently dangerous foreign substances."[77] Plaintiffs sued dozens of defendants alleging damages from

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64. *Whistle Stop*, 51 N.E.3d at 201-02.

65. *Id.* at 203.

66. *Id.* at 203-04.

67. 48 N.E.3d 325 (Ind. Ct. App. 2015), *trans. denied*, 48 N.E.3d 317 (Ind. 2016).

68. *Id.* at 331 (citing Robertson v. Gene B. Glick Co., 960 N.E.2d 179, 185 (Ind. Ct. App. 2011)).

69. *Id.* at 328-29. If this sounds like the beginning of an LSAT question, that is understandable.

70. *Id.* at 332.

71. *Id.* at 329-30.

72. *Id.* at 332.

73. *Id.*

74. *Id.*

75. *Id.*

76. 53 N.E.3d 1160 (Ind.), *reh'g denied*, 53 N.E.3d 1173 (Ind. 2016).

77. *Id.* at 1168.

asbestos-caused diseases, which commonly take many years to manifest after exposure.[78] At issue was whether the plaintiffs' claims could be barred by the ten-year statute of repose in the Indiana Product Liability Act.[79]

The court first addressed whether it should revisit its decision in *Allied Signal, Inc. v. Ott*,[80] which held section 1 of the Product Liability Act,[81] and its two-year statute of limitations and ten-year statute of repose, applied to product liability actions generally.[82] Additionally, section 2's more generous two-year discovery rule[83] applied to asbestos lawsuits against defendants who mined and sold raw asbestos, leaving sellers of asbestos-containing products to the ambit of section 1.[84] The court, with Justice Dickson writing the opinion, declined to revisit *Ott* and adopt the Justice Dickson dissent—the General Assembly had twelve years to express disapproval of *Ott* but expressed acquiescence in the decision.[85]

But the court did find that, unlike the plaintiffs in *Ott*, the plaintiffs in *Myers* brought a different article 1, section 23 claim.[86] Instead of comparing asbestos victims to non-asbestos victims, the plaintiffs compared two different types of asbestos victims in a manner the court found unconstitutional: asbestos plaintiffs injured by defendants who both mined and sold raw asbestos and asbestos plaintiffs who were injured by defendants outside that category.[87] Because this distinction was not raised or addressed in *Ott*, the court found this new section 23 challenge could serve as a basis for revisiting the *Collins* two-prong analysis.[88]

Under the first element, the classes were identical—asbestos victims.[89] Section 2 of the Products Liability Act did "not differentiate between them based on any single characteristic of theirs—inherent or otherwise."[90] Rather, the difference between asbestos victims seeking relief from defendants who mined and sold raw asbestos and defendants who provided products containing asbestos did "not constitute an inherent distinguishing difference between the asbestos victims."[91] Because this disparate treatment did not reasonably relate to an inherent difference of unequally treated classes, the statute violated article 1,

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78. *Id.* at 1162.
79. *Id.*
80. 785 N.E.2d 1068 (Ind. 2003).
81. IND. CODE § 34-20-3-1 (2016).
82. *Ott*, 785 N.E.2d at 1070.
83. IND. CODE § 34-20-3-2 (2016).
84. *Myers*, 53 N.E.3d at 1163.
85. *Id.* at 1162.
86. *Id.* at 1164.
87. *Id.* at 1166-67.
88. *Id.* Again, another example where legal arguments mattered under article 1, section 23. *See* text accompanying *supra* notes 51-54.
89. *Myers*, 53 N.E.3d at 1166.
90. *Id.* at 1165-66.
91. *Id.* at 1166.

section 23.[92]

The court also found the statute conflicted with the second element of the *Collins* analysis.[93] With two similarly situated classes of asbestos victims, one could only seek damages from defendants who mined and sold asbestos while the other was exempt.[94] Because nearly all class members suffered from a ten-plus year latency period, and all class members were exposed to products containing asbestos, the two classes' unconstitutional treatment violated the equal privileges and immunities clause.[95]

Chief Justice Rush dissented on that basis that the court's decision created the "perception" that it would reverse close and controversial decisions based on "a third vote for the opposing view."[96] The court's authority rested on the rule of law, "a fragile thing"[97] that is earned "by showing stability and consistency in our judgments and integrity in our processes."[98]

In slight contrast to Chief Justice Rush's belief that the decision was "not a catastrophe,"[99] Justice Massa suggested that he agreed with much of Chief Justice Rush's dissent including "perhaps" the fact that the sky was not falling.[100] Justice Massa believed the decision had "the potential to more than chip away at the rule of law and inflict more serious damage on our court and state."[101] Justice Massa noted that Justice Dickson first suggested the unconstitutionality of the statute of repose in a dissenting opinion,[102] and "it is now finally the law of Indiana in asbestos cases."[103] Justice Massa found the majority's "new"[104] claim to avoid overruling *Ott* "clever"[105] but ultimately unconvincing. Rather, the "only thing that *is* new is the make-up of our Court, and [the] dissenting viewpoint garnering a third vote."[106]

Defendants sought rehearing on April 1, 2016, partly on the basis that the plaintiffs failed to notify the Attorney General regarding its claim that the state law violated the Indiana Constitution, and the plaintiffs did not file a response until April 25, 2016.[107] The court denied the petition for rehearing on April 28,

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92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 1169 (Rush, C.J., dissenting).
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* (Massa, J., dissenting).
101. *Id.*
102. *Id.* at 1169 n.1 (citing Covalt v. Carey, 543 N.E.2d 382, 389-90 (Ind. 1989) (Dickson, J., dissenting)).
103. *Id.* at 1169.
104. *Id.* at 1170.
105. *Id.*
106. *Id.* at 1172 (emphasis in original).
107. Brief for Appellee, Myers v. Crouse-Hinds Div. of Cooper Indus., 53 N.E.3d 1173 (Ind.

2016, in the same 3-2 vote.[108]

II. UNCONSTITUTIONAL VAGUENESS—SYNTHETIC DRUG CASES

The Indiana Supreme Court resolved a split in the court of appeals on whether the State's prohibition against certain synthetic drugs was unconstitutionally vague in *Tiplick v. State*.[109] The split arose from contradictory holdings in the Indiana Court of Appeals' cases of *Elvers v. State*[110] and *Tiplick v. State*.[111]

In *Elvers*, the court of appeals held the law satisfied article 1, section 20, which provides that "[e]very act and joint resolution shall be plainly worded, avoiding, as far as practicable, the use of technical terms."[112] But in *Tiplick*, a decision issued only a little over a month after *Elvers*, the court of appeals held the synthetic drug statute's reference to Pharmacy Board Regulations violated void for vagueness principles.[113]

The Indiana Supreme Court reversed the court of appeals, holding the synthetic drug law and a look-a-like statute were not unconstitutionally vague.[114] The General Assembly was attempting to regulate a field of advanced chemistry that required the use of technical terms—article 4, section 20 only prohibited the use of technical terms to the extent "*practicable*."[115] The defendant contended that the "statutory maze"[116] made it impossible to know how to act.[117] However, the court refuted this contention by stating that the "three discrete statutes . . . give clear guidance as to how to find everything falling within the definition of 'synthetic drug.'"[118] Furthermore, the look-a-like statute required scienter, defeating any vagueness challenge.[119]

The court also held that delegating to the Pharmacy Board authority to add drugs to the controlled substances list was not an impermissible delegation of legislative authority.[120] The court found no guidance from the Indiana Constitutional Convention of 1850-1851 with respect to whether such delegation

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2016) (No. 49S00-1501-MI-36).

108. *Myers*, 53 N.E.3d at 1174.

109. 43 N.E.3d 1259, 1264 (Ind. 2015).

110. 22 N.E.3d 824, 836 (Ind. Ct. App. 2014) (holding law was not unconstitutionally technical).

111. 25 N.E.3d 190, 196 (Ind. Ct. App.) (holding law was unconstitutionally vague), *rev'd in part, aff'd in part*, 43 N.E.3d 1259, 1264 (Ind. 2015).

112. 22 N.E.3d at 830 (quoting IND. CONST. art. 4, § 20).

113. *Tiplick*, 25 N.E.3d 190.

114. Tiplick v. State, 43 N.E.3d 1259, 1261 (Ind. 2015).

115. *Id.* at 1263 (emphasis in original).

116. *Id.*

117. *Id.*

118. *Id.* at 1264.

119. *Id.*

120. *Id.* at 1266.

to an executive agency violated separation of powers.[121] In the absence of such guidance, the court looked at U.S. Supreme Court authority and found such delegation appropriate where necessary for a limited time to avoid imminent hazard to public safety.[122] The Pharmacy Board could also only rule on whether additional substances should qualify as "synthetic drugs" under another statute.[123] Put otherwise, the law allowed the agency to determine whether "some fact or situation"[124] qualified under the statute.[125]

III. FREE SPEECH

In *Williams v. State*,[126] the court of appeals held an angry resident's protest of police action that prevented her from reentering her home, while officers waited for a search warrant to search the home, failed to establish that her speech was political and thus protected by article 1, section 9 of the Indiana Constitution.[127] After officers asked her to be quiet, Dorothy Williams yelled "You mean to tell me you are not going to let me enter my mother***ing house?"[128] She declared she would return to her house to see her mother, who was sick, and did not care about going to jail.[129] The jury acquitted her of assisting a criminal but convicted her of disorderly conduct.[130]

On appeal, Williams argued that the conviction violated her right under article 1, section 9, which states, "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible."[131] Based on *Barnes v. State*,[132] the court first addressed whether Williams carried her burden of showing that her speech was political because, if it was, the burden shifted to the State to show that the impairment's magnitude was slight or that the speech constituted a public nuisance.[133] The court found the jury could focus on the entirety of her statement in concluding that it was ambiguous and thus not political.[134] For example, her statements referred to

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121. *Id.* at 1267.

122. *Id.* at 1268 (citing Touby v. United States, 500 U.S. 160 (1991)).

123. *Id.* at 1269.

124. *Id.*

125. *Id.*

126. 59 N.E.3d 287 (Ind. Ct. App. 2016).

127. *Id.* at 294-95.

128. *Id.* at 291 (omissions in original).

129. *Id.*

130. *Id.* at 292.

131. *Id.* (quoting IND. CONST. art. 1, § 9).

132. 946 N.E.2d 572, 577 (Ind.), *aff'd on reh'g*, 953 N.E.2d 473 (2011), *superseded by statute on other grounds as stated in* Cupello v. State, 27 N.E.3d 1122, 1124 (Ind. Ct. App. 2015).

133. *Williams*, 59 N.E.3d at 293.

134. *Id.* at 294.

herself, her mother, and her own conduct.[135]

The court also addressed whether the State impaired her expression under rational basis review.[136] The court found the State could have concluded that Williams' expressive activity constituted an abuse (on her part) of her right to speak.[137] Her speech prompted neighbors to come out of their homes and distracted a number of officers from their work of securing the residence's perimeter.[138] Because her "outburst"[139] constituted an abuse of her right to speak, the officers acted rationally in arresting her.[140]

IV. EX POST FACTO

Amendments to the habitual traffic offender statute requiring the Bureau of Motor Vehicles to use dates of prior offenses, rather than dates of judgments, did not violate the ex post facto clause in *Abernathy v. Gulden*.[141] The habitual traffic offender statute requires three qualifying offenses within the last ten years.[142] Before July 1, 2012, the status triggered upon three qualifying judgments within a ten-year period.[143] The time between five appellees' first and third qualifying convictions exceeded ten years, but the offense dates were within the ten-year period.[144] The trial court found this retroactive application of the statute violated the ex post facto clause.[145]

The court of appeals reversed because it found the amendment's purpose was public safety, not punishment.[146] Under article 1, section 24, "[n]o ex post facto law . . . shall ever be passed."[147] The State did not dispute that the application of the law here created an ex post facto effect, but argued that the result—the suspension of driving privileges—served the interests of public safety, not punishment.[148] The court found the amendment was procedural rather than substantive and therefore could be applied to crimes committed before the effective date because it changed neither the elements of the crime nor enlarged the punishment.[149] Rather, the legislature had merely explained the "method of enforcing" the designation and sought to protect the public by regulating

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135. *Id.*
136. *Id.* at 295.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. 46 N.E.3d 489, 497 (Ind. Ct. App. 2015).
142. *Id.* at 497.
143. *Id.* at 492.
144. *Id.*
145. *Id.* at 492-93.
146. *Id.* at 496-97.
147. *Id.* at 494 (quoting IND. CONST. art. 1, § 24).
148. *Id.* at 495-97.
149. *Id.* at 496-97.

dangerous driving.[150]

Judge Brown dissented on the basis that the ex post facto prohibition was violated because the appellees could not have been deemed habitual offenders before the amendment.[151] The amendment changed the elements of the offense rather than simply the procedures for enforcing the law.[152]

In *Tyson v. State*,[153] the Indiana Supreme Court addressed whether the Sex Offender Registry Act violated the ex post facto clause in circumstances where putative registrants were subject to registration elsewhere and therefore subject to registration upon moving to Indiana.[154] The court unanimously held in each case that the new resident requirement did not violate the ex post facto clause.[155] The court analyzed the two-pronged intent-effects test used to determine whether a statute imposes a punishment.[156]

First, the registration requirement was not imposed for a punitive intent.[157] It appeared in Title 11 addressing corrections, not Title 35 addressing criminal offenses, procedure, and sentencing.[158] Second, the statute's practical effects only imposed a slightly greater affirmative disability beyond performing the same obligations in a new state because Tyson could not get a fresh start by moving.[159] Registration was slightly punitive in that it would "result in some increased shaming."[160] But there was no mens rea requirement and registration did not support the traditional aims of punishment.[161] The registration requirement was not triggered by criminal behavior but by another state requiring registration and the statutory scheme advanced a non-punitive interest of preventing Indiana from becoming a safe haven for sex offenders.[162] Lastly, registration was not an excessive punishment.[163]

Similarly, in *State v. Zerbe*,[164] the Indiana Supreme Court held requiring a sex offender already required to register elsewhere to also register in Indiana did not violate the ex post facto clause.[165] Zerbe's conviction and conduct occurred in

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150. *Id.*

151. *Id.* at 497-98 (Brown, J., dissenting)

152. *Id.*

153. 51 N.E.3d 88 (Ind. 2016).

154. *Id.* at 89-90.

155. *Id.* at 96.

156. *Id.* at 93 (noting the test was adopted from Wallace v. State, 905 N.E.2d 371, 383 (Ind. 2009)).

157. *Id.*

158. *Id.*

159. *Id.* at 94.

160. *Id.*

161. *Id.* at 95.

162. *Id.* at 95-96.

163. *Id.* at 96.

164. 50 N.E.3d 368 (Ind. 2016).

165. *Id.* at 371.

1992 in Michigan.[166] Two years later, Michigan and Indiana enacted registration requirements.[167] Then in 2006, Indiana added a registration requirement for anyone required to register in any jurisdiction.[168] Zerbe subsequently moved to Indiana in 2012.[169] The court found the amendment did not violate the ex post facto clause because, although Michigan's registration requirement may have violated Indiana's ex post facto clause jurisprudence, it was not Indiana's job to second-guess Michigan's decision that its law can apply retroactively.[170] Instead, the scope of the court's analysis was limited to whether Indiana's 2006 amendment requiring registration of anyone required to register anywhere violated the Indiana Constitution.[171] Such a requirement did not trigger any ex post facto analysis because Zerbe's existing registration requirements were merely maintained across state lines.[172] The amendment was also merely regulatory and non-punitive, as to Zerbe.[173]

Lastly, in a per curiam opinion, *Ammons v. State*,[174] the court found requiring registration for a conviction for child molestation before the Act's enactment did not violate the ex post facto clause despite the court's decision in *Wallace v. State*.[175] *Wallace* held the Act violated Indiana's ex post facto clause because it imposed a punitive burden as applied to an offender who committed a crime and served his sentence before the existence of the registration requirement.[176] But Ammons had moved to Iowa after his release where registration was required of him.[177] When Ammons moved back, he was not subject to any new punishment.[178] Instead, he voluntarily assented to Indiana law by returning to the state.[179]

The court of appeals held in *McVey v. State*[180] that a law making it a crime for a person required to register as a sex offender to enter school property did not violate the ex post facto clause.[181] Richard McVey was convicted of child molestation for conduct committed in 2001, years before the General Assembly

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166. *Id.* at 369.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 370.

171. *Id.* at 370-71.

172. *Id.* at 371.

173. *Id.*

174. 50 N.E.3d 143 (Ind. 2016).

175. 905 N.E.2d 371 (Ind. 2009).

176. *Id.* at 384.

177. *Ammons*, 50 N.E.3d at 144.

178. *Id.* (explaining the applicable statute was non-punitive in effect when applied to persons already registered in other states).

179. *Id.*

180. 56 N.E.3d 674 (Ind. Ct. App. 2016).

181. *Id.* at 676.

enacted the unlawful entry statute on July 1, 2015.[182] The court applied the "intent-effects" test from *Wallace* in examining the "type of scheme" the General Assembly intended to establish.[183] Distinguishing the Indiana Supreme Court's holding in *State v. Pollard*,[184] which held retroactive application of a statute restricting where registered sex offenders could live violated the ex post facto clause, the court found the statute was non-punitive as applied to McVey because he could find other places to take classes.[185] Thus, the court deemed the effects on McVey minor compared to the residency-restriction statute.[186] Additionally, McVey's conviction was for conduct against a child whereas it was unknown whether a child was involved in the conviction in *Pollard*.[187]

V. SEARCH AND SEIZURE

In *Garcia v. State*,[188] the Indiana Supreme Court held a police officer could reasonably open a container found on a defendant after a pat-down search incident to arrest for driving without a license.[189] A routine traffic stop for driving at night without headlights and turning without signaling led the officer to discover that the driver lacked a license.[190] After the officer placed the driver under arrest, he searched the driver for weapons and found a cylinder-shaped container in the driver's pocket.[191] A pill found inside the bottle was later confirmed to be Hydrocodone for which the driver lacked a valid prescription.[192]

Because there was no dispute that the arrest and the pat-down were lawful, under the *Litchfield* reasonableness factors, the court addressed whether the search of the pill container was "reasonable" under the Indiana Constitution.[193] Under *Litchfield v. State*,[194] Indiana courts determine the reasonableness of a search under article 1, section 11 by looking at: "(1) The degree of concern, suspicion, or knowledge that a violation has occurred, (2) the degree of the intrusion the method of the search or seizure imposes on the citizen's ordinary

182. *Id.*

183. *Id.* at 679 (citing Wallace v. State, 905 N.E.2d 371, 378 (Ind. 2009)).

184. 908 N.E.2d 1145, 1147 (Ind. 2009).

185. *McVey*, 56 N.E.3d at 681.

186. *Id.*

187. *Id.* The court also readily found the 2001 extension of the registration requirement for McVey's convictions from ten years to life violated the ex post factor clause under the Indiana Supreme Court's holding in *Gonzales v. State*, 980 N.E.2d 312, 315 (Ind. 2013) and thus McVey only had to register for ten years. *See generally id.*

188. 47 N.E.3d 1196 (Ind. 2016).

189. *Id.* at 1197.

190. *Id.*

191. *Id.* at 1197.

192. *Id.* at 1198.

193. *Id.* at 1199-1200.

194. 824 N.E.2d 356 (Ind. 2005).

activities, and (3) the extent of law enforcement needs."[195]

Here, the court found the officer needed no additional degree of suspicion in opening the container.[196] A search incident to arrest permits a "relatively extensive exploration of the person."[197] The court focused heavily on U.S. Supreme Court decision in *United States v. Robinson*,[198] governing searches incident to arrest, to reject the driver's argument that the pill container's nature should be considered in the reasonableness analysis.[199] Instead, once the driver was subject to a search, the opening of the pill bottle was of little relevance to the degree of the intrusion—he was already under arrest.[200] The minimal additional step of opening the pill bottle meant little to the court.[201] Lastly, the need for law enforcement to examine the contents of the pill rested on the law enforcement need to immediately eliminate even the most "seemingly innocuous items" that could pose a threat.[202] The officer's acknowledgment that he did not view the pill bottle as threatening was beside the point.[203]

Garcia is notable for its heavy reliance on U.S. Supreme Court precedent to analyze the *Litchfield* reasonableness factors. The court noted although the federal interpretation of reasonableness under the Fourth Amendment is not binding on the court's article 1, section 11 analysis, the court was satisfied that it reached the same conclusion.[204]

In *Wilford v. State*,[205] the Indiana Supreme Court held a warrantless impoundment and inventory search of a car was unconstitutional because the State failed to establish actual procedures authorizing the search.[206] Because no state statute authorized the impoundment, the court analyzed whether the impoundment could be authorized under the State's community-caretaking function.[207]

Under the standards established in *Fair v. State*,[208] "police [officers] may

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195. *Id.* at 361.

196. *Garcia*, 47 N.E.3d at 1200.

197. *Id.* at 1200.

198. 414 U.S. 218 (1973).

199. *Garcia*, 47 N.E.3d at 1200-01.

200. *Id.* at 1201.

201. *Id.*

202. *Id.* at 1203.

203. *Id.*

204. *Id.* at 1205. In *Zanders v. State*, 58 N.E.3d 254 (Ind. Ct. App.), *trans. granted*, No. 15S01-1611-CR-571, 62 N.E.3d 1202 (Ind. 2016), the court of appeals held the warrantless search of a defendant's historical location information data on his cellphone violated his rights under the Fourth Amendment to the U.S. Constitution. The court expressly declined to address Zanders' argument based on the Indiana Constitution because the court reversed on a Fourth Amendment violation. *Id.* at 261 n.1.

205. 50 N.E.3d 371 (Ind. 2016).

206. *Id.* at 378.

207. *Id.* at 375.

208. 627 N.E.2d 427 (Ind. 1993).

discharge their caretaking function whenever circumstances compel it."[209] But the decision to impound must rest on standard criteria and on a basis other than the suspicion of evidence of criminal activity.[210] Because the State could not establish written policies or officer testimony proving that an established policy governed the impoundment, the police conduct was unconstitutional.[211] Although the court's decision rested on its 1993 decision in *Fair*, the court made no attempt to separately analyze the issue under the Indiana Constitution. And because *Fair* expressly found that the defendant waived any state constitutional challenge,[212] *Wilford* is ambiguous as to whether it rests on the U.S. or the Indiana Constitution.

In *Whitley v. State*,[213] the court of appeals appeared to reach a different result from the Indiana Supreme Court's decision in *Wilford* in part by relying on police department orders that, although were not followed, were not deemed unreasonable under article 1, section 11.[214]

In *Gerth v. State*,[215] the Indiana Court of Appeals held hearsay tips from confidential informants lacked sufficient indicia of reliability to support a search warrant's issuance.[216] Two hearsay tips in a probable cause affidavit were not meaningfully corroborated other than the defendant's address—publicly available information that could have been easily obtained.[217] The officer also omitted information regarding the confidential informant's credibility.[218] Furthermore, the good faith exception did not apply because of the officer's reckless omission of the credibility issue.[219]

In *Sidener v. State*,[220] the court of appeals held the Indiana Constitution did not protect a passenger's interests in being tracked by law enforcement-placed GPS devices.[221] Assuming that the GPS tracking of the vehicle constituted property being seized, the court found the passenger had no interest in the property because the officers were only tracking the car and were not even aware of the passenger's presence.[222]

In *Moore v. State*,[223] the court of appeals held the wearing of "a hoodie on a

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209. *Wilford*, 50 N.E.3d at 375.
210. *Id.*
211. *Id.* at 377.
212. 627 N.E.2d at 430 n.1.
213. 47 N.E.3d 640 (Ind. Ct. App. 2015), *trans. denied*, 46 N.E.3d 445 (Ind. 2016).
214. *Id.* at 649.
215. 51 N.E.3d 368 (Ind. Ct. App. 2016).
216. *Id.* at 375.
217. *Id.* at 374.
218. *Id.*
219. *Id.* at 375-76.
220. 55 N.E.3d 380 (Ind. Ct. App. 2016).
221. *Id.* at 382.
222. *Id.* at 384-85.
223. 49 N.E.3d 1095 (Ind. Ct. App. 2016), *reh'g denied*, No. 49A02-1505-CR-321, 2016 Ind. App. LEXIS 79 (Ind. Ct. App. Mar. 14, 2016), *trans. denied*, No. 49A02-1505-CR-321, 2017 WL

very hot day" could give an officer a basis for stopping someone to talk.[224] The intrusion was minimal—it just took a minute to answer the questions.[225] The officer did not activate his patrol lights or otherwise engage him in anything but a consensual conversation.[226] After learning the man's name, the officer remembered the same person had been issued written trespass warnings and nearby residents had complained about him.[227] These two factors—the hoodie and the information regarding the issuance of trespass warnings—justified a further investigatory stop.[228] Law enforcement needs were also high given several residential complaints regarding trespass.[229]

In *Hodges v. State*,[230] the court held a lack of reasonable suspicion is no longer a legitimate objection to the constitutionality of probation searches.[231] The Indiana Supreme Court held in *State v. Vanderkolk*[232] that Indiana probationers and community correction participants may consent and waive their constitutional rights by authorizing warrantless and suspicionless searches.[233] *Vanderkolk* rested solely on the Fourth Amendment and did not address the Indiana Constitution.[234] The court of appeals found this broad holding meant that a separate *Litchfield* analysis was unnecessary to determine the reasonableness of the probation officer's suspicionless search because the defendant had waived his rights as a condition of his probation.[235]

In *State v. Pitchford*,[236] the court of appeals held a warrantless strip search violated article 1, section 11 of the Indiana Constitution.[237] Officers arrested Pitchford on misdemeanor battery charges and conducted a strip search pursuant to department policy because the offense, although a misdemeanor, was a "crime of violence."[238] But under *Edwards v. State*,[239] "routine, warrantless strip searches of misdemeanor arrestees, even when incidental to a lawful arrest, are not

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237751 (Ind. Jan. 12, 2017).

224. *Id.* at 1099, 1103.

225. *Id.* at 1103.

226. *Id.* at 1099, 1101.

227. *Id.* at 1099.

228. *See id.* at 1103 (concluding the officer's investigatory stop was reasonable). The additional investigation included the officer asking to pat down the individual. *Id.* at 1099.

229. *Id.* at 1103.

230. 54 N.E.3d 1055 (Ind. Ct. App. 2016).

231. *Id.* at 1059.

232. 32 N.E.3d 775 (Ind. 2015).

233. *Id.* at 779.

234. *See id.* at 778 (concluding because the search and seizures at issue were unlawful under the Fourth Amendment, whether they were lawful under the Indiana Constitution was irrelevant).

235. *Hodges*, 54 N.E.3d at 1060; *see also id.* at 1061 (finding the defendant had signed probation rules that waived his right against search and seizure).

236. 60 N.E.3d 1100 (Ind. Ct. App.), *trans. denied*, 64 N.E.3d 1206 (Ind. 2016).

237. *Id.* at 1103-04.

238. *Id.* at 1101, 1106 (noting "Pitchford was arrested for misdemeanor battery").

239. 759 N.E.2d 626 (Ind. 2001).

reasonable under . . . the Indiana Constitution."[240] Rather, the officers must have a reasonable suspicion, based on the arrest's totality of the circumstances, that the defendant was concealing weapons or contraband.[241]

The State argued that the U.S. Supreme Court's decision in *Florence v. Board of Chosen Freeholders*[242] abrogated *Edwards* in holding "the Fourth Amendment does not prohibit strip searches of arrested persons before they enter a jail's general population."[243] But *Edwards* rested on both the Indiana Constitution and the federal Constitution.[244] Thus, even though the Fourth Amendment may have allowed the search, the search still had to satisfy article 1, section 11's stricter requirements.[245]

The State attempted to establish that the battery arrest constituted a crime of violence and was thus permitted.[246] But *Edwards* did not provide a general exception for crimes of violence.[247] Routine searches of individuals arrested for violent misdemeanors went contrary to the *Edwards* requirement of reasonable suspicion that the arrestee was concealing weapons or contraband.[248] Because the circumstances around Pitchford's offense and arrest did not suggest a reasonable suspicion that he concealed any weapons or contraband, the court found the trial court properly suppressed the evidence discovered during the strip search.[249]

VI. RIGHTS OF THE ACCUSED AND VICTIMS

The Indiana Supreme Court held in *Horton v. State*[250] that a defendant's silence when his attorney requested a bench trial was insufficient to waive the right to a jury trial.[251] The court's decision rested on article 1, section 13 of the Indiana Constitution, which the court recognized "provides greater protection" by requiring the defendant to personally waive the right in a felony prosecution.[252] The court's decision also rested on the statutory right that had remained essentially unchanged since its enactment in 1852, conferring upon the defendant—not counsel—the authority to waive the jury trial right.[253] This

240. *Pitchford*, 60 N.E.3d at 1103-04 (citing *Edwards*, 759 N.E.2d at 629).
241. *Id.* at 1106.
242. 566 U.S. 318 (2012).
243. *Pitchford*, 60 N.E.3d at 1104 (citing *Florence*, 566 U.S. at 339).
244. *Id.* (citing *Edwards*, 759 N.E.2d at 630).
245. *Id.* at 1104.
246. *Id.* at 1105.
247. *Id.*
248. *Id.*
249. *Id.* at 1106.
250. 51 N.E.3d 1154 (Ind. 2016).
251. *See id.* at 1158 (finding the defendant's attorney's attempt to waive the defendant's jury trial right on the defendant's behalf was not enough to meet Indiana's personal waiver requirement).
252. *Id.*
253. *Id.*

personal waiver requirement avoids the "intolerable risk" that "a felony prosecution will not proceed to a bench trial against the defendant's will . . . [g]iven the high stakes of erroneous jury-trial deprivation and the low cost of confirming personal waiver."[254]

In *Wahl v. State*,[255] the Indiana Supreme Court held an alternate juror's participation and taking over of deliberations entitled the defendant to a presumption of prejudice.[256] The alternate juror, according to an affidavit, physically manipulated evidence and repeatedly played portions of a DVD admitted into evidence, increasing the volume to get the other juror's attention.[257] The State asserted that the alternate's behavior diminished after other jurors told him to stop and that the jury still reached a unanimous verdict.[258] Yet the record failed to show that the jury remained impartial.[259] Because the State could not show that the prejudice was harmless, the court reversed the convictions and remanded for retrial.[260]

Justice Massa concurred in part and dissented in the grant of a new trial on the basis that the court should give the State an opportunity to meet its burden on the merits by having every juror inform the court as to the alternate's conduct's impact on their impartiality.[261]

In *Ward v. State*,[262] the court held article 1, section 13's promise that criminal defendants "shall have the right . . . to meet the witnesses face to face" did not require a literal interpretation.[263] Although the clause has the same meaning and history of the Sixth Amendment's Confrontation Clause, the Indiana provision "has a special concreteness and is more detailed."[264] Yet testimony from an absent witness may nevertheless be admissible at trial if the witness is otherwise unavailable through death or illness.[265] In this case, the witness had simply recounted a minor's out-of-court statements giving the defendant the opportunity to confront a "case of typical hearsay."[266]

Notably, the article 1, section 13 discussion only occupied two paragraphs of the court's opinion.[267] The Confrontation Clause aspect of the case occupied the

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254. *Id.* at 1160.

255. 51 N.E.3d 113 (Ind. 2016), *reh'g denied*, No. 29S04-1510-CR-605, 2016 Ind. LEXIS 385 (Ind. May 17, 2016).

256. *Id.* at 116.

257. *Id.* at 115.

258. *Id.* at 117.

259. *Id.* (recognizing the State did not meet its burden to show the jury was impartial).

260. *Id.*

261. *Id.* at 119 (Massa, J., concurring in part and dissenting in part).

262. 50 N.E.3d 752 (Ind. 2016) .

263. *Id.* at 756.

264. *Id.* (quoting Brady v. State, 575 N.E.2d 981, 987 (Ind. 1991)).

265. *Id.* (quoting Miller v. State, 517 N.E.2d 64, 71 (Ind. 1987)).

266. *Id.*

267. *See id.* at 756-57.

bulk of the discussion across another seven pages.[268]

VII. DOUBLE JEOPARDY

Convictions for reckless driving and operating a vehicle while intoxicated did not violate double jeopardy principles in *Berg v. State*.[269] Under *Richardson v. State*,[270] the court looked at whether either the (A) statutory elements of the offense or (B) actual evidence supporting the convictions established the same essential elements of both offenses.[271] The actual evidence used to obtain both convictions must establish a "reasonable possibility" that the jury used the same facts to obtain both convictions.[272]

Here, the State presented evidence of unsafe driving to support both the endangerment element for operating while intoxicated and the reckless driving offense.[273] Yet because the reckless driving offense did not require evidence of intoxication, the State established a wholly separate basis for the crime of operating a vehicle while intoxicated.[274] Thus the behavior underlying the convictions was not "the very same behavior."[275] Put otherwise, the "evidentiary footprint" for both offenses was not the same.[276]

A defendant's guilty plea to multiple convictions made it impossible to review the convictions for double jeopardy violations in *Kunberger v. State*.[277] The facts alleged in a probable cause affidavit were insufficient to determine whether the same act served as the foundation for all three offenses.[278] The defendant admitting to each offense's elements was the only factual basis supporting the guilty plea.[279] Thus, there was no basis for finding a double jeopardy violation.[280]

In *Luke v. State*,[281] convictions for stalking and invasion of privacy violated double jeopardy principles under the actual evidence test.[282] The evidence at the trial on invasion of privacy rested on the defendant's violation of no contact

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268. *See id.* at 757-64.

269. 45 N.E.3d 506, 508 (Ind. Ct. App. 2015).

270. 717 N.E.2d 32 (Ind. 1999).

271. *Berg*, 45 N.E.3d at 509 (quoting Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002)).

272. *Id.* at 509.

273. *Id.* at 510.

274. *Id.*

275. *Id.* at 511 (quoting *Richardson*, 717 N.E.2d at 56).

276. *Id.* The State had in fact conceded the issue and agreed to remand. *Id.* at 510. Despite this concession, Berg's convictions were both affirmed. *Id.* at 511.

277. 46 N.E.3d 966, 972 (Ind. Ct. App. 2015).

278. *Id.*

279. *Id.*

280. *Id.*

281. 51 N.E.3d 401 (Ind. Ct. App.), *trans. denied*, 50 N.E.3d 147 (Ind. 2016).

282. *Id.* at 414.

orders and testimony from victims.[283] The same evidence was used at the trial on the stalking charges.[284] The court rejected the State's argument that the invasion of privacy convictions rested on the violations of the no contact order and that the stalking conviction rested on the course of conduct of contacting the victims.[285] That argument simply could not overcome the "reasonable probability" that the jury used the same evidence to convict the defendant twice for the same conduct.[286]

VIII. PROPORTIONATE SENTENCES

In *Pittman v. State*,[287] the court held a six-year sentence for stalking did not violate article 1, section 16's proportionality clause.[288] The provision states "[a]ll penalties shall be proportioned to the nature of the offense."[289] Although the language sweeps broadly, its protections are limited.[290] The court found the legislative decision to establish an advisory sentence of ten years for such an offense did not "shock public sentiment" or "violate the judgment of reasonable people."[291] The defendant had repeatedly called the victim, threatened to kill her, threatened her safety, and confronted her and her infant child with his mother's guns.[292]

IX. THE RIGHT OF THE JURY TO DETERMINE THE LAW AND THE FACTS IN CRIMINAL CASES

In *Keller v. State*,[293] the Indiana Supreme Court held a "misleading" and expansive jury instruction as to the statutory definition of "dwelling" for a burglary conviction violated the Indiana Constitution.[294] Article 1, section 19, provides that in all criminal cases "the jury shall have the right to determine the law and the facts."[295] By defining a "dwelling" to include both a "building, structure, or other enclosed space" and any "place a person keeps personal items with the intent to reside in the near future," the instruction invaded the providence of the jury.[296]

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283. *Id.* at 410.
284. *Id.* at 410-11.
285. *Id.* at 413-14.
286. *Id.* at 414.
287. 45 N.E.3d 805 (Ind. Ct. App. 2015).
288. *Id.* at 819 (citing IND. CONST. art. 1, § 16).
289. *Id.* at 818 (quoting IND. CONST. art. 1, § 16).
290. *Id.*
291. *Id.* at 819.
292. *Id.*
293. 47 N.E.3d 1205 (Ind. 2016), *reh'g denied*, No. 88S04-1506-CR-354, 2016 Ind. LEXIS 267 (Ind. Apr. 11, 2016).
294. *Id.* at 1207.
295. *Id.* at 1208 (citing IND. CONST. art. 1, § 19).
296. *Id.* at 1208-09 (citing Ludy v. State, 784 N.E.2d 459, 461 (Ind. 2003)).

By imposing on the definition a specific set of facts—any "place where a person keeps personal items with the intent to reside in the near future"—the instruction decided for the jury what constituted a conviction under the statute.[297] Although an earlier court of appeals decision held such facts could support a conviction for burglary, that did not make the same language appropriate for a jury instruction.[298]

Justice Massa dissented on the basis that the trial court was placed in the position of relying either on the statutory text or to "further inform deliberations by incorporating the holding of [the *White* decision]," the court of appeals decision that found where a person kept his personal belongings constituted a "dwelling" for a burglary conviction.[299] Such a place "*is* considered a dwelling," and not optional for the jury to deem otherwise.[300]

In *Williams v. State*,[301] the Indiana Supreme Court held that although an officer's testimony embraced the ultimate issue of guilt and invaded the province of the jury in violation of Indiana Constitution article 1, section 19, the admission of such evidence was nevertheless harmless.[302] Implementing article 1, section 19, Indiana Rule of Evidence 704(b) prohibits witnesses from testifying as to a defendant's guilt or innocence.[303] Here, the officer's testimony paraphrased all the elements of the offense.[304] These factual assertions went to the ultimate opinion of whether the defendant was guilty, which was for the jury alone to decide.[305] For example, the officer said there was "zero doubt in his mind that" the defendant dealt cocaine.[306] The testimony did not just describe the offense's elements, the testimony encompassed all of the offense's elements including mens rea.[307] Yet admission of the guilt opinion was harmless error because of the substantial, independent evidence supporting the jury's verdict.[308]

X. TAKINGS

In *Boyland v. Hedge*,[309] the Indiana Court of Appeals held residential flooding caused by heavy rainfall did not constitute a taking through inverse condemnation.[310] The plaintiffs claimed that county officials failed to remedy the

297. *Id.*
298. *Id.* (citing White v. State, 846 N.E.2d 1026, 1031 (Ind. Ct. App. 2006)).
299. *Id.* at 1210 (Massa, J., dissenting) (citing *White*, 846 N.E.2d at 1031).
300. *Id.* (emphasis in original).
301. 43 N.E.3d 578 (Ind. 2015).
302. *Id.* at 583.
303. *Id.* at 580 (citing IND. R. EVID. 704).
304. *Id.* at 581-82.
305. *Id.*
306. *Id.* at 580.
307. *Id.* at 583.
308. *Id.* at 583-84.
309. 58 N.E.3d 928 (Ind. Ct. App. 2016).
310. *Id.* at 930-32.

Dickey Ditch after multiple incidents of flooding.[311] Under *Arkansas Game & Fish Commission v. United States*,[312] damages resulting from temporary flooding can amount to a compensable taking.[313] But rather than inducing flooding in *Boyland* as in *Arkansas Game & Fish*, the county officials took steps to address the flooding, including paying $14,000 to an engineering firm to address the flooding.[314] The county officials never benefited from the flooding nor used the plaintiff's property.[315] Thus, the temporary occupation of the plaintiff's homes by the flooding of the ditch did not constitute a public taking.[316]

XI. IMPRISONMENT FOR DEBT

In *Whittaker v. Whittaker*,[317] the Indiana Court of Appeals held the trial court could use its contempt authority to enforce a spouse's obligation pursuant a divorce decree.[318] In most cases, Indiana Constitution article 1, section 22's prohibition against imprisonment for debt and Indiana Trial Rule 69's provisions for execution on a judgment make contempt unavailable for obligations to pay money.[319] But a specific statute authorizes the enforcement of dissolution decrees by contempt.[320] Therefore, the spouse did not have to execute on the judgment under Rule 69 of the Indiana Rules of Trial Procedure to enforce the decree by contempt.[321]

XII. RIGHT TO REMEDY

In *Town of West Terre Haute Ind. v. Roach*,[322] the court of appeals held a town employee's claim that the town failed to hold a pre-termination hearing did not support a claim for money damages under article 1, section 12 of the Indiana Constitution.[323] The employee, an at-will utility clerk who handled payment of public funds, was terminated after a routine audit by the State Board of Accountants revealed missing funds.[324] Others involved in the audit were arrested and pled guilty to felonies, but Roach was dismissed without a hearing.[325]

Roach sued under the article 1, section 12 "open courts" provision of the

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311. *Id.*
312. 133 S. Ct. 511 (2012),
313. *Boyland*, 58 N.E.3d at 937.
314. *Id.* at 937-38.
315. *Id.* at 938.
316. *Id.*
317. 44 N.E.3d 716 (Ind. Ct. App. 2015).
318. *Id.* at 720.
319. *Id.* at 719 (citing Cowart v. White, 711 N.E.2d 523, 531 (Ind. 1999)).
320. *Id.* (citing IND. CODE § 31-15-7-10 (2016)).
321. *Id.* at 720.
322. 52 N.E.3d 4 (Ind. Ct. App. 2016).
323. *Id.* at 9.
324. *Id.* at 6-8.
325. *Id.* at 8.

Indiana Constitution: "All 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."[326] The court, in an opinion by Senior Judge Shepard,[327] noted the differences between this provision and the Due Process Clause of the federal Constitution, but found the case law did not support a notion that article 1, section 12 created a substantive right of action.[328] Instead, "Indiana reflects the historic reasons why state constitutions contain open courts provisions."[329] Royal governors and other representatives from England had closed courts as "a tool of repression."[330] This interference with the independence of the judiciary prompted states to enact open courts provisions but did not support a claim for money damages.[331]

326. *Id.*; IND. CONST. art. 1, § 12.

327. The former Chief Justice of the Indiana Supreme Court. *See Justice Randall Terry Shepard*, IND. JUDICIAL BRANCH, http://www.in.gov/judiciary/citc/2828.htm [https://perma.cc/A74Z-92WX] (last visited May 3, 2017).

328. *Roach*, 52 N.E.3d at 9.

329. *Id.*

330. *Id.*

331. *Id.*