

V. Criminal Law and Procedure

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A. Crimes

1. *Generally.*—During the survey period,¹ one law was enacted that will be of interest to all criminal law practitioners—a major revision of Indiana's drunk driving laws. This will be discussed in detail below. For the remainder of the 1983 legislation it is sufficient to note the following changes in substantive criminal laws. Rape and criminal deviate conduct are now Class A felonies if they result in serious bodily injury to a person other than the defendant.² A Class C felony was created for manufacturing, possessing, or transferring armor-piercing handgun ammunition.³ Additionally, it is now an aggravating factor for purposes of sentencing to commit a forcible felony while wearing a garment designed to resist penetration of a bullet.⁴ New offenses controlling animal fighting contests were enacted.⁵ Special criminal mischief provisions for damaging religious structures, cemeteries, school property, or community centers were created.⁶ The child exploitation statute was amended to punish the dissemination or exhibition of child pornography,⁷ and an offense of "peeping" was made a Class B misdemeanor.⁸ The public servant conflict of interest law was amended to require, among other things, that

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¹Although the Indiana Legislature created a flurry of activity in the criminal law area this survey period, no major substantive or procedural changes in the criminal code were enacted. This Survey Article will therefore concentrate on the decisions of the Indiana appellate courts during the survey period. This has also been an active year for the United States Supreme Court in the criminal law area. However, except for a few instances where the Supreme Court decisions seem especially pertinent to recent Indiana cases, these will not be discussed.

²Act of Apr. 18, 1983, Pub. L. No. 320-1983, §§ 23, 24, 1983 Ind. Acts 1943, 1962-63 (codified at IND. CODE §§ 35-42-4-1, -2 (Supp. 1983)).

³Act of Apr. 11, 1983, Pub. L. No. 332-1983, § 1, 1983 Ind. Acts 1979, 1979-81 (codified at IND. CODE § 35-47-5-11 (Supp. 1983)).

⁴Act of Apr. 11, 1983, Pub. L. No. 332-1983, § 2, 1983 Ind. Acts 1979, 1979 (codified at IND. CODE § 35-38-1-7 (Supp. 1983)).

⁵Act of Apr. 18, 1983, Pub. L. No. 331-1983, 1983 Ind. Acts 1978 (codified at IND. CODE § 35-46-3-2 (Supp. 1983)).

⁶Act of Apr. 11, 1983, Pub. L. No. 326-1983, 1983 Ind. Acts 1971 (codified at IND. CODE § 35-43-1-2 (Supp. 1983)).

⁷Act of Apr. 4, 1983, Pub. L. No. 325-1983, 1983 Ind. Acts 1970 (codified at IND. CODE § 35-42-4-4 (Supp. 1983)). Also, a new statutory procedure to deal with "indecent nuisances" was enacted. Act of Apr. 21, 1983, Pub. L. No. 310-1983, § 2, 1983 Ind. Acts 1855, 1855-60 (codified at IND. CODE §§ 34-1-52.5-1 to -8 (Supp. 1983)).

⁸Act of Apr. 22, 1983, Pub. L. No. 311-1983, § 31, 1983 Ind. Acts 1861, 1891 (codified at IND. CODE § 35-45-4-5 (Supp. 1983)).

a public servant make a disclosure of any pecuniary interest in, or derivation of profit from, a contract or purchase associated with the governmental entity that he serves.⁹ It was made a Class A misdemeanor for a physician to perform an unlawful abortion.¹⁰ This discussion is only a brief overview of a few of the changes in the substantive criminal law. Changes in procedure and in sentencing statutes will be discussed later.

2. *Drunk Driving.*—The most comprehensive revision of a criminal statute in the past year was the enactment of a new drunk driving law.¹¹ Several of its provisions are controversial and will, no doubt, be quickly challenged in the courts. First, it should be noted that the juvenile jurisdiction statute was amended so that many juvenile drunk driving offenders will be prosecuted in adult criminal courts.¹² Previously, the juvenile court had exclusive original jurisdiction over juveniles charged with driving under the influence.¹³ Under the new law, the juvenile court will retain exclusive original jurisdiction over juveniles charged with felony drunk driving offenses, but juveniles sixteen and over who are charged with misdemeanor drunk driving offenses will be tried in adult criminal courts.

The first major change made by the new drunk driving law, Public Law 143-1983, is the definition of "intoxicated." Prior law defined the term to mean under the influence of alcohol, a controlled substance, or any combination of the two.¹⁴ The new law provides that a driver can also be intoxicated by being under the influence of "any drug," other than alcohol or a controlled substance, or a combination of "drugs," alcohol, or controlled substances.¹⁵ The new law relies on the definition of controlled substances in another statute,¹⁶ but the term "drug" is not defined in the new law.¹⁷ This was no doubt intended by the legislature to permit the courts to broadly define the term.

The next subsection of the new law defines the crimes of operating a vehicle while intoxicated. Following a national trend,¹⁸ Indiana has adopted a *per se* law, that is, a person is guilty of a Class C misdemeanor if he "operates a vehicle with ten-hundredths percent (.10%), or more;

⁹Act of Apr. 15, 1983, Pub. L. No. 329-1983, § 1, 1983 Ind. Acts 1974, 1974-76 (codified at IND. CODE § 35-44-1-3 (Supp. 1983)).

¹⁰Act of Apr. 15, 1983, Pub. L. No. 318-1983, 1983 Ind. Acts 1933 (codified at IND. CODE § 35-1-58.5-4 (Supp. 1983)).

¹¹Act of Apr. 19, 1983, Pub. L. No. 143-1983, 1983 Ind. Acts 989 (codified at IND. CODE §§ 9-11-1-1 to -4-15 (Supp. 1983)).

¹²Act of Apr. 4, 1983, Pub. L. No. 287-1983, 1983 Ind. Acts 1782 (codified at IND. CODE § 31-6-2-1 (Supp. 1983)).

¹³IND. CODE § 31-6-2-1 (1982) (amended 1983).

¹⁴*Id.* § 9-4-1-54(a) (repealed 1983).

¹⁵*Id.* § 9-11-1-5 (Supp. 1983).

¹⁶*Id.* § 9-11-1-4; see *id.* § 35-48-1-1 (1982) (defining the term "controlled substances").

¹⁷The term "doing" is defined in the Controlled Substances Act, IND. CODE § 35-48-1-1 (1982).

¹⁸See generally 3 R. ERWIN, DEFENSE OF DRUNK DRIVING CASES Ch. 33A (3d ed. 1982).

by weight of alcohol in his blood."¹⁹ This blood alcohol level is not merely evidence of intoxication, as it has been in the past,²⁰ and can be under the new law,²¹ rather it is a crime in itself to operate a vehicle with this blood alcohol level. The per se law will probably be one of the most controversial provisions of the new drunk driving law.

The new law also retains driving while intoxicated as a Class A misdemeanor.²² This raises the issue of whether the per se and driving while intoxicated offenses punish the same conduct, or whether one is an included offense of the other.²³ It appears that the per se offense may be, but is not necessarily, an included offense of driving while intoxicated. For example, if a person had a blood alcohol level of .15% he would violate both the per se law and the driving while intoxicated law. However, if the blood alcohol level were .07% he would not violate the per se law but might violate the driving while intoxicated provision.²⁴

Both the per se and driving while intoxicated offenses are upgraded from misdemeanors to Class D felonies if the crime results in serious bodily injury,²⁵ and to Class C felonies if they result in the death of another person.²⁶ Additionally, both the per se offense and driving while intoxicated offenses are raised to Class D felonies if the driver has been convicted of driving while intoxicated in the last five years.²⁷ When a person is tried for a Class D felony because of a prior conviction the trial must be bifurcated as in an habitual offender proceeding.²⁸

Public Law 143-1983 almost totally rewrote the implied consent law.²⁹ Under the new law, when a law enforcement officer stops a driver and has probable cause to believe the driver has committed a per se offense or is driving while intoxicated, the officer must offer the person a chemical test (although he need not offer it to an unconscious person).³⁰ In con-

¹⁹IND. CODE § 9-11-2-1 (Supp. 1983).

²⁰IND. CODE § 9-4-1-54(g)(1) (1982) (repealed 1983).

²¹*Id.* § 9-11-1-7 (Supp. 1983).

²²*Id.* § 9-11-2-2.

²³*See id.* § 35-41-1-16 (definition of "included offense").

²⁴*See State v. Watts*, 601 S.W.2d 617 (Mo. 1980) (per se offense not necessarily included offense of driving while intoxicated); *State v. Basinger*, 226 S.E.2d 216 (N.C. App. 1976) (finding that although statute defined the per se offense as an included offense of driving under the influence, it is only included when there is evidence that blood level was .10% or greater).

²⁵IND. CODE § 9-11-2-4 (Supp. 1983).

²⁶*Id.* § 9-11-2-5.

²⁷*Id.* § 9-11-2-3. A later section defines "previous conviction" for purposes of this law and provides that a certified copy of the person's driving record obtained from the bureau of motor vehicles or a certified copy of a court record constitutes prima facie evidence that the person had a previous conviction. *Id.* § 9-11-4-14.

²⁸Act of Mar. 28, 1983, Pub. L. No. 324-1983, 1983 Ind. Acts 1969 (codified at IND. CODE § 35-38-1-19 (Supp. 1983)); *see also* IND. CODE § 35-50-2-8 (Supp. 1983) (habitual offender statute); *cf.* *Sweet v. State*, 439 N.E.2d 1144 (Ind. 1982).

²⁹IND. CODE §§ 9-4-4.5-1 to -7 (1982) (repealed 1983).

³⁰*Id.* § 9-11-4-2 (Supp. 1983).

trast to the former law,³¹ the officer need not offer the chemical test before he can arrest the driver. This eliminates the issue that arose under the prior law of whether the person was arrested before he was offered a chemical test.³²

The new law also provides that a law enforcement officer may offer more than one chemical test to the suspect. The suspect must consent to each or it will constitute a refusal under the implied consent law.³³ The number of chemical tests a suspect had to consent to was also a point of contention under the old law. The new statute will permit multiple testing under two circumstances. First, multiple tests are allowed if an obviously intoxicated person does not register any blood alcohol content on the breathalyzer. Because this situation will occur in the case of drug intoxication, the officer may then request the person to submit to a blood test. Multiple tests can also be administered if a person registers .10% blood alcohol content on the breathalyzer. The crucial question in this situation is the suspect's level of intoxication at the time he was driving. The officer may therefore request additional breathalyzer tests at timed intervals to determine whether the suspect's blood alcohol content is increasing or decreasing.

The new law sets a time limit for multiple testing by requiring that "all tests must be administered within three (3) hours after the officer had probable cause to believe the person violated IC 9-11-2."³⁴ The time that probable cause arose may become an issue, but in most cases it will coincide with the time the police officer requests the person to take a chemical test. However, the new law also provides that a suspect who refuses to submit to a chemical test "may be arrested for an offense under IC 9-11-2."³⁵ This awkward phrasing appears to mean that the refusal gives rise to probable cause for arrest. As explained earlier, however, the law enforcement officer must have probable cause before he offers the chemical test; the refusal, therefore, cannot furnish the probable cause. Additionally, following the lead of *South Dakota v. Neville*,³⁶ the statute provides that a person's refusal to submit to a chemical test is admissible evidence.³⁷

When a person suspected of driving while intoxicated is offered a chemical test he has two obvious alternatives—take the chemical test or refuse to take it.³⁸ However, the legislature has created an incentive to

³¹*Id.* § 9-4-4.5-3 (1982) (repealed 1983).

³²See *Reidhaar v. State*, 165 Ind. App. 307, 332 N.E.2d 117 (1975).

³³IND. CODE § 9-11-4-2 (Supp. 1983).

³⁴*Id.*

³⁵*Id.* § 9-11-4-3(c).

³⁶103 S.Ct. 916 (1983); see also, *Allredge v. State*, 239 Ind. 256, 263-70, 156 N.E.2d 888, 891-94 (1959).

³⁷IND. CODE § 9-11-4-3(d) (Supp. 1983).

³⁸The refusal may be demonstrated by conduct as well as words, *Thacker v. State*, 441 N.E.2d 708 (Ind. Ct. App. 1982); *Jaremczuk v. State*, 177 Ind. App. 628, 380 N.E.2d

take the test. If the person takes the test and it results in prima facie evidence that he was intoxicated (.10% blood alcohol content),³⁹ then the bureau of motor vehicles will suspend *before trial* the person's driving privileges for 180 days or until the case is disposed of, whichever occurs first.⁴⁰ However, if the person refuses to submit to a chemical test, the bureau will suspend driving privileges for one year, *before trial* or a hearing.⁴¹

If the driver refuses a chemical test after it is offered by the police officer, the officer must advise the person that his refusal will result in suspension of his driving privileges.⁴² If the person continues to refuse after being so advised, or if he submits to the chemical test and it results in prima facie evidence of intoxication,⁴³ the officer will take the person's driving license or permit and give the person a receipt for it.⁴⁴ The person will also be arrested at this point, if he has not already been.⁴⁵ If the chemical test indicates only "relevant evidence" that the person is intoxicated (.05%-.10% blood alcohol content),⁴⁶ then he *may* be arrested.⁴⁷ Additionally, the new law deleted a troublesome provision in the old law which provided that a person could not be arrested or charged with driving under the influence if the chemical test revealed that his blood alcohol content was .05% or below.⁴⁸ This permitted some persons obviously intoxicated, but probably under the influence of drugs, to go free.

After the driver has been arrested, and the officer has taken his driver's license, the officer will submit a probable cause affidavit to the prosecuting attorney of the county where the offense occurred.⁴⁹ This sworn affidavit must set forth the grounds for the officer's belief that the arrested person was violating the drunk driving law, state that the person was arrested for this violation, and state that the person either refused to submit to a chemical test or did submit to a chemical test which

615 (1978), and by requesting a lawyer, *Steward v. State*, 436 N.E.2d 859 (Ind. Ct. App. 1982); *Davis v. State*, 174 Ind. App. 433, 367 N.E.2d 1163 (1977).

³⁹The definition of "prima facie evidence of intoxication" is found at IND. CODE § 9-11-1-7 (Supp. 1983).

⁴⁰*Id.* § 9-11-4-9(b).

⁴¹*Id.* § 9-11-4-9(a).

⁴²*Id.* § 9-11-4-7(a). Although the recent decision of *Gibbs v. State*, 444 N.E.2d 893 (Ind. Ct. App. 1983), holding a drunk driving suspect must be advised of the consequences of his refusal for there to be a "knowing" refusal, was based on language in the former implied consent law, IND. CODE § 9-4-4.5-4(e) (1982) (repealed 1983), this section of the new law appears to comply with *Gibbs*.

⁴³IND. CODE § 9-11-1-7 (Supp. 1983).

⁴⁴*Id.* § 9-11-4-7(b)(1).

⁴⁵*Id.* § 9-11-4-3(b), (c).

⁴⁶*Id.* § 9-11-4-3(a).

⁴⁷*Id.* § 9-11-4-3(b).

⁴⁸*Id.* § 9-4-1-54(g)(3) (1982) (repealed 1983).

⁴⁹*Id.* § 9-11-4-7(b)(2) (Supp. 1983).

revealed prima facie evidence of intoxication.⁵⁰

At this point the prosecuting attorney has discretion to decide whether to proceed through the courts with the case or whether to require a first time offender to participate in a pre-trial diversion program.⁵¹ However, the law requires that a judicial officer determine whether there was probable cause to believe that the person violated the drunk driving law.⁵² If the judge determines probable cause existed, the person's drivers license and a copy of the probable cause affidavit are delivered to the circuit court clerk,⁵³ who sends the documents to the bureau of motor vehicles.⁵⁴ If the bureau suspends driving privileges, either because a suspect refused to submit to a chemical test,⁵⁵ or because the test revealed a prima facie level of intoxication,⁵⁶ the bureau must notify the person of the suspension and his right to judicial review.⁵⁷ The suspect is entitled to a "prompt" judicial hearing on the suspension, but the hearing is limited to the issues of whether the person refused to submit to the chemical test and whether a judicial officer made the required probable cause finding, not whether the finding was proper.⁵⁸ Driving privileges can also be reinstated if all of the pending charges for a violation have been dismissed and the prosecuting attorney states on the record that they will not be refiled.⁵⁹ It is important to emphasize that the new law provides for the suspension of driving privileges *before* any kind of trial or judicial hearing, other than the probable cause determination. This is an automatic administrative suspension by the bureau of motor vehicles, not suspension as the result of a court order. This provision in the new law will probably be as controversial as the per se law, if not more so.

The new law also amended a number of statutes which govern the penalties imposed for violations of the drunk driving laws. A first offense of the per se crime is a Class C misdemeanor⁶⁰ and a first offense of driving while intoxicated is a Class A misdemeanor,⁶¹ if neither result in serious bodily injury or death to another person.⁶² Upon a first conviction for either offense, the trial court will recommend suspension of driving privileges for a fixed period of ninety days to two years. The suspect is entitled to credit for any period of pre-trial suspension, unless the suspen-

⁵⁰*Id.* § 9-11-4-8(c).

⁵¹*Id.* § 33-14-1-7 (1982).

⁵²*Id.* § 9-11-4-8(a) (Supp. 1983).

⁵³*Id.*

⁵⁴*Id.* § 9-11-4-8(b).

⁵⁵*Id.* § 9-11-4-9(a).

⁵⁶*Id.* § 9-11-4-9(b).

⁵⁷*Id.* § 9-11-4-9(c).

⁵⁸*Id.* § 9-11-4-10.

⁵⁹*Id.* § 9-11-4-11.

⁶⁰*Id.* § 9-11-2-1.

⁶¹*Id.* § 9-11-2-2.

⁶²*See id.* § 9-11-2-4 (Class D felony if violation results in serious bodily injury); *id.* § 9-11-2-5 (Class C felony if violation results in death).

sion was the result of a refusal to submit to a chemical test.⁶³ The trial court may also withhold execution of any part of a sentence suspending driving privileges and place the defendant on probation for 180 days.⁶⁴ Part of this probation includes a restricted license.⁶⁵ However, even when probation is granted, the person's driving privileges must be suspended for at least thirty days,⁶⁶ something not previously required. A first offender may also still receive alcohol or drug abuse treatment.⁶⁷

Both the *per se* crime and driving while intoxicated are Class D felonies if the defendant has been convicted of either of these crimes within the five years immediately preceding the second conviction.⁶⁸ In this situation, the court must recommend suspension of driving privileges for one to two years, with the person still being entitled to credit for a pre-trial suspension.⁶⁹ Additionally, the person must be imprisoned for five days or ordered to perform ten days of community service.⁷⁰ At least two days of a five day sentence of imprisonment must be served consecutively, and the sentence must be served within six months from the date of sentencing.⁷¹ Additionally, a second offender is not eligible for dismissal of charges to participate in a drug or alcohol abuse program if he previously participated in one.⁷²

The *per se* offense and the pre-trial administrative suspension of driving privileges are two of the most controversial provisions of the new drunk driving law and will no doubt be challenged.⁷³ The *per se* offense may be challenged on the basis that the .10% blood alcohol element is unconstitutionally vague because, without conducting his own chemical test continually, a driver cannot know when his blood alcohol content reaches the illegal level. Therefore, he cannot conform his conduct to the requirements of the law. Proponents of this argument will find support in a recent California decision which held California's *per se* law unconstitutional for this reason.⁷⁴ However, arrayed against this solitary decision are many decisions from other jurisdictions which have upheld *per*

⁶³*Id.* § 9-11-3-1(a). Under prior law the minimum period of suspension was 60 days. *Id.* § 9-4-1-54(c) (1982) (repealed 1983).

⁶⁴*Id.* § 9-11-3-1(b) (Supp. 1983). The probation period was one year under prior law. *Id.* § 9-4-1-54(c) (1982) (repealed 1983).

⁶⁵*Id.* §9-11-3-1(c)(3) (Supp. 1983).

⁶⁶*Id.* § 9-11-3-2.

⁶⁷*Id.* § 16-13-6.1-15.1.

⁶⁸*Id.* § 9-11-2-3.

⁶⁹*Id.* § 9-11-3-3.

⁷⁰*Id.* § 9-11-3-4(a). The community service provision is new.

⁷¹*Id.* § 9-11-3-4(b).

⁷²*Id.* § 16-13-6.1-15.1(e).

⁷³It should be emphasized that with many of the arguments that follow the author is not merely setting up straw men to knock down, but is relying on attacks against similar legislation in other jurisdictions.

⁷⁴*People v. Alfaro*, 143 Cal. App. 3d 528, 192 Cal. Rptr. 178 (1983) (opinion published in advance sheet at 192 Cal. Rptr. 178-84, but was withdrawn from the bound volume).

se laws against the same challenge.⁷⁵ Indeed, driving while intoxicated offenses have traditionally been viewed as "strict liability crimes."⁷⁶ As such, it is not necessary for the driver to intend to be drunk and drive or to know that he is drunk when he is driving. Further, the same kind of vagueness challenge has been made against statutory presumptions of intoxication arising from certain blood alcohol levels, and such statutes have been sustained against this constitutional attack.⁷⁷ Therefore, the adequate notice or unconstitutionally vague argument is not likely to be a successful challenge to the Indiana per se statute.

It has also been argued that per se statutes create an unconstitutional "mandatory presumption" of guilt from a certain blood alcohol level.⁷⁸ This presumption of guilt contravenes the strongly held tenet that the accused is presumed innocent until proven guilty beyond a reasonable doubt. However, as one court has stated: "The statute does not presume, it defines."⁷⁹ The argument that the per se law contains a mandatory presumption of guilt ignores the plain import of the law, which is to define a new crime.

In another case it was contended that per se laws deprive a defendant of due process and the right to confrontation because his guilt will generally be established by a mechanical device, such as a breathalyzer.⁸⁰ The Alaska Court of Appeals rejected this argument, stating that "[b]reathalyzer test results, like any other evidence, may be subject to attack and disproof."⁸¹ It has also been argued that the presence of both a per se law and a driving under the influence law, with different penalties for each, punishes essentially the same conduct but denies equal protection by permitting a prosecuting attorney to choose which charge to file. This argument has also been rejected.⁸²

As can be seen from this brief discussion, successful constitutional attacks against the per se statute are unlikely. A more promising challenge

⁷⁵E.g., *Van Brunt v. State*, 646 P.2d 872 (Alaska Ct. App. 1982); *Roberts v. State*, 329 So. 2d 296 (Fla. 1976); *Greaves v. State*, 528 P.2d 805 (Utah 1974); *State v. Franco*, 96 Wash. 2d 816, 639 P.2d 1320 (1982).

⁷⁶*Morgan v. Municipality of Anchorage*, 643 P.2d 691 (Alaska Ct. App. 1982); *State v. Grimsley*, 3 Ohio App. 3d 265, 444 N.E.2d 1071 (1982); *State v. Franco*, 96 Wash. 2d 816, 639 P.2d 1320 (1982).

⁷⁷*People v. Perkins*, 126 Cal. App. 3d Supp. 12, 179 Cal. Rptr. 431 (1981); *People v. Cruz*, 48 N.Y.2d 419, 399 N.E.2d 513, 423 N.Y.S.2d 625 (1979).

⁷⁸Thompson, *The Constitutionality of Chemical Test Presumptions of Intoxication in Motor Vehicle Statutes*, 20 SAN DIEGO L. REV. 301 (1983); Comment, *Under the Influence of California's New Drunk Driving Law: Is the Drunk Driver's Presumption of Innocence on the Rocks?*, 10 PEPPERDINE L. REV. 91 (1982).

⁷⁹*State v. Franco*, 96 Wash. 2d 816, 823, 639 P.2d 1320, 1323 (1982); see also *Coxe v. State*, 281 A.2d 606 (Del. 1971); *State v. Ball*, 264 S.E.2d 844 (W. Va. 1980).

⁸⁰*Cooley v. Municipality of Anchorage*, 649 P.2d 251 (Alaska Ct. App. 1982).

⁸¹*Id.* at 254-55.

⁸²*State v. Watts*, 601 S.W.2d 617 (Mo. 1980).

might lie in a challenge to the sufficiency of the evidence when the blood alcohol level is measured exactly at .10%.⁸³

The other provision of the new drunk driving law likely to be challenged is the pre-trial automatic administrative suspension of a person's driving privileges if he either refuses to submit to a chemical test, or submits and the test reveals a blood alcohol level of .10% or more. The constitutionality of this procedure will be determined by measuring the Indiana procedure against the Massachusetts system permitting pre-trial suspension of driving privileges for refusal to take a chemical test that the United States Supreme Court approved in *Mackey v. Montrym*.⁸⁴ Additionally, statutory systems similar to Indiana's new law have been challenged because a more severe penalty, in terms of suspension of driving privileges, is imposed on a person who refuses a chemical test compared to one who takes the test and "fails" it. It has been held that this is a reasonable and constitutional approach to encourage drivers to submit to a chemical test.⁸⁵

3. *Assisting a Criminal*.—An infrequently prosecuted crime received an interesting interpretation last year in *Taylor v. State*.⁸⁶ The defendant was charged with assisting a criminal,⁸⁷ because of her alleged efforts to harbor or conceal a fugitive. Police officers went to a residence jointly occupied by the defendant Taylor and a man named Lipscomb to serve an arrest warrant on a Louis Jordan. Both Taylor and Lipscomb told the police they neither knew Jordan nor knew of his whereabouts. However, a search of the house uncovered Jordan hiding in a trunk in the living room.

The second district court of appeals quoted prior case law which stated that to "assist" a criminal a person must perform "some positive, affirmative act intended to help or aid someone to escape arrest, capture, or punishment."⁸⁸ The court found that Taylor's statement to the police that she did not know of Jordan or his whereabouts would have been a sufficient affirmative act if the State could have shown that Taylor knew of Jordan's presence in the house. However, the court held that because Taylor's possessory interest in the house and her presence there were nonexclusive, the evidence was not sufficient to permit an inference of her knowledge without other facts being present. The court then listed a

⁸³See *People v. Campos*, 138 Cal. App. 3d Supp. 1, 188 Cal. Rptr. 366 (1982); *State v. Boehmer*, 613 P.2d 916 (Hawaii Ct. App. 1980); *State v. Bjornsen*, 201 Neb. 709, 271 N.W.2d 839 (1978). *But see State v. Rucker*, 297 A.2d 400 (Del. Super. Ct. 1972).

⁸⁴443 U.S. 1 (1979); *see also Illinois v. Batchelder*, 103 S.Ct. 3513 (1983) (*Mackey* analysis is controlling regarding suspension without a hearing).

⁸⁵*Walker v. Department of Motor Vehicles*, 274 Cal. App. 2d 793, 79 Cal. Rptr. 433 (1969); *Augustino v. Colorado Dep't of Revenue*, 193 Colo. 273, 565 P.2d 933 (1977).

⁸⁶445 N.E.2d 1025 (Ind. Ct. App. 1983).

⁸⁷IND. CODE § 35-44-3-2 (1982).

⁸⁸445 N.E.2d at 1027 (quoting *Dennis v. State*, 230 Ind. 210, 217, 102 N.E.2d 650, 654 (1952)).

number of facts which, in addition to a possessory interest and presence in the house, might show knowledge of a fugitive's presence.⁸⁹

4. *Burglary*.—In *Watt v. State*,⁹⁰ the term “dwelling” in the burglary statute received an enlightening interpretation. The defendant had committed the offense of burglary⁹¹ but contended on appeal that the State had not proven a Class B burglary because the State failed to prove that the burglarized structure was a “dwelling.” The elderly owner of the house had resided there for fifty-five years. However, she had been ill and was residing in a convalescent home at the time of the offense. Her daughter had been assigned power of attorney over her mother's affairs and worked at her mother's house nearly every day, redecorating and renovating the house. Clothing, furniture, and other items belonging to the owner remained in the house.

The court of appeals noted that past Indiana decisions had defined a “dwelling” as a “‘home’—a settled residence house for a family and their personal possessions.”⁹² The court also commented that previous Indiana decisions had found vacant houses or vacation homes not to be dwellings. However, emphasizing the victim's fifty-five years of residence and evidence indicating that she intended to return to the house, the court of appeals held that the house constituted a “dwelling” under the facts of this case.⁹³

5. *Child Neglect*.—A split in the districts of the court of appeals over the mens rea requirement for child neglect was revealed in *Ware v. State*.⁹⁴ The issue was whether the element “knowingly” in the neglect statute⁹⁵ was intended to be an objective or a subjective mens rea requirement. That is, should the question of whether a parent knowingly neglected his child be determined by reference to a community standard or a

⁸⁹The examples which the court provided included:

1) the length of time the defendant and the fugitive were within the dwelling before the officer's presence was known, 2) the place the fugitive was hidden (*e.g.*, in a room in which the defendant was located or to which the defendant had sole access); 3) the fugitive's secretion in a room where his presence and activity were available to defendant's senses of sight or sound; 4) the existence of a relationship between or among the parties (*e.g.*, a familial or romantic relationship between Taylor and Jordan); 5) the reasons the police officers had for going to the house where the fugitive was found; 6) the length of time the dwelling was under surveillance by the law enforcement authorities; or 7) the physical layout of the house (*e.g.*, openness of the dwelling or open doors). This listing is not exhaustive but merely illustrative.

445 N.E.2d at 1027 (footnote omitted).

⁹⁰446 N.E.2d 644 (Ind. Ct. App. 1983).

⁹¹IND. CODE § 35-43-2-1 (1982).

⁹²446 N.E.2d at 645.

⁹³The court quoted the poet Edgar Guest: “It takes a heap o' living in a house t' make it home.” *Id.*

⁹⁴441 N.E.2d 20 (Ind. Ct. App. 1982).

⁹⁵IND. CODE § 35-46-1-4 (1982).

reasonable parent standard, or by reference to what the particular parent actually knew? In *Ware*, a woman left her seven-year-old daughter in the care of her boyfriend, who had sexual intercourse with the daughter. The mother continued to permit her boyfriend to frequent her apartment after she apparently knew about the rape.

The second district court of appeals noted that prior to 1976 neglect was defined as having an objective mens rea⁹⁶ and continued to be so defined by the first district court of appeals.⁹⁷ The second district, however, ruled that the definition of “knowingly” contained in the new penal code⁹⁸ was essentially a subjective standard, meaning that “ ‘the accused person knew what he was about, and, possessing such knowledge, proceeded to commit the crime of which he is charged.’ ”⁹⁹ The second district concluded that the subjective standard was the correct one and held that the defendant in this case was guilty of neglect because she continued to permit her boyfriend to spend three or four nights a week in her apartment after she learned about the rape.¹⁰⁰

6. *Conspiracy*.—In *McBride v. State*,¹⁰¹ the fourth district court of appeals enunciated a limitation on conspiracy prosecutions. The defendant in this case sold a stolen vehicle to an undercover officer after they had settled on a price. The defendant was convicted of conspiracy to commit theft. The court first reasoned that a charge of conspiracy to commit theft was sufficient to include a charge of conspiracy to dispose of stolen property. In reversing the conviction, however, the court of appeals said that a conspiracy requires two intents—an intent to commit the felony and an intent to agree to commit the felony. The only intent proved by the State in this case was the intent to commit the felony. In *McBride*, the participants in the sale met for the first time at the time of the sale. There was no prior agreement. The sales agreement, therefore, only proved that the defendant intended to commit the felony of theft. The court held that to support a conspiracy conviction there must be proof of an addi-

⁹⁶441 N.E.2d at 22 (citing *Eaglen v. State*, 249 Ind. 144, 231 N.E.2d 147 (1967)).

⁹⁷441 N.E.2d at 23 (citing *Smith v. State*, 408 N.E.2d 614 (Ind. Ct. App. 1980)).

⁹⁸IND. CODE § 35-41-2-2 (1982).

⁹⁹441 N.E.2d at 22 (quoting *State v. Bridgewater*, 171 Ind. 1, 8, 85 N.E. 715, 718 (1908)).

¹⁰⁰Surely, such conduct would also violate an objective standard since a reasonable parent possessing such knowledge would have not permitted the boyfriend to continue overnight visits. The second district seemed to be saying that the objective standard would mean that the trier of fact must evaluate the parent's conduct in somewhat of a vacuum, without reference to what the particular parent in the case actually knew. Apparently the objective standard could permit a jury to determine whether or not the accused acted as a reasonable parent in light of what she knew.

It should also be noted that in child abuse prosecutions involving the murder statute, the Indiana Supreme Court has construed “knowingly” to be synonymous with “purposely” in prior murder statutes. *Horne v. State*, 445 N.E.2d 976 (Ind. 1983); *Burkhalter v. State*, 397 N.E.2d 596 (Ind. 1979).

¹⁰¹440 N.E.2d 1135 (Ind. Ct. App. 1982).

tional understanding between the parties beyond the mere sales agreement.

7. *Drugs*.—A conflict among the districts of the court of appeals was demonstrated by the fourth district court of appeals' decision in *Romack v. State*.¹⁰² In *Romack*, the defendant was convicted of selling over thirty grams of marijuana, a Class D felony. He contended on appeal that without a quantitative analysis of the marijuana that was seized, the State could not determine the purity of the marijuana and could not, therefore, prove that he sold over thirty grams of "pure" marijuana. This dispute arose because the first subsection of the dealing statute prohibits manufacturing, delivering, or possessing with intent to deliver marijuana "pure or adulterated,"¹⁰³ a Class A misdemeanor. Under the second subsection of the statute, however, if the amount of marijuana is over thirty grams and less than ten pounds, the offense is a Class D felony.¹⁰⁴ The first district court of appeals had interpreted the "pure or adulterated" language to carry over into the second subsection,¹⁰⁵ so that it was unnecessary for the State to prove that the defendant sold over thirty grams of "pure" marijuana.

In *Romack*, the fourth district disagreed with this interpretation and stated that because the legislature did not specifically include the language "pure or adulterated" in the penalty enhancement subsection, the State must prove more than thirty grams of unadulterated marijuana to obtain a Class D felony.¹⁰⁶ The fourth district nevertheless found that the defendant sold more than thirty grams of marijuana because the police chemist testified that the total weight of the drug seized was 427 grams, that the small portions she tested were marijuana, and that in her opinion at least thirty grams of the substance was marijuana. The court refused to impose a requirement for a quantitative analysis in every case.

In 1983, the Indiana General Assembly responded to earlier cases imposing purity requirements¹⁰⁷ by adding the phrase "pure or adulterated" to several provisions in the Controlled Substances Act.¹⁰⁸ These amendments make it unlawful to possess cocaine or a Schedule I or II narcotic drug "pure or adulterated" and a Class C felony if the amount is more than three grams "pure or adulterated."¹⁰⁹ Additionally, it will be a Class D felony to possess controlled substances classified in Schedules I-V (except marijuana or hashish) in a "pure or adulterated" form.¹¹⁰ Finally, the law

¹⁰²446 N.E.2d 1346 (Ind. Ct. App. 1983).

¹⁰³IND. CODE § 35-48-4-10(a) (1982).

¹⁰⁴*Id.* § 35-48-4-10(b).

¹⁰⁵*Grogg v. State*, 417 N.E.2d 1175 (Ind. Ct. App. 1981).

¹⁰⁶446 N.E.2d at 1353; *see also* *Jones v. State*, 435 N.E.2d 616 (Ind. Ct. App. 1982) (wherein the second district also interpreted the statute as the fourth district did in *Romack*).

¹⁰⁷*E.g.*, *Hutcherson v. State*, 178 Ind. App. 8, 381 N.E.2d 877 (1978).

¹⁰⁸Act of Apr. 15, 1983, Pub. L. No. 138-1983, §§ 3, 4, 5, 1983 Ind. Act. 980, 981 (codified at IND. CODE §§ 35-48-4-6, 35-48-4-7, 35-48-4-11 (Supp. 1983)).

¹⁰⁹IND. CODE § 35-48-4-6 (Supp. 1983).

¹¹⁰*Id.* § 35-48-4-7.

has been amended so that it is a Class A misdemeanor to possess marijuana, hash oil, or hashish "pure or adulterated."¹¹¹ However, the new law did not amend the penalty enhancement sections of either the marijuana possession or marijuana dealing statutes, which were at issue in *Romack*. Therefore the question of whether the penalty enhancement provision for over thirty grams of marijuana requires proof of more than thirty grams of "pure" marijuana remains unsettled.

8. *Homicide*.—In *Head v. State*,¹¹² the Indiana Supreme Court concluded that attempted felony murder is an impossible offense. The felony murder doctrine provides that when a killing occurs during the perpetration or attempted perpetration of an inherently dangerous felony, the criminal, as a matter of law, acts with the culpability from which the mens rea for murder can be inferred. In Indiana, the felony murder rule has been statutorily limited to the killing of another while committing or attempting to commit seven specified crimes.¹¹³ In *Head*, the court concluded that the commission or attempted commission of one of the underlying felonies cannot be extended to supply the mens rea for an attempted murder charge where no death occurs. This is so because a specific intent to kill is one element of the crime of attempted murder.

The court retained the principle that the State, in proving a felony murder charge, need only establish that the defendant intended to commit the underlying felony; no evidence of an intent to kill need be introduced. The majority also commented that increased punishment may be imposed on the perpetrator of one of the seven listed felonies if the offense results in bodily injury,¹¹⁴ and that there is no requirement that there be an *intent* to inflict bodily injury.

Despite its ruling that there could be no crime of attempted felony murder, the supreme court held that the trial court did not err in denying the defendant's motion to dismiss the charging information on this ground. Although the information erroneously cited both the felony murder statute¹¹⁵ and the attempted murder statute,¹¹⁶ it contained all the elements necessary to allege attempted murder. The defendant, therefore, was adequately advised of the charges against him. However, the court held that the trial court did err in its jury instructions. The trial court, consistent with the information, gave erroneous preliminary instructions on the attempted murder charge, which included elements of the felony murder rule, but omitted the element of specific intent to kill. In final instruc-

¹¹¹*Id.* § 35-48-4-11.

¹¹²443 N.E.2d 44 (Ind. 1982) (3-2 decision).

¹¹³The seven specified crimes are arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery. IND. CODE § 35-42-1-1(2) (1982).

¹¹⁴*See, e.g., id.* § 35-43-2-1 (burglary becomes a Class A felony if it results in bodily injury or serious bodily injury to any person other than a defendant).

¹¹⁵*Id.* § 35-42-1-1.

¹¹⁶*Id.* § 35-41-5-1.

tions the court gave a correct instruction on attempted murder, which included the element of specific intent. Thus, the jury was given two inconsistent and contradictory theories regarding an essential element of the crime of attempted murder.

B. Arrest, Search and Seizure

1. *Statutory Developments.*—One of the more controversial amendments to the criminal procedure code¹¹⁷ enacted during the survey period was a “knock and announce” law. This provision became a media event in Indianapolis and received only a narrow vote of approval in the Indiana House of Representatives. The amendment simply stated that a law enforcement officer executing an arrest warrant¹¹⁸ or search warrant¹¹⁹ may break open an outer or inner door or window if he is not admitted following an announcement of his authority and purpose. What is amazing about the controversy over this “new” law is that a similar law had been in existence in Indiana since 1905¹²⁰ and was well-accepted in case law.¹²¹

Several other changes in arrest and search laws were made by the Indiana General Assembly in 1983. As noted in last year’s survey article,¹²² some confusion existed over the proper procedures for effecting an arrest for an infraction or ordinance violation, due to the existence of two separate statutes on the same subject. This has been remedied by the repeal of a provision in the criminal procedure code.¹²³ The arrest provisions for infractions and ordinances are now found solely in Indiana Code section 34-4-32-3.¹²⁴ Another amendment permits a search warrant issued by a court not of record to be executed only in the court’s county.¹²⁵

¹¹⁷For a discussion of the most recently enacted Indiana criminal procedure code, most of which became effective on September 1, 1982, see Johnson, *Criminal Law and Procedure, 1981 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 119-47 (1983).

¹¹⁸Act of Apr. 18, 1983, Pub. L. No. 320-1983, § 4, 1983 Ind. Acts 1943, 1944-45 (codified at IND. CODE § 35-33-2-3(b) (Supp. 1983)).

¹¹⁹Act of Apr. 18, 1983, Pub. L. No. 20-1983, § 7(d), 1983 Ind. Acts 1943, 1949 (codified at IND. CODE § 35-33-5-7(d) (Supp. 1983)).

¹²⁰Act of Mar. 10, 1905, ch. 169, § 132, 1905 Ind. Acts 584, 614 (formerly codified at IND. CODE § 35-1-19-6 (1982) (repealed 1983)).

¹²¹See *Cannon v. State*, 414 N.E.2d 578 (Ind. Ct. App. 1980); *Johnson v. State*, 157 Ind. App. 105, 299 N.E.2d 194 (1973).

¹²²Johnson, *supra* note 117, at 124-25.

¹²³Act of Apr. 18, 1983, Pub. L. No. 320-1983, § 2, 1983 Ind. Acts 1943, 1944 (repealing IND. CODE § 35-33-1-1(5) (1982)).

¹²⁴This section provides:

A person who knowingly or intentionally refuses to provide either his:

- (1) name, address, and date of birth; or
- (2) driver’s license, if in his possession;

to a law enforcement officer who has stopped the person for a [sic] infraction or ordinance violation commits a Class C misdemeanor.

IND. CODE § 34-4-32-3 (1982).

¹²⁵Act of Apr. 18, 1983, Pub. L. No. 320-1983, § 7, 1983 Ind. Acts 1943, 1949 (codified at IND. CODE § 35-33-5-7(a) (Supp. 1983)).

Another controversial piece of legislation enacted by the legislature was the law creating a "good faith" exception to the exclusionary rule.¹²⁶ Last year, in *Illinois v. Gates*,¹²⁷ the United States Supreme Court avoided the issue of a good faith exception;¹²⁸ however, the Court has recently granted certiorari in two other cases involving this issue.¹²⁹ An analysis of the constitutionality of the Indiana statute would be more informed by awaiting these decisions. It should be emphasized, however, that Indiana's good faith statute applies only where a search warrant has been obtained, or where the evidence is obtained by reliance on "a state statute, judicial precedent, or court rule that is later declared unconstitutional or otherwise invalidated."¹³⁰

¹²⁶Act of Apr. 5, 1983, Pub. L. No. 323-1983, 1983 Ind. Acts 1968 (codified at IND. CODE § 35-37-4-5 (Supp. 1983)). This statute provides:

(a) In a prosecution for a crime or a proceeding to enforce an ordinance or a statute defining an infraction, the court may not grant a motion to exclude evidence on the grounds that the search or seizure by which the evidence was obtained was unlawful if the evidence was obtained by a law enforcement officer in good faith.

(b) For purposes of this section, evidence is obtained by a law enforcement officer in good faith if:

(1) it is obtained pursuant to:

(A) a search warrant that was properly issued upon a determination of probable cause by a neutral and detached magistrate, that is free from obvious defects other than nondeliberate errors made in its preparation, and that was reasonably believed by the law enforcement officer to be valid; or

(B) a state statute, judicial precedent, or court rule that is later declared unconstitutional or otherwise invalidated; and

(2) the law enforcement officer, at the time he obtains the evidence, has satisfied applicable minimum basic training requirements established by rules adopted by the law enforcement training board under IC 5-2-1-9.

(c) This section does not affect the right of a person to bring a civil action against a law enforcement officer or a governmental entity to recover damages for the violation of his rights by an unlawful search and seizure.

IND. CODE § 35-37-4-5 (Supp. 1983).

¹²⁷103 S. Ct. 2317 (1983).

¹²⁸In *Illinois v. Gates*, the Supreme Court asked the parties to brief and argue the question of whether the exclusionary rule "should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment." The Court ultimately decided not to address this issue because it was not presented to the Illinois state courts. 103 S. Ct. 2321.

¹²⁹*Commonwealth v. Sheppard*, 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted sub nom. Massachusetts v. Sheppard*, 103 S. Ct. 3534 (1983); *United States v. Leon*, 701 F.2d 187 (9th Cir. 1983), *cert. granted*, 103 S. Ct. 3535 (1983).

¹³⁰IND. CODE § 35-37-4-5(b)(1)(B) (Supp. 1983). The Seventh Circuit Court of Appeals also recently sidestepped a good faith argument in *United States v. Pichany*, 687 F.2d 204 (7th Cir. 1982), where that argument was not asserted by the government in the lower court, but rather by the district court sua sponte in its opinion. The Seventh Circuit did comment: "The good faith exception, where it has been explicitly recognized, provides that evidence is not to be suppressed under the exclusionary rule where that evidence was discovered by

2. *Community Caretaking Exception to Warrant Requirement.*—In *United States v. Pichany*,¹³¹ the Seventh Circuit Court of Appeals refused to extend the community caretaking exception to the fourth amendment warrant requirement to a warehouse. The facts of this case indicated that the owner of a trailer manufacturing company, Hunter, reported a burglary at his business. The burglary was not in progress when Hunter made the report, and the police agreed to meet Hunter at the premises within an hour. The site of the burglary contained approximately sixty aluminum buildings of nearly equal size and appearance. No signs designated the occupants of separate buildings. The defendant, Pichany, leased a building located near Hunter's buildings. When the police arrived, they attempted to locate Hunter at his buildings and then went to the defendant's building. After knocking and calling for Hunter, the police entered the unlocked building, which contained a semi-tractor and trailer. The truck was amateurishly painted and the officers became suspicious and investigated further, recording the license number of the truck. The officers also found two new farm tractors in the defendant's building and recorded their serial numbers. Later, the officers discovered that the semi-tractor and the farm tractors were stolen, but unrelated to the Hunter burglary. They obtained a search warrant and seized the vehicles.

The defendant was subsequently charged with the theft of four tractors. The defendant moved to suppress the evidence found in his warehouse on the ground that the officers' warrantless entry into his building violated the fourth amendment.¹³² In response, the government argued that when the officers made the warrantless entry into the unlocked warehouse, they were conducting a "community caretaking function" under *Cady v. Combrowski*.¹³³ In *Cady*, a car driven by an intoxicated off-duty police officer was disabled in an accident. Because the car was a hazard to traffic on the road, the police towed the car to a garage. The police believed that the off-duty officer's gun might be in his car and searched the car. No warrant was obtained because no crime was being investigated. The search revealed bloody clothing that was instrumental in the defendant's subsequent conviction for murder. The United States Supreme Court found that the search did not violate the fourth amendment because it was performed within the police "community caretaking function" and was therefore reasonable.¹³⁴

the officers acting in good faith and in a reasonable, though mistaken, belief that they were authorized to take those actions." *Id.* at 209 (citing *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981)).

¹³¹687 F.2d 204 (7th Cir. 1982). This case is also discussed in Been & Donnelly, *Constitutional Law, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 79, 92 (1984).

¹³²*Id.* at 206. The district court granted the motion and the government appealed. *Id.*

¹³³413 U.S. 433 (1973).

¹³⁴*Id.* at 447-48.

The *Pichany* court rejected the government's community caretaking argument, noting that, unlike the impounded car in *Cady*, the police in *Pichany* exercised no dominion or control over the warehouse. Second, unlike *Cady*, the officers in the present case "were under no obligation to secure the warehouse or to preserve its contents where no threat of damage or theft was immediately present."¹³⁵ Also, in contrast to *Cady*, the facts of *Pichany* did not indicate any danger to the public. Most importantly, this case did not involve a vehicle. The Seventh Circuit stated that, in *Cady*, the Supreme Court expressly limited the community caretaking exception to automobiles.¹³⁶

3. *Vehicle Searches*.—Recent developments in vehicle search rules were highlighted by two recent Indiana decisions. In *Fyock v. State*,¹³⁷ the Indiana Supreme Court reversed a third district court of appeals decision.¹³⁸ In this case, an off-duty police officer saw a suspect remove an object from the gas tank of a parked car. The suspect carried this object, described as a "sock type thing,"¹³⁹ to the driver's window of the car where the defendant Fyock was sitting. As the officer approached the car, he saw three other people in the car passing a cigarette and noticed the odor of marijuana.¹⁴⁰ The officer grabbed the suspect standing outside the car and informed him and Fyock that they were under arrest. The officer then saw what seemed to be a package of marijuana on the front seat next to Fyock. After the officer identified himself, Fyock started the car's engine and the suspect standing outside the car together with the three passengers fled on foot. When Fyock began to move the car, the officer drew his gun and ordered him to stop. The officer pulled Fyock from the car and patted him down, but he found no weapons or drugs. When other officers arrived, one of them looked into the car and saw two sweat socks in the back seat on the floor. One of the socks clearly had something in the toe, but the officer could not see what was inside.¹⁴¹ The officer investigated the sock and found tablets of methaqualone, the basis for the charge against Fyock.

The court of appeals concluded that the search of the sock was unlawful and reversed the defendant's conviction.¹⁴² The court of appeals

¹³⁵687 F.2d at 207.

¹³⁶*Id.* at 209.

¹³⁷436 N.E.2d 1089 (Ind. 1982). For a further discussion of this case, see Been & Donnelly, *Constitutional Law, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 79, 87 (1984).

¹³⁸428 N.E.2d 58 (Ind. Ct. App. 1981) *rev'd*, 436 N.E.2d 1089 (Ind. 1982).

¹³⁹436 N.E.2d at 1092.

¹⁴⁰For a recent Seventh Circuit case discussing odor of drugs as furnishing probable cause, see *United States v. Sweeney*, 688 F.2d 1131 (7th Cir. 1982); see also Annot., 5 A.L.R.4th 681 (1981).

¹⁴¹428 N.E.2d at 61.

¹⁴²*Id.* at 64. The court of appeals found that the search was not valid as a search incident to a lawful arrest because the sock was "well out of Fyock's area of control." *Id.*

stated that under the United States Supreme Court decision of *New York v. Belton*,¹⁴³ the search of the sock would probably be considered valid as a search incident to a lawful arrest. However, the court of appeals concluded that *Belton* established a new constitutional principle and refused to apply it retroactively to the *Fyock* case, where the search had occurred one year before the *Belton* decision.

The Indiana Supreme Court unanimously reversed the court of appeals. The supreme court did not view *Belton* as enunciating a new constitutional principle, and therefore held that there was no issue of retroactive application in the *Fyock* case.¹⁴⁴ The court also said that, given the facts in this case, there was probable cause to believe that the sock contained contraband.¹⁴⁵ The court found that "where there is probable cause to believe an automobile contains the fruits or instrumentalities of a crime, the inherent mobility of the automobile combines to justify a warrantless search."¹⁴⁶

The defendant in *Fyock* also attempted to argue that the sock could not have been searched under *United States v. Chadwick*.¹⁴⁷ The Indiana Supreme Court answered this argument by holding that the defendant could not have had a substantial expectation of privacy with regard to the sock. While as a matter of common sense this is no doubt accurate, as a matter of constitutional law it is incorrect. As confusing as recent

¹⁴³453 U.S. 454 (1981).

¹⁴⁴"A careful reading of that case shows the United States Supreme Court considered the decision as one that elaborated on the validity of searches incident to lawful custodial arrests, when the arrestee was the recent occupant of an automobile." 436 N.E.2d at 1091.

¹⁴⁵On this point the *Fyock* case seems very similar to the recent United States Supreme Court "plain view" case of *Texas v. Brown*, 103 S. Ct. 1535 (1983). In *Brown* a police officer stopped the defendant's car at a routine driver's license checkpoint and asked him for his license. He shined his flashlight into the car and saw an opaque, green party balloon, knotted at the tip, fall from Brown's hand to the seat next to him. While the defendant was fumbling in the glove compartment for his license, the officer shifted his view and noticed small plastic vials, loose white powder, and an open bag of party balloons in the glove compartment. When the defendant could not produce a license, he was asked to get out of his car. When he did, the officer seized the balloon. Brown was placed under arrest. An on-the-scene inventory of the car revealed several plastic bags containing a green leafy substance and a large bottle of milk sugar. Later tests indicated that heroin was in the party balloon. The majority opinion of the Supreme Court held that the plain view doctrine justified seizure of the balloon where the officer was in a place where he had a right to be when he observed the balloon and had probable cause to believe what was in it.

While the officers in *Fyock* could no more see into the sock than could the officer in *Brown* see into the balloon, surely the probable cause was as strong as in *Brown*. The officer in *Fyock* observed some unusual activity, something that looked like a sock being passed into the car, passing of a cigarette among three passengers combined with the odor of marijuana, the flight of the other suspects, and the attempted flight of *Fyock*.

¹⁴⁶436 N.E.2d at 1094.

¹⁴⁷433 U.S. 1 (1977) (holding that the warrantless search of a footlocker found in a car was unreasonable, and distinguishing the requirements for the valid search of a car from those for a footlocker because a person has a greater expectation of privacy with regard to a footlocker).

United States Supreme Court vehicle search cases have been, the Court is in virtually unanimous agreement that no constitutionally worthy or unworthy containers are found in vehicles.¹⁴⁸ Having ruled that the search in *Fyock* was proper either as a search incident to arrest based upon *Belton*, or as a search based upon probable cause, it was unnecessary to rule on the *Chadwick* argument. If an item is legally seized under one theory, it matters not that it was illegally seized under another.

An Indiana case which appears similar in many respects to *Fyock*, but involves a slightly different principle of constitutional search and seizure law, is *Klopfenstein v. State*.¹⁴⁹ In this decision an officer made a lawful stop of a vehicle and a lawful arrest of the defendant, the driver of the car. He searched the defendant's person and found a clear plastic bag which contained a closed Tylenol pill bottle and some loose pills. The officer opened the Tylenol bottle and saw a greenish-brown substance which was later analyzed and identified as hashish.

The second district court of appeals chose not to rely directly on the *Belton* decision in ruling that the search of the Tylenol bottle was a proper search incident to arrest.¹⁵⁰ Instead, the court held that *United States v. Robinson*¹⁵¹ justified the search of the bottle. In *Robinson*, the United States Supreme Court upheld a search of a crumpled cigarette package found on the defendant's person as a search incident to arrest.¹⁵² The court also distinguished *United States v. Chadwick*¹⁵³ and its progeny on the ground that "*Chadwick* does not protect from warrantless searches items which are found on the person of an arrestee or items immediately associated with his person."¹⁵⁴

4. *Probable Cause*.—It will be interesting to see the effect of *Illinois v. Gates*¹⁵⁵ on the issue of probable cause for arrest or search. In *Gates*, the Supreme Court held that the *Aguilar-Spinelli*¹⁵⁶ two-pronged test for determining whether an informant's tip establishes probable cause for the issuance of a search warrant should be abandoned in favor of a totality of the circumstances approach. Indiana has a statute which is the general equivalent of the *Aguilar-Spinelli* two-prong test for probable cause.¹⁵⁷

¹⁴⁸*United States v. Ross*, 456 U.S. 798, 822 (1982).

¹⁴⁹439 N.E.2d 1181 (Ind. Ct. App. 1982).

¹⁵⁰The decision not to rely on *Belton* was correct because *Belton* concerned a search of the interior of a vehicle incident to arrest, not a search of a person incident to arrest.

¹⁵¹414 U.S. 218 (1973).

¹⁵²*Id.* at 235.

¹⁵³433 U.S. 1 (1977).

¹⁵⁴439 N.E.2d at 1188 (quoting *Chambers v. State*, 422 N.E.2d 1198, 1203 (Ind. 1981)).

¹⁵⁵103 S. Ct. 2317 (1982).

¹⁵⁶*Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

See generally Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 MERCER L. REV. 741 (1974).

¹⁵⁷IND. CODE § 35-33-5-2(a) (1982) provides: "When based on hearsay, the affidavit shall contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished."

However, this statute is not necessarily inconsistent with the *Gates* totality of the circumstances approach because it does not limit or pigeonhole the methods of proving credibility and factual basis.

Two recent Indiana decisions regarding issues of probable cause will remain significant even after the *Gates* decision. In *Nash v. State*,¹⁵⁸ the second district court of appeals firmly established that "declarations against penal interest constitute an indicia of credibility which may be utilized in ascertaining the credibility of an informant whose information provides the basis of an affidavit for search warrant."¹⁵⁹ This is an important principle under either the two-prong or totality of the circumstances approach.

The second case is *Flaherty v. State*,¹⁶⁰ a "controlled buy" case. In the typical controlled buy case the police use an informant to make a drug purchase. They may strip search the informant to insure that he has no drugs on his person, give him money, send him into the place where the buy is to be made, observing him all the time, and search the informant again when he returns with the drugs. These facts and the officers' observations of the informant as he enters the place of purchase are set forth in a probable cause affidavit and a search warrant is obtained to search the place where the purchase was made. Under this set of facts it does not matter how credible the informant is. Probable cause is not based on hearsay because the informant is not telling the police officers something which they then put in a warrant. It is based upon the personal observations of the officers. Indiana courts have approved searches under this type of factual situation.¹⁶¹

The distinguishing feature in *Flaherty* was that the probable cause affidavit for the search warrant indicated only that the affiant police officer observed the informant making the buy enter an apartment building, not the individual apartment of the defendant. The search warrant was directed to a search of the defendant's apartment within the building. Because the affiant officer was relying solely on his personal observations of the informant's actions, and the affidavit indicated he did not observe the informant enter the specific apartment he sought to search, the affidavit did not demonstrate sufficient probable cause to issue a warrant to search that particular apartment. This decision will not be altered by *Gates* because it does not concern probable cause based on hearsay, but rather concerns the sufficiency of probable cause based on personal observation.

5. *Arrest*.—The 1981 procedure code did not attempt to define "arrest." That task has been left to the courts and several Indiana deci-

¹⁵⁸433 N.E.2d 807 (Ind. Ct. App. 1982).

¹⁵⁹*Id.* at 810.

¹⁶⁰443 N.E.2d 340 (Ind. Ct. App. 1982).

¹⁶¹*Haynes v. State*, 431 N.E.2d 83 (Ind. 1982); *Watt v. State*, 412 N.E.2d 90 (Ind. Ct. App. 1980); *Whirley v. State*, 408 N.E.2d 629 (Ind. Ct. App. 1980); *Mills v. State*, 177 Ind. App. 432, 379 N.E.2d 1023 (1978).

sions addressed that issue in 1982. As the decisions indicate, this question usually arises when a confession is obtained from the defendant and he attempts to have it suppressed as the fruit of an illegal arrest. In *Triplett v. State*,¹⁶² the police received a tip from a first time informant that he knew two men who claimed to have committed a robbery four days earlier. The police concluded that they had insufficient evidence to secure an arrest warrant but nevertheless wished to question the suspect, Triplett. Several officers went to Triplett's residence and were informed that the suspect was not home, so one of the officers left to obtain a search warrant. Triplett left his residence a short time later and was approached by three uniformed officers on his front lawn. The officer in charge asked Triplett for identification and then told him, without any explanation, to go to police headquarters for questioning. The defendant was searched and placed in the security cage of a squad car. He was not advised that he had no obligation to go with the police or that he could leave. At police headquarters Triplett was taken to an interrogation room and read his *Miranda* rights. The defendant was never advised that he was not formally charged or that he could leave, and a guard watched him for several hours. The defendant subsequently gave a confession that was admitted over his objection at trial and was convicted.

The Indiana Supreme Court reversed the defendant's conviction, relying on a United States Supreme Court decision which found that "detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrests."¹⁶³ The Indiana court also quoted another decision in which the Supreme Court stated that " 'a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all circumstances surrounding the incident, a reasonable person would believe that he was not free to leave.' "¹⁶⁴ The Indiana Supreme Court concluded that a reasonable person in Triplett's situation would believe that he was under arrest, and refused to permit the State to use the product of an illegal detention.

The Indiana Supreme Court confronted the same issue in *Dunaway v. State*.¹⁶⁵ In *Dunaway*, the defendant was a suspect in a murder case. The police went to Dunaway's home the day after the murder and requested that he come to the station for questioning. The police did not draw their guns or handcuff the defendant, and the defendant rode to the police station in the front seat of the police car. At the station, the defendant talked with an officer, whom he had known for several years, and was read his *Miranda* rights before any questions were asked. The

¹⁶²437 N.E.2d 468 (Ind. 1982).

¹⁶³*Dunaway v. New York*, 442 U.S. 200, 216 (1979), *quoted in Triplett*, 437 N.E.2d at 469.

¹⁶⁴437 N.E.2d at 469 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

¹⁶⁵440 N.E.2d 682 (Ind. 1982).

defendant had previous encounters with the police and stated that he understood his rights. After giving a statement the defendant asked to see his girlfriend "before he was arrested."¹⁶⁶ Like the defendant in *Triplett*, Dunaway was not specifically informed that he was not under arrest or that he was free to leave. However, the supreme court concluded that the facts of this case supported the trial court's conclusion that the defendant did not think he was under arrest when he was taken to the police station. Clearly then, whether someone has been "arrested" or "seized" within the meaning of the fourth amendment is an extremely fact sensitive determination.¹⁶⁷

In one other arrest case, the Indiana Supreme Court ruled in *Brown v. State*¹⁶⁸ that a misdemeanor arrest may be based upon the collective information known to the law enforcement agency, even if the arresting officer does not personally possess probable cause to arrest. This has been the rule in felony cases for several years.¹⁶⁹ However, a well-established rule in misdemeanor cases is that the arresting officer must personally observe the commission of the misdemeanor.¹⁷⁰ In the *Brown* case a police officer did observe the commission of a misdemeanor in his presence, but he relayed this information to another officer, who did not personally observe it, and the second officer made the arrest. The arrest was upheld by the court.¹⁷¹

C. Confessions

1. *Emergency Exception to Miranda*.—Perhaps the most significant confession case decided during the survey period was *Cronk v. State*,¹⁷² in which the Indiana Court of Appeals adopted an "emergency exception" to the *Miranda* requirements.¹⁷³ In *Cronk*, the defendant had chained himself, in protest, to a cannon on a courthouse lawn. He had a piece of plywood and a sleeping bag in close proximity to the cannon. When Cronk refused to unlock his chain and continue his protest on the sidewalk, police officers cut the chain, handcuffed him, and placed him in custody. On the way to the police car Cronk turned back toward the cannon yelling that if the officer who was standing on the plywood stepped off he would be blown up because there was a bomb under the board. The police took Cronk back to the cannon and inquired about the bomb. Cronk

¹⁶⁶*Id.* at 685.

¹⁶⁷See also *Minneman v. State*, 441 N.E.2d 673 (Ind. 1982).

¹⁶⁸442 N.E.2d 1109 (Ind. 1982).

¹⁶⁹See, e.g., *Owens v. State*, 427 N.E.2d 880 (Ind. 1981); *Benton v. State*, 401 N.E.2d 697 (Ind. 1980).

¹⁷⁰*Hart v. State*, 195 Ind. 384, 145 N.E.2d 492 (1924); IND. CODE § 35-33-1-1(4) (Supp. 1983).

¹⁷¹The *Brown* decision also discusses the issue of "pretext" arrests. 442 N.E.2d at 1115.

¹⁷²443 N.E.2d 882 (Ind. Ct. App. 1983).

¹⁷³*Miranda v. Arizona*, 384 U.S. 436 (1966).

said the officer could safely step off the board because the bomb would not explode unless a string was pulled. When the plywood was removed, a string was observed extending from a mound of dirt. Cronk indicated this as the bomb's location. Cronk was further questioned about the bomb at the jail and he drew a diagram which was turned over to State Police officers. The state troopers dismantled the bomb and then went to the jail to question the defendant. Then, for the first time, Cronk was advised of his *Miranda* rights. It was undisputed that he was not advised before he drew the diagram or before he made his statements at the scene.

The court of appeals broke down the incriminating evidence given by the defendant into three separate categories. First, the defendant's statement that if the officer stepped off the board a bomb would explode was admissible, despite the absence of *Miranda* warnings, because it was not elicited through custodial interrogation, but rather was a spontaneous voluntary statement outside the scope of *Miranda*.¹⁷⁴

Second, when the defendant was returned to the location of the bomb and asked questions about it, he was certainly in custody and was clearly being interrogated. As such, *Miranda* would ordinarily apply. However, the court of appeals stated that the questioning was not designed to elicit incriminating information, but was instead designed to deal with an emergency situation. Therefore, it could be argued that such questioning was not "interrogation" within the meaning of *Miranda*. However, the court felt that other reasons existed supporting the officers' actions in this case:

The officers found themselves presented with an emergency situation possibly life-threatening or likely to cause personal injuries or serious property damage. They had been informed of the presence of a bomb. They were themselves possibly within a danger zone of grave consequences, as were Cronk and any other persons who came upon the scene. At this point, they did not know of the size of the bomb, its manner of detonation, or probable impact. They returned Cronk to the scene and obtained from him pertinent information concerning the location and method of detonation of the bomb. We believe they had a right, even a duty, to make such inquiry of Cronk and that they did not have to risk possible death or serious bodily injury while they read Cronk his *Miranda* rights or waited for Cronk's lawyer to arrive from another city. Under the circumstances of this case, we believe the *Miranda* rule must yield to the emergency.¹⁷⁵

The court therefore held that an emergency exception to the *Miranda* requirements exists where safety of the public, the officers, or the accused

¹⁷⁴443 N.E.2d at 884.

¹⁷⁵*Id.* at 885 (footnote omitted).

is threatened and time is critical to ensure safety.¹⁷⁶ Regarding the diagram drawn at the jail, the court of appeals concluded that the trial court properly excluded this evidence because the emergency had passed and *Miranda* warnings had not yet been given.

In adopting the emergency exception to the *Miranda* requirements, the court of appeals relied on several cases from other jurisdictions¹⁷⁷ and the "emergency exception" to the search warrant requirement.¹⁷⁸ The emergency doctrine has been limited in at least one jurisdiction. In *People v. Quarles*,¹⁷⁹ the New York Court of Appeals rejected an emergency exception to the *Miranda* rule under the facts present in that case.¹⁸⁰ The United States Supreme Court may resolve this issue, as the Court has granted certiorari to review the *Quarles* case.¹⁸¹

2. *Confessions and the Right to Counsel*.—An area of confusion in the law of confessions was reflected in the decisions of the Indiana Supreme Court this past year concerning the continued interrogation of a defendant once he has in some manner invoked the right to counsel. In *Wall v. State*,¹⁸² the court had little difficulty reversing a conviction when the defendant expressly invoked his right to an attorney five times during the course of a confession which was later introduced at trial.

The issue was not so simple, however, in *Bryan v. State*.¹⁸³ In this case, the defendant had been properly advised of his *Miranda* rights. During his interrogation the defendant indicated that he wanted an attorney present, but it was unclear whether he was requesting one during questioning or for trial. When the defendant seemed to indicate that he wanted an attorney during questioning, the tape recorder was shut off for several minutes. During this silent interval the two interrogating police officers apparently just sat there and said nothing. When the defendant asked the officers why they had stopped, the police told him that since

¹⁷⁶*Id.* at 887.

¹⁷⁷*Id.* at 886 (citing *United States v. Castellana*, 500 F.2d 325 (5th Cir. 1974); *Commonwealth v. Hankins*, 293 Pa. Super. 341, 439 A.2d 142 (1981)).

¹⁷⁸443 N.E.2d at 885 (citing *Mincey v. Arizona*, 437 U.S. 385 (1978); *Michigan v. Tyler*, 436 U.S. 499 (1978); *Bruce v. State*, 268 Ind. 180, 375 N.E.2d 1042, *cert. denied*, 429 U.S. 988 (1978); *Maxey v. State*, 251 Ind. 645, 244 N.E.2d 650 (1969), *cert. denied*, 397 U.S. 949 (1970)).

¹⁷⁹58 N.Y.2d 664, 444 N.E.2d 984, 458 N.Y.S.2d 520 (1982), *cert. granted sub nom.* *New York v. Quarles*, 103 S. Ct. 2118 (1983).

¹⁸⁰After the defendant had been frisked and handcuffed police officers discovered an empty shoulder holster and asked where the gun was. The defendant pointed and said, "The gun is over there." 58 N.Y.2d at 664, 444 N.E.2d at 985, 458 N.Y.S.2d at 521. *But cf.* *People v. Chesnut*, 51 N.Y.2d 14, 409 N.E.2d 958, 431 N.Y.S.2d 485 (1980) (stop and frisk was justified by reasonable suspicion, and single question by officer about location of gun was justified to protect officer's safety and did not constitute custodial interrogation).

¹⁸¹*New York v. Quarles*, 103 S. Ct. 2118 (1983).

¹⁸²441 N.E.2d 682 (Ind. 1982).

¹⁸³438 N.E.2d 709 (Ind. 1982).

he said he wanted an attorney they could not ask him any more questions. The defendant then stated that he wanted an attorney to defend him, but that he wanted to tell the police what happened. After the tape recorder was turned back on, the defendant still seemed somewhat confused, but did agree that he wanted to give a statement first, and then obtain an attorney. In ruling that the tape-recorded confession was admissible, a majority of the Indiana Supreme Court stated: "It appears that defendant exercised his free will and voluntarily and knowingly made the confession."¹⁸⁴

Justice DeBruler authored a dissent joined by Justice Hunter.¹⁸⁵ The dissent began by commenting that the analysis employed by the majority was faulty because it mixed the separate issues of whether the confession was voluntary with the question of whether there was a valid waiver of the right to counsel, the latter requiring a higher standard of proof from the State. The dissent relied on the United States Supreme Court decision in *Edwards v. Arizona*,¹⁸⁶ and found that the State bore the burden of showing that the defendant waived his right to counsel when the tape recorder was turned back on. The State's burden was to show beyond a reasonable doubt that the defendant knowingly and intelligently waived his right to counsel. The dissent found that the defendant's confusion indicated that the State had not met this burden.

A two-step analysis is the appropriate way to analyze the *Bryan* case. This is clear from the split decision of the United States Supreme Court in *Oregon v. Bradshaw*,¹⁸⁷ which interpreted *Edwards v. Arizona*. The plurality opinion in *Bradshaw* held that when a suspect undergoing interrogation requests an attorney, and the police stop their interrogation and subsequently resume it at a later time without the presence of an attorney, two questions must be asked: first, whether the suspect "initiated" further conversation with the police, and second, if he did, whether, in light of the totality of the circumstances, he made a knowing and intelligent waiver of the right to counsel.¹⁸⁸

In *Bradshaw*, the defendant's waiver of the right to counsel was not at issue, rather the split in the Supreme Court was over the definition of the term "initiate" for the purpose of an *Edwards* analysis. The plurality opinion in *Bradshaw* ruled that a defendant initiates a conversation with the police within the meaning of *Edwards* when he evinces "a willingness and a desire for a generalized discussion about the investigation,"¹⁸⁹ as opposed to a request for a cigarette or a drink of

¹⁸⁴*Id.* at 718.

¹⁸⁵*Id.* at 719 (DeBruler, J., dissenting).

¹⁸⁶451 U.S. 477 (1981).

¹⁸⁷103 S. Ct. 2830 (1983) (plurality opinion).

¹⁸⁸*Id.* at 2832. Justice Powell, concurring in the judgment of the plurality opinion, would not apply a two-step analysis. *Id.* at 2837-38 (Powell, J., concurring).

¹⁸⁹*Id.* at 2835.

water. The dissent would have limited initiation to a communication by the defendant "about the subject matter of the criminal investigation."¹⁹⁰ In the *Bradshaw* case the defendant asked, "Well, what is going to happen to me now?"¹⁹¹ This question, coming after he had requested an attorney and after questioning had stopped, was held to have initiated further conversation.

In summary, the majority's analysis in the *Bryan* case may have been incorrect, as the dissent claimed, because it did not separately examine whether the defendant made a valid waiver of the right to counsel. However, the conclusion is sound on the initiation issue. Bryan's inquiry as to why the police had halted their interrogation seems to be as much of an "initiation" as the defendant's question in *Bradshaw*.

In another case decided last year, Justice DeBruler again disagreed with a majority of the supreme court, this time on the adequacy of an advisement of the right to counsel during interrogation. In *Solomon v. State*,¹⁹² the defendant was advised orally and in writing that he was "entitled to legal counsel present at all times,"¹⁹³ and was orally advised that he could use the telephone to contact an attorney if he wished. The majority found this advice sufficient to inform the defendant that he had a right to have an attorney present during interrogation. Justice DeBruler, however, felt that the advice on this point must be more explicit to satisfy the *Miranda* requirements.¹⁹⁴

3. *Miranda Warnings in Non-traditional Settings.*—The necessity for *Miranda* warnings in a judicial hearing was explored in *State v. McClain*.¹⁹⁵ At the defendant's first judicial appearance, now called an initial appearance, the trial judge advised the defendant that he was charged with robbery and asked whether he was going to hire an attorney. The defendant responded: "The reason why I did the robberies, I needed money, so therefore I can't hire an attorney because I don't have any money."¹⁹⁶ The trial judge excluded this statement from the trial and the defendant was acquitted. On the State's appeal, the fourth district court of appeals held that the trial judge erred in excluding the statement. Although the court cautioned judges to warn defendants before they speak at judicial hearings, it stated that "'interrogation occurs only when officials intend to elicit, by whatever means, substantive evidence concerning criminal activity.'" ¹⁹⁷ Here, the judge "did not intend to elicit evidence or obtain a confession when he asked McClain if he was going to hire a lawyer."¹⁹⁸

¹⁹⁰*Id.* at 2839 (Marshall, J., dissenting).

¹⁹¹*Id.* at 2833.

¹⁹²439 N.E.2d 570 (Ind. 1982).

¹⁹³*Id.* at 575.

¹⁹⁴*Id.* at 579 (DeBruler, J., dissenting).

¹⁹⁵442 N.E.2d 1131 (Ind. Ct. App. 1982).

¹⁹⁶*Id.* at 1132.

¹⁹⁷*Id.* at 1133 (quoting *Nading v. State*, 268 Ind. 634, 639, 377 N.E.2d 1345, 1348 (1978)).

¹⁹⁸442 N.E.2d at 1134.

The court concluded that the statements McClain gave were voluntary and not the product of custodial interrogation. *Miranda* warnings were therefore not required and the statement should have been admitted.¹⁹⁹

Two interesting, and apparently conflicting, decisions were handed down on the issue of whether a probation officer must give a probationer *Miranda* warnings. The fourth district court of appeals reviewed this question in detail in *Alspach v. State*,²⁰⁰ where a probationer's statements to a probation officer were admitted at a probation revocation hearing. The court of appeals considered the issue to be whether a probation officer supervising a probationer is acting as a police officer or government agent for the purposes of giving *Miranda* warnings, because *Miranda* only applies to questioning by such individuals.²⁰¹ The court of appeals, however, acknowledged that because the right against self-incrimination is involved in this situation, caution should be used. Thus, the court adopted the following guidelines:

Miranda warnings need not be given by probation officers legitimately engaged in the supervision of probationers when

- a) the probationer is not in custody,
- b) the interrogation is reasonably related to the officer's duty to supervise the probationer, and,
- c) the questioning is reasonable under all the circumstances, including the length of time and hour of the day or night it is conducted, the manner in which it is conducted, the persons present during questioning, and the place where it is conducted.²⁰²

One of the underlying bases for the court of appeals' decision in *Alspach* was a finding that a probation officer supervising a probationer is an arm of the court, and not a government agent. More recently, however, the Indiana Supreme Court in *Rose v. State*²⁰³ simply stated, without analysis, that the defendant was "correct that [the defendant's probation officer] was an agent of the State."²⁰⁴ Thus, it could be contended that one of the foundational underpinnings of the *Alspach* decision was removed, and that the *Alspach* requirements are no longer good law. However, the supreme court in *Rose* went on to say that any statements made by a defendant to his probation officer "under any con-

¹⁹⁹See also *United States v. Dohm*, 618 F.2d 1169 (5th Cir. 1980) (defendant's statement at judicial hearing not admissible because judge's confusing statements misled defendant concerning whether his statements could be used against him).

²⁰⁰440 N.E.2d 502 (Ind. Ct. App. 1982).

²⁰¹*Id.* at 503 (citing *Turner v. State*, 407 N.E.2d 235 (Ind. 1980); *Trinkle v. State*, 259 Ind. 114, 284 N.E.2d 816 (1972); *Leaver v. State*, 250 Ind. 523, 237 N.E.2d 368 (1968)).

²⁰²440 N.E.2d at 505.

²⁰³446 N.E.2d 598 (Ind. 1983).

²⁰⁴*Id.* at 600.

ditions akin to a custodial interrogation would require that they be preceded by the proper *Miranda* warnings and an acknowledgment that [he] was waiving his rights as described in those warnings."²⁰⁵ When the *Alspach* guidelines are closely examined it appears that they too would require *Miranda* warnings by probation officers before anything "akin to a custodial interrogation" takes place. On this point, *Alspach* and *Rose* can be reconciled.

4. *Juvenile Confessions*.—Several cases in the past year also discussed the special rules applicable to a juvenile's waiver of rights, particularly the "meaningful consultation" and "no adverse interest" requirements.²⁰⁶ In *Andrews v. State*,²⁰⁷ a juvenile suspect was arrested, taken to the police station, and advised that he had the right to confer with a parent or guardian before the police could question him. The defendant stated that he wanted to talk to his grandmother, and that he did not want to talk to his parents. The police complied with his request. After a juvenile detention hearing, the defendant was taken back to the police station where he refused to speak to his mother, who was then at the station. The police advised the defendant and his grandmother of his rights, both signed a waiver form, and the defendant gave a statement.

The trial court did not grant defendant's motion to suppress the statement and on appeal the defendant challenged the admission of his statement on the ground that he was not allowed to confer with his parents. Citing the leading case on juvenile confessions, *Lewis v. State*,²⁰⁸ the court stated the special requirements for a juvenile's waiver of rights are designed to give a juvenile the special status he enjoys in other areas of the law and to insure that a juvenile has a meaningful opportunity to consult with his parents or guardians, without police coercion, before he gives a statement. The court found the grandmother in this case to be a de facto guardian, and stated:

The main concern of *Lewis* and its progeny is to afford the

²⁰⁵*Id.*

²⁰⁶IND. CODE § 31-6-7-3 (1982) provides, in pertinent part:

(a) Any rights guaranteed to the child under the Constitution of the United States, the Constitution of Indiana, or any other law may be waived only:

- (1) by counsel retained or appointed to represent the child, if the child knowingly and voluntarily joins with the waiver; or
- (2) by the child's custodial parent, guardian, custodian, or guardian ad litem if:
 - (A) that person knowingly and voluntarily waives the right;
 - (B) that person has no interest adverse to the child;
 - (C) meaningful consultation has occurred between that person and the child; and
 - (D) the child knowingly and voluntarily joins with the waiver.

(b) The child may waive his right to meaningful consultation under subdivision (a)(2)(C) if he is informed of that right, if his waiver is made in the presence of his custodial parent, guardian, custodian, guardian ad litem, or attorney, and if the waiver is made knowingly and voluntarily.

²⁰⁷441 N.E.2d 194 (Ind. 1982).

²⁰⁸259 Ind. 431, 288 N.E.2d 138 (1972).

juvenile defendant a stabilizing and relaxed atmosphere in which to make a serious decision that could possibly affect the rest of his life. The primary focus should be on the defendant's rights, not that of the parents. The record indicates that Defendant trusted his grandmother more than his parents. A trusting atmosphere, rather than an atmosphere riddled with animosity, would be more conducive to a meaningful consultation between a juvenile and an adult.²⁰⁹

The *Lewis* case involved a juvenile confession that was taken before the enactment of the present juvenile code, so no reference to the code was made by the court. However, the Indiana Supreme Court correctly interpreted the waiver of rights section of the juvenile code²¹⁰ in the *Andrews* case, because this section was primarily intended to codify the *Lewis* requirements.²¹¹ The central issue is whom the juvenile trusts, and if a juvenile trusts another close relative, or de facto guardian, more than his own parents, then it is with that person that he can most likely have a meaningful consultation.²¹²

There is, however, one important exception to this "trusted person" rule. The trusted person must not have an interest adverse to that of the juvenile. This was emphasized in *Taylor v. State*,²¹³ a recent decision by the Indiana Supreme Court. The defendant in *Taylor* was given an opportunity to consult with his mother prior to waiving his rights and giving a statement that was subsequently admitted into evidence at his trial. The defendant had been living with his uncle for at least a year prior to his arrest, although his mother saw him two or three times a month.²¹⁴ The defendant contended that he viewed his relationship with his mother with hostility and therefore should have been permitted to speak with someone else. However, the uncle, with whom the defendant had been living, was also arrested and charged with the same crime as the defendant. Therefore, the uncle would have had a potentially adverse interest to the juvenile and would not be a proper person to consult.²¹⁵ Under these facts the State took adequate care to ensure that the juvenile "had the opportunity for meaningful consultation with a person who had no 'interest' adverse to him"²¹⁶ by allowing him to talk with his mother.

²⁰⁹441 N.E.2d at 198.

²¹⁰IND. CODE § 31-6-7-3 (1982); see *supra* note 206.

²¹¹IND. CODE ANN. § 31-6-7-3 commentary at 303 (West 1979).

²¹²See Johnson, *supra* note 117, at 155-58.

²¹³438 N.E.2d 275 (Ind. 1982).

²¹⁴The defendant had not lived with his father for an even longer period of time. *Id.* at 284.

²¹⁵See also *Borum v. State*, 434 N.E.2d 581 (Ind. Ct. App. 1982) (holding that minor's waiver of rights was invalid where it was joined by a welfare caseworker who signed the delinquency petition against the juvenile).

²¹⁶438 N.E.2d at 284.

D. Miscellaneous Pre-Trial Issues

1. *Grand Jury*.—The court of appeals' decision in *Brown v. State*²¹⁷ may be significantly altered by a provision of the 1981 criminal procedure code that became effective September 1, 1982.²¹⁸ In *Brown* the defendant was indicted by a grand jury for involuntary manslaughter in a child abuse case. On appeal, the defendant claimed that his motion to dismiss the indictment should have been granted by the trial court because the investigating police officer was present during the grand jury proceedings. Although the prosecuting attorney actually conducted the examination of the witnesses, the officer actively intervened in the examination of nine witnesses, including the defendant and another suspect. The officer apparently stressed to the witnesses that they should "testify more fully and honestly"²¹⁹ and put pressure on the suspects to testify although their attorneys advised them to the contrary.

The court of appeals reversed the conviction because the "unauthorized presence and participation"²²⁰ of the officer in the grand jury prejudiced the defendant's rights.²²¹ The new procedure code changed prior law by permitting "any witness the prosecuting attorney or the grand jury requests" to be present during the taking of testimony.²²² Therefore, an investigating officer's presence in the grand jury may now be authorized; however, an officer's conduct during grand jury proceedings may still be restricted by *Brown* because the decision was based on concepts of fairness as well as on the unauthorized presence of the officer.

The fact of Sergeant Mann's presence and the nature of his participation, though not pervading the entire hearing, was not only detrimental to a proper atmosphere and impartial consideration of the facts, but it also demonstrated oppression of witnesses. It is wholly unreasonable to infer that the totality of these circumstances did not influence the course of the proceedings in a manner adverse to Brown's substantial right to a detached and neutral atmosphere. To permit an indictment to stand because there was sufficient evidence supporting a finding of probable cause by the grand jury regardless of the manner in which the evidence was obtained and the manner in which the grand jury

²¹⁷434 N.E.2d 144 (Ind. Ct. App. 1982).

²¹⁸Act of May 5, 1981, Pub. L. No. 298, § 3, 1981 Ind. Acts 2314 (codified at IND. CODE § 35-34-2-4(c) (1982)).

²¹⁹434 N.E.2d at 145.

²²⁰*Id.*

²²¹*See State v. Bowman*, 423 N.E.2d 605, 608 (Ind. 1981) (presence of police officers during grand jury proceedings is unauthorized and not proper however, "the presence of unauthorized persons during grand jury proceedings does not warrant *per se* the dismissal of an individual").

²²²IND. CODE § 35-34-2-4(c) (1982).

hearing was conducted vitiates the purpose of the prohibition against oppressive prosecution and the letter of the statute.²²³

2. *Change of Judge.*—During the survey period the Indiana General Assembly once again enacted legislation concerning the right to a change of judge. Before the enactment of the 1981 criminal procedure code, the right to a change of judge was governed primarily by Criminal Rule 12. As interpreted by the Indiana Supreme Court, this rule required that a timely application for a change of judge be granted despite the absence of a verified allegation of bias and prejudice and without a hearing on the application.²²⁴ This was labeled the right to an “automatic” change of judge.

The 1981 procedure code adopted a new change of judge statute²²⁵ that became effective June 1, 1981.²²⁶ The new change of judge statute could be read in several different ways, but one interpretation would require verified allegations of cause in all motions for change of judge. This reading would eliminate the right to an automatic change of judge. The Indiana Supreme Court apparently believed the legislature intended this result, because the court amended the first paragraph of Criminal Rule 12, effective July 1, 1981, noting that it had done so after examining the new criminal procedure code.²²⁷ The supreme court amendment eliminated the right to an automatic change of judge from Criminal Rule 12.

In 1982, the legislature added a preamble to the criminal procedure code which stated that the 1981 change of judge law was merely a restatement of prior law and should not be construed as having altered prior change of judge law.²²⁸ The Indiana Supreme Court did not revise Criminal

²²³434 N.E.2d at 146. In another case concerning grand jury proceedings, *In re Elkhart Grand Jury*, June 20, 1980, 433 N.E.2d 835 (Ind. Ct. App. 1982), the third district court of appeals reiterated the rule that grand juries do not have the authority “to issue reports criticizing . . . conduct . . . that does not constitute an indictable offense.” *Id.* at 838. This decision does not establish new law, but is notable for its partial reliance on sixty-year-old Indiana precedent. See *Coons v. State*, 191 Ind. 580, 134 N.E. 194 (1922).

²²⁴State ex rel. Benjamin v. Criminal Court of Marion County, 264 Ind. 191, 341 N.E.2d 395 (1976); accord *Briscoe v. State*, 180 Ind. App. 450, 388 N.E.2d 638 (1979).

²²⁵Act of May 5, 1981, Pub. L. No. 298, § 5, 1981 Ind. Acts 2314, 2376-77 (codified at IND. CODE §§ 35-36-5-1 to -2, (1982)).

²²⁶The majority of the procedure code became effective September 1, 1982. Act of May 5, 1981, Pub. L. No. 298, § 10(c), 1981 Ind. Acts 2314, 2392.

²²⁷The first paragraph of IND. R. CRIM. P. 12 now reads:

In any criminal action, a motion for change of judge or change of venue from the county shall be verified or accompanied by an affidavit signed by the Criminal Defendant or the Prosecuting Attorney setting forth facts in support of the statutory basis or bases for the change. An opposing party shall have the right to file counter-affidavits within ten [10] days, and after a hearing on the motion, the ruling of the court may be reviewed only for abuse of discretion.

²²⁸Act of Feb. 25, 1982, Pub. L. No. 204, 1982 Ind. Acts 1518.

Rule 12 in response to the new preamble; therefore, in 1983, the Indiana Legislature enacted the following provision: "In any criminal action, either the State or the defendant is entitled as a substantive right to a change of venue from the judge upon the same grounds and in the same manner as a change of venue from the judge is allowed in civil actions."²²⁹ This apparently returns the right to an automatic change of judge to Indiana criminal law.²³⁰ It should be noted that the legislature stated that this manner of obtaining a change of judge was a "substantive" right. The reason for characterizing the right in this manner is that supreme court rules control over legislative enactments in the area of "procedure,"²³¹ while statutes control over court rules in the area of "substantive" rights.²³² The Indiana Supreme Court has concluded that the right to a change of judge is a substantive right which can be conferred only by the legislature, but the method and time of asserting the right are matters of procedure which are controlled by court rule.²³³

3. *Summons, Initial Hearings, Omnibus Dates.*—Several new procedures in Indiana criminal law became effective in 1982, including initial hearings²³⁴ and omnibus dates.²³⁵ Certain aspects of these procedures were modified by 1983 legislation.²³⁶ Under prior law the procedures for an initial hearing following issuance of a summons to appear were unclear.²³⁷ The law provided that if an indictment or information is filed charging a person with a misdemeanor, the court could issue a summons in lieu of an arrest warrant, with the summons setting forth the offense and commanding the defendant to appear at a stated time and place.²³⁸ The new law amends this to require that the court set the appearance date for the defendant at least seven days after the issuance of a summons.²³⁹ The new law also requires that the court determine the existence of probable cause to believe a crime was committed before the court may issue an arrest warrant when a person does not appear in response to a summons.²⁴⁰

²²⁹Act of Apr. 22, 1983, Pub. L. No. 311-1983, § 48, 1983 Ind. Acts 1861, 1922 (codified at IND. CODE § 35-36-6-1(a) (Supp. 1983)).

²³⁰See IND. R. TR. P. 76.

²³¹State v. Bridenhager, 257 Ind. 699, 279 N.E.2d 794 (1972).

²³²State ex rel. Blood v. Gibson Circuit Court, 239 Ind. 394, 157 N.E.2d 475 (1959).

²³³*Id.*

²³⁴Act of May 5, 1981, Pub. L. No. 298, § 2, 1981 Ind. Acts 2314, 2320 (current version at IND. CODE § 35-34-4-1(a) (Supp. 1983) (effective Sept. 1, 1982)).

²³⁵Act of May 5, 1981, Pub. L. No. 298, § 5, 1981 Ind. Acts 2314, 2382 (current version at IND. CODE § 35-36-8-1 (Supp. 1983) (effective Sept. 1, 1982)).

²³⁶Act of Apr. 18, 1983, Pub. L. No. 320-1983, 1983 Ind. Acts 1943.

²³⁷See Johnson, *supra* note 117, at 133.

²³⁸IND. CODE § 35-33-4-1(a) (1982) (amended 1983).

²³⁹Act of Apr. 18, 1983, Pub. L. No. 320-1983, Sec. 5, § 1(a), 1983 Ind. Acts 1943, 1945 (codified at IND. CODE § 35-33-4-1(a) (Supp. 1983)).

²⁴⁰Act of Apr. 18, 1983, Pub. L. No. 320-1983, Sec. 5, § 1(b), 1983 Ind. Acts 1943, 1945 (codified at IND. CODE § 35-33-4-1(b) (Supp. 1983)). See also, IND. CODE § 35-33-4-1(c) (Supp. 1983) (similar provision when court issues summons and "is satisfied that the person will not appear").

Another amendment provides that when a person is issued a summons, or a summons and a promise to appear, there need be no probable cause determination at the initial hearing "unless the prosecuting attorney requests on the record that the person be held in custody before his trial."²⁴¹ Thus, for many misdemeanor cases a probable cause determination at or before the initial hearing will no longer be required.

Another amendment to the initial hearing statute provides that the judge may advise the accused of his rights orally or in writing.²⁴² This same section, under the old law, required the judge to advise the accused at the initial hearing that a preliminary plea of not guilty would be entered for him, which would become a formal plea of not guilty within certain periods of time after the initial hearing unless the defendant "after consulting with counsel" entered a different plea.²⁴³ This was amended in 1983 to strike the phrase "after consulting with counsel."²⁴⁴ As previously written, a defendant apparently could not plead guilty at the initial hearing, even if he had unequivocally and knowingly waived his right to counsel and desired to plead guilty, unless he had first consulted an attorney.

One of the most confusing aspects of the new procedure code was the concept of omnibus dates.²⁴⁵ Recent amendments have greatly simplified this area of the law. The omnibus date in felony cases will be set by the judicial officer at the initial hearing, and can be no earlier than forty-five days, and no later than seventy-five days after the completion of an initial hearing, unless the prosecutor and defendant agree upon another date.²⁴⁶ A new provision also makes absolutely clear that the purpose of the omnibus date is to establish a date from which various other deadlines in the procedure code are set.²⁴⁷ Finally, the amendments state that the omnibus date set at the initial hearing will, without exception, remain the omnibus date for the case until final disposition.²⁴⁸ Thus, the omnibus date cannot be continued.

4. *Right to Counsel.*—In *Nation v. State*,²⁴⁹ the second district court of appeals, in effect, applied guilty plea standards to determine whether

²⁴¹Act of Apr. 18, 1983, Pub. L. No. 320-1983, § 9, 1983 Ind. Acts 1943, 1950 (codified at IND. CODE § 35-33-7-3.5 (Supp. 1983)).

²⁴²Act of Apr. 18, 1983, Pub. L. No. 320-1983, § 10, 1983 Ind. Acts 1943, 1950-51 (codified at IND. CODE § 35-33-7-5 (Supp. 1983)).

²⁴³IND. CODE § 35-33-7-5 (1982) (amended 1983).

²⁴⁴Act of Apr. 18, 1983, Pub. L. No. 320-1983, § 10, 1983 Ind. Acts 1943, 1951 (codified at IND. CODE § 35-33-7-5 (Supp. 1983)).

²⁴⁵IND. CODE § 35-36-8-1 (1982) (amended 1983); see Johnson, *supra* note 117, at 139.

²⁴⁶Act of Apr. 18, 1983, Pub. L. No. 320-1983, Sec. 22, § 1(a), 1983 Ind. Acts 1943, 1961 (codified at IND. CODE § 35-36-8-1(a) (Supp. 1983)).

²⁴⁷Act of Apr. 18, 1983, Pub. L. No. 320-1983, Sec. 22, § 1(b), 1983 Ind. Acts 1943, 1962 (codified at IND. CODE § 35-36-8-1(b) (Supp. 1983)).

²⁴⁸Act of Apr. 18, 1983, Pub. L. No. 320-1983, Sec. 22, § 1(d), 1983 Ind. Acts 1943, 1962 (codified at IND. CODE § 35-36-8-1(d) (Supp. 1983)).

²⁴⁹426 N.E.2d 436 (Ind. Ct. App. 1981), *reh'g denied*, 438 N.E.2d 1003 (Ind. Ct. App. 1982), *vacated*, 445 N.E.2d 565 (Ind. 1983).

a defendant had effectively waived his right to counsel and chosen to proceed to trial *pro se*. The court of appeals held that the record of the proceedings of a defendant who seeks to waive his right to counsel and proceed *pro se* must, on its face, include "direct evidence" that the defendant was clearly advised of the following: "1) of his right to counsel, 2) the exercise of his right to proceed *pro se* constitutes a waiver of that right, and 3) of the disadvantages of self-representation."²⁵⁰ The record must also show that the defendant "clearly and unequivocally exercised his right to proceed *pro se*."²⁵¹

The Indiana Supreme Court disagreed and vacated the court of appeals' decision.²⁵² The supreme court agreed that it is dangerous for a defendant to go to trial *pro se*; however, the supreme court refused to require that the advisements needed for a valid guilty plea be given to a defendant who is waiving the right to counsel. The court noted that guilty pleas are, in themselves, convictions, whereas the waiver of counsel and self-representation, no matter how ill-advised, is not the equivalent of a conviction. The defendant in *Nation* had retained counsel but became dissatisfied and fired his attorney on the morning of trial. The trial court advised the defendant of the dangers of self-representation and urged him to have representation. The defendant refused and the trial court permitted the defendant's attorney to withdraw, but ordered that he remain in a stand-by capacity. Because the defendant had the funds to hire an attorney, he was not entitled to appointed counsel. The trial court said they would then proceed to try the case and asked the defendant if that was his wish. The defendant replied that it was. Under these facts, the supreme court held that the trial court did not compel the defendant to proceed *pro se* and that the defendant knowingly and intelligently waived his right to counsel.²⁵³

An interesting challenge to local public defender systems was asserted in *Wright v. State*.²⁵⁴ The defendant contended that the public defender selection system in Lake County violated the sixth amendment and the Code of Professional Responsibility by preventing public defenders from acting as independent advocates. Public defenders in Lake County were assigned to specific courtrooms and were alleged to be "hired by and serve at the pleasure and behest of the judges"²⁵⁵ of the criminal division of the superior court. The defendant argued that this caused the public defenders to serve two clients, the defendant and the judge in whose courtroom they worked, preventing an independent and zealous defense. The

²⁵⁰438 N.E.2d at 1004-05 (footnotes omitted).

²⁵¹*Id.* at 1005.

²⁵²445 N.E.2d 565 (Ind. 1983).

²⁵³*Id.* at 569. *See also* Phillips v. State, 441 N.E.2d 201 (Ind. 1982); Jackson v. State, 441 N.E.2d 29 (Ind. Ct. App. 1982).

²⁵⁴436 N.E.2d 335 (Ind. Ct. App. 1982).

²⁵⁵*Id.* at 338.

defendant urged that the public defenders were acting as amici curiae rather than independent advocates in violation of the Code of Professional Responsibility. The court of appeals rejected these arguments and concluded that absent proof that some improper pressure was exerted on the public defenders, directly or indirectly, indigent defendants in Lake County were ensured the "guiding hand of counsel."²⁵⁶

E. Guilty Pleas

1. *Advisements Concerning Sentencing.*—One of the most frequently litigated issues in recent years has been whether the trial court, before accepting a guilty plea, has properly advised the defendant of the range of possible sentences he might receive if the plea is accepted. This admonition by the trial judge is required by statute. Indiana Code section 35-35-1-2(a)(3) states that the court may not accept a guilty plea without first informing the defendant "of the maximum possible sentence and minimum sentence for the crime charged and any possible increased sentence by reason of the fact of a prior conviction or convictions, and of any possibility of the imposition of consecutive sentences."²⁵⁷

Many recent cases have challenged the lower courts' advisements to defendants concerning possible maximum and minimum sentences. In *Brown v. State*,²⁵⁸ the Indiana Supreme Court explained that it is the crime to which the defendant is pleading guilty that determines the range of penalties of which the defendant must be advised, not the charges that may have been dismissed as part of a plea agreement.

The defendant in *Brown* was originally charged with attempted murder. He subsequently pled guilty to attempted voluntary manslaughter pursuant to a plea agreement. On appeal the defendant contended that his guilty plea was not knowingly, intelligently, and voluntarily made because he was not informed of the minimum possible sentence he might have received on the original attempted murder charge had he proceeded to trial. A factual dispute regarding whether the defendant was advised of the penalties for attempted murder existed, but the record was clear that he had been advised of the maximum and minimum possible sentences for attempted voluntary manslaughter, the crime to which he pled guilty. The supreme court said that to satisfy the statutory requirement, the trial court must advise the defendant of the range of possible sentences for the offense to which the defendant actually pleads guilty. The court noted that a "[d]efendant is entitled to be informed of the actual penal consequences of his plea of guilty, not the hypothetical result of a trial on a charge which the State has agreed not to prosecute in return for the plea."²⁵⁹

²⁵⁶*Id.* at 340 (citing *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963)).

²⁵⁷IND. CODE § 35-35-1-2(a)(3) (1982).

²⁵⁸443 N.E.2d 316 (Ind. 1983).

²⁵⁹*Id.* at 319.

Although *Brown* clearly explains that the trial court need only advise the defendant of the potential penalties for the crime to which he is pleading guilty, the exact nature of that advisement remained a source of confusion in Indiana until the supreme court decided *Johnson v. State*.²⁶⁰ In *Johnson*, the defendant pled guilty to murder and was advised by the trial judge that if his plea were accepted, he could be sentenced for more than the presumptive period of forty years. However, the judge did not discuss the effect that the defendant's prior convictions could have on the sentence. Subsequently, the defendant was sentenced to fifty years imprisonment. In post-conviction relief proceedings, the defendant sought reversal of the trial court's judgment on the ground that "his advisements were deficient in that he was not advised that his prior convictions could be considered as aggravating circumstances for sentencing purposes."²⁶¹ The defendant contended that the deficient advice constituted a violation of Indiana Code section 35-35-1-2.²⁶²

The State argued that the trial court had complied with the statute because it had advised the defendant of the minimum and maximum sentences and that aggravating and mitigating factors could be considered in increasing or decreasing the presumptive sentence.²⁶³ In support of its argument the State relied on the court of appeals' decision in *VanDerberg v. State*,²⁶⁴ which held that "the trial court did not have to inform [the defendant] that his prior convictions could result in the aggravated sentence."²⁶⁵

The supreme court disagreed with the State's argument, expressly disapproved *VanDerberg*, and concluded that compliance with Indiana Code section 35-35-1-2 required the trial judge to "specifically advise [the defendant] that his prior convictions could be considered aggravating circumstances for sentencing purposes,"²⁶⁶ or that the record "reflect that [the defendant] was aware that his prior convictions could result in an increased sentence."²⁶⁷

Another recent decision emphasized the importance of advising a defendant of the minimum sentence for the crime with which he is charged before the court accepts his guilty plea. In *McKinney v. State*,²⁶⁸ the defen-

²⁶⁰453 N.E.2d 975 (Ind. 1983). It should be noted that the *Johnson* case was decided well after this survey period had ended; however, because this case overruled one decision during the survey period, *VanDerberg v. State*, 434 N.E.2d 936 (Ind. Ct. App. 1982), and clarified this area of criminal law, it is discussed in this Survey Article.

²⁶¹453 N.E.2d at 976.

²⁶²See *supra* text accompanying note 257.

²⁶³453 N.E.2d at 977.

²⁶⁴434 N.E.2d 936 (Ind. Ct. App. 1982), *overruled*, 453 N.E.2d 975, 977 (Ind. 1983).

²⁶⁵453 N.E.2d at 977 (quoting *VanDerberg v. State*, 434 N.E.2d 936, 938 (Ind. Ct. App. 1982)).

²⁶⁶See 453 N.E.2d at 978 (Pivarnik, J., dissenting).

²⁶⁷*Id.* at 977.

²⁶⁸442 N.E.2d 727 (Ind. Ct. App. 1982).

dant entered a plea of guilty to burglary as a Class B felony and to one other charge. The plea agreement called for the defendant to receive an executed sentence of ten years on the burglary charge and a consecutive executed sentence on the other.²⁶⁹ The trial court accepted the plea agreement, but sentenced the defendant to eight years on the burglary charge and two years on the second charge, to be served consecutively.

The third district court of appeals reversed. The trial court had not advised the defendant of the minimum possible sentence for burglary because the defendant had pled guilty pursuant to a plea agreement which called for a specific sentence. The trial court, therefore, believed that advice concerning the minimum sentence would have been "superfluous."²⁷⁰ The court of appeals reasoned that a specified sentence in a plea agreement does not remove the trial court's obligation to give proper advisements. The majority concluded that correct advisement concerning the minimum sentence not only ensures that the defendant makes an informed decision to plead guilty, but also helps avoid unnecessary appeals.²⁷¹

Judge Hoffman dissented, arguing that once the trial court accepted the plea agreement, it was bound by the terms of the agreement, including the specified sentence.²⁷² Therefore, it was difficult to perceive how the defendant could have been prejudiced by the court's failure to inform him of the minimum sentence. Moreover, the defendant actually received a lesser sentence than specified in the plea agreement. The dissent would have remanded the case to the trial court with instructions to sentence the defendant in accordance with the agreement.

In another decision involving advice of sentence ranges, the first district court of appeals reversed a conviction based on a guilty plea. In *Helton v. State*,²⁷³ the defendant had been properly advised of the minimum sentence at his arraignment but was not properly advised at the time of his guilty plea fifty-nine days later. The court of appeals held that this time gap between the proper advisement and the entry of the plea was fatal to the conviction.²⁷⁴

Another issue that has arisen frequently in recent years is whether a defendant must be advised of the "collateral" sentencing consequences of his guilty plea.²⁷⁵ During the survey period, the Indiana Court of Ap-

²⁶⁹*Id.* at 728 (Hoffman, J., dissenting).

²⁷⁰*Id.*

²⁷¹*Id.* at 727.

²⁷²*Id.* at 728 (Hoffman, J., dissenting); see also *Phillips v. State*, 441 N.E.2d 201 (Ind. 1982); *State ex rel. Goldsmith v. Marion County Superior Court*, 419 N.E.2d 109 (Ind. 1981); IND. CODE § 35-35-1-2(a)(4) (1982).

²⁷³443 N.E.2d 1201 (Ind. Ct. App. 1982).

²⁷⁴*Id.* at 1202. Compare *George v. State*, 403 N.E.2d 339 (Ind. 1980) (15 day period between advisement concerning constitutional rights and entry of plea did not invalidate plea) with *Beard v. State*, 176 Ind. App. 348, 375 N.E.2d 270 (1978) (70 day gap invalidated plea) and *Davis v. State*, 432 N.E.2d 67 (Ind. Ct. App. 1982) (advisement at preliminary hearing four months earlier too remote).

²⁷⁵Of course, labeling a consequence "collateral" usually answers the question of whether

peals handed down two superficially conflicting opinions on this issue. In *Catt v. State*,²⁷⁶ the second district found several reasons to vacate a guilty plea. The court emphasized that the trial court misinformed the defendant that he was pleading guilty to a misdemeanor when he was actually pleading guilty to a felony. The court stated that "[t]he potential consequences of a felony conviction in light of the additional punishment assessable against a habitual offender render the characterization of Catt's plea as a misdemeanor plea material."²⁷⁷ However, in *Owens v. State*,²⁷⁸ the third district upheld the defendant's guilty plea despite the trial court's failure to advise him, before the plea was accepted, of "possible collateral consequences, such as the potential of a subsequent conviction as a habitual offender."²⁷⁹ In a concurring opinion, Justice Garrard noted a common ground between *Catt* and *Owens*. Justice Garrard suggested that the better practice is at least to advise the accused that he is pleading guilty to a felony.²⁸⁰ Neither decision would apparently require the trial judge to go further and advise the defendant about the myriad of potential future consequences of his guilty plea.²⁸¹

2. *Written versus Oral Advisements.*—The strictness imposed upon trial court judges concerning advice to defendants who plead guilty was further emphasized by the Indiana Supreme Court's decision in *Early v. State*.²⁸² *Early* is the most recent in a series of cases concerning the advisement of an accused through a combination of written advisements signed by the defendant and oral advisements given by the judge at the time the plea is accepted. In an earlier case, *Clark v. State*,²⁸³ a three-

the defendant should be advised of it. In the past, Indiana courts have ruled that a guilty plea is not rendered involuntary when the defendant is not advised that the parole board could "set him back," i.e., require the sentence on his new conviction to begin only after he had completed his present term on another crime. *Jamerson v. State*, 394 N.E.2d 222 (Ind. Ct. App. 1979); *Odore v. State*, 178 Ind. App. 444, 382 N.E.2d 1024 (1978). Nor is it necessary to advise the defendant of his parole possibilities unless special parole provisions exist which are applicable to the crime he committed. *Romine v. State*, 431 N.E.2d 780 (Ind. 1982); *Greer v. State*, 428 N.E.2d 787 (Ind. 1981); cf. FED. R. CRIM. P. 11(c)(1) (requiring only advice of a "special parole term"). Also, where a guilty plea is challenged on the ground that the defendant has been incorrectly advised about sentencing, and the information in question is not statutorily required to be imparted by the trial court, the validity of the plea is measured by: "(1) whether the defendant was aware of actual sentencing possibilities and (2) whether accurate information would have made any difference in his decision to enter the plea." *Disney v. State*, 441 N.E.2d 489, 492 (Ind. Ct. App. 1982).

²⁷⁶437 N.E.2d 1001 (Ind. Ct. App. 1982).

²⁷⁷*Id.* at 1003.

²⁷⁸437 N.E.2d 501 (Ind. Ct. App. 1982).

²⁷⁹*Id.* at 504.

²⁸⁰*Id.* at 505 (Garrard, J., concurring).

²⁸¹Certainly, a trial judge who accepts a defendant's guilty plea to a felony should not be required to advise the defendant that two more felonies may lead to habitual criminal sentencing. See STANDARDS RELATING TO CRIMINAL JUSTICE § 14-1.4(a)(iii) commentary at 14.25 (1979).

²⁸²442 N.E.2d 1071 (Ind. 1982).

²⁸³270 Ind. 104, 383 N.E.2d 321 (1978).

page plea agreement was submitted to the trial court. One paragraph of the agreement specified that the defendant understood and voluntarily waived his constitutional rights. The rights were listed in the plea agreement and the defendant signed his initials next to each. One of the initialed paragraphs advised the defendant of his right to have compulsory process. Before accepting the plea, the trial judge carefully questioned the defendant regarding his plea and whether he understood all his rights; but the judge neglected to ask the defendant whether he understood his right to compulsory process. A unanimous supreme court held that despite the trial court's omission "it is abundantly clear from the record as a whole that appellant was aware of and understood the full panoply of constitutional rights and the ramifications of his waiver of such rights."²⁸⁴

In a second case, *German v. State*,²⁸⁵ the trial judge, who accepted a guilty plea, "failed to advise the defendants explicitly that by pleading guilty they were waiving certain rights; or that the plea of guilty was an admission of the facts alleged in the information or . . . that the court was not a party to the agreement."²⁸⁶ Further, the trial judge had not specifically questioned the defendants to establish that their pleas were not the result of promises or threats. However, a written plea agreement advised the defendants of their rights and notified them that a guilty plea acts as a waiver of these rights. The defendants initialed each advisement. The trial judge had orally advised the defendants of certain rights, the charges against them, and the maximum and minimum sentences. The supreme court held that the trial judge must personally advise a defendant that a guilty plea operates as a waiver of constitutional rights. This requirement cannot be met by a defendant's initialing a written plea agreement advising him of the consequences of his guilty plea.

The most recent case, *Early v. State*,²⁸⁷ appears to be much closer to *Clark* than to *German*. In *Early*, the record contained a plea agreement which set forth each advisement required by statute.²⁸⁸ At the guilty plea hearing the trial judge apparently attempted to give the necessary advisements, but omitted the right to compulsory process, as the trial judge in *Clark* had done. The supreme court majority conceded that the facts were similar to *Clark* but said that "an essential link is missing."²⁸⁹ The missing link was the trial court's failure to ask the defendant if he understood the terms of the plea agreement. Therefore, the court held that nothing in the record, other than the plea agreement itself, demonstrated that the defendant understood his right to compulsory process. This is a very narrow distinction from *Clark*, so narrow that *Early*

²⁸⁴*Id.* at 106, 383 N.E.2d at 322.

²⁸⁵428 N.E.2d 234 (Ind. 1981).

²⁸⁶*Id.* at 235.

²⁸⁷442 N.E.2d 1071 (Ind. 1982).

²⁸⁸See IND. CODE § 35-35-1-2(a)(1), (2) (1982).

²⁸⁹442 N.E.2d at 1072.

appears to overrule *Clark*. The majority opinion emphasized the fine line drawn by the court.

Although the plea bargain agreement in the instant case reflects that the petitioner understood the rights therein enumerated, including the right to compulsory process, it did not come from the judge, and it did not come at the time of the waiver. In order for rights to be voluntarily waived, they must be known and understood *at the time of the waiver*. The waiver occurs simultaneously with the guilty plea; hence the judge must ascertain, *and the record must reflect*, that the defendant understands his rights and the effect of a guilty plea *at that very moment*. This is the critical time. What he knew or did not know at prior times, including the time when he signed the plea agreement, is immaterial except insofar as it may be an aid to the hearing judge and to us in determining what he comprehended and understood at the time the plea is given.²⁹⁰

Justice Hunter concurred with most of the majority opinion but wrote a separate opinion to express his disagreement with the last sentence quoted above. Justice Hunter found this sentence to be inconsistent with the basic thrust of the majority opinion—a signed plea agreement cannot assist an appellate court in determining what the defendant understood at the time he entered his plea.²⁹¹ Thus, *Early* sounds the death knell for utilizing a written plea agreement rather than oral advisement by the judge as a means for advising an accused in a felony case of his constitutional rights.²⁹²

3. *Advisements Concerning the Nature of the Charge*.—Another portion of the guilty plea statute which has received confusing interpretations by the courts is the requirement that the trial judge determine that the accused “understands the nature of the charge against him.”²⁹³ One federal court has commented that there is no “simple or mechanical rule” concerning how the court is to determine the defendant’s understanding of the charge.²⁹⁴ The dispute seems to be whether the judge accepting the plea must advise the defendant of all the elements of the crime to which he is pleading guilty or whether some other method, such as the

²⁹⁰*Id.*

²⁹¹*Id.* at 1076 (Hunter, J., concurring).

²⁹²In misdemeanor cases, Indiana law specifically provides that a defendant may be advised by a signed written waiver of rights without being orally advised by the trial judge. IND. CODE § 35-35-1-2(b) (1982). Further, as infractions and ordinance proceedings are now civil matters, *see* IND. CODE §§ 34-4-32-1 to -5 (1982 & Supp. 1983), there is no requirement that the defendant in an infraction or ordinance case receive the same advisements as a criminal defendant. *Wirgau v. State*, 443 N.E.2d 327 (Ind. Ct. App. 1982).

²⁹³IND. CODE § 35-35-1-2(a)(1) (1982).

²⁹⁴*United States v. Dayton*, 604 F.2d 931, 937-38 (5th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980); *see also* J. BOND, PLEA BARGAINING AND GUILTY PLEAS §3.37 (2d ed. 1982).

defendant's own recitation of the facts of the crime, will suffice to show that he understands the nature of the charge.

This conflict was highlighted in *Robinson v. State*,²⁹⁵ a 1982 Indiana Supreme Court decision. The defendant entered a plea of guilty to murder, and later unsuccessfully sought post-conviction relief. Appealing the denial of post-conviction relief, the defendant contended that the trial court had not instructed him regarding the elements of murder and that "if the trial court had explained the elements to defendant then he would have understood that voluntary intoxication would be a defense to the crime and would not have pled guilty."²⁹⁶ While otherwise adequately advising the defendant, the trial court failed to explain the elements of the offense. However, upon questioning from the trial judge and his own attorney, the defendant stated he was "well aware" of the charges against him.²⁹⁷ The defendant told the judge he had admitted to the police that he had committed the crime and that he expressed remorse for it. The defendant also gave a detailed account of the murder. Statements by the defendant and his attorney indicated that support for an intoxication defense was unlikely. The majority opinion concluded that the trial court thoroughly questioned the defendant and his attorney to make sure that the accused understood the charges against him.

Justices Hunter and DeBruler dissented because of their belief that the record was inadequate to demonstrate that the defendant understood the nature of the charges against him. The dissenting opinion noted that "the record reveals the elements of the offense were never explained to him."²⁹⁸ The dissent distinguished two earlier Indiana decisions because *Robinson* did not unequivocally admit each element of the crime and because an issue concerning *Robinson's* mental state and intent existed.²⁹⁹ Although *Robinson's* exact statements were not set forth in great detail in the opinion, it appeared that the defendant admitted each element of the crime of murder. He recited the details of the crime and said that he shot a cab driver in the back during a robbery because he thought the driver was reaching for a weapon. This description of the crime appears to be as adequate as those in the two earlier cases Justice Hunter sought to distinguish, but Justice Hunter apparently believed that the admissions were rendered equivocal by the defendant's claim of intoxication.³⁰⁰

²⁹⁵437 N.E.2d 73 (Ind. 1982).

²⁹⁶*Id.* at 73.

²⁹⁷*Id.* at 74.

²⁹⁸*Id.* at 75 (Hunter, J., dissenting).

²⁹⁹*Id.* (citing *DeVillev v. State*, 416 N.E.2d 846 (Ind. 1981); *Vertner v. State*, 400 N.E.2d 134 (Ind. 1980)).

³⁰⁰Justice Hunter indicated that the facts in *Robinson* brought the case within the ambit of *Henderson v. Morgan*, 426 U.S. 637 (1976). In *Morgan*, the defendant pled guilty to second degree murder, but was never informed that the intent to kill was an element of the crime of second degree murder. The Supreme Court found that *Morgan's* intent to

The better practice appears to be for a trial judge specifically to advise the defendant of the elements of the crime to which he is pleading guilty by reading the indictment or information or by some other method.³⁰¹ It should not be necessary, however, for the trial judge to break down the crime into its component elements and discuss each separately.³⁰² Nevertheless, where this practice is not followed, the *Robinson* case indicates that a defendant's detailed admission of the crime may be sufficient to show that he understands the nature of the charge.

4. *Determining the Voluntariness of the Plea.*—Another aspect of the trial court's responsibility to advise the defendant before accepting a guilty plea produced a split opinion by the Indiana Supreme Court in *James v. State*.³⁰³ The issue was whether the trial court had made an adequate inquiry into the voluntariness of the guilty plea. The trial judge asked the defendant if he had signed the plea agreement voluntarily.³⁰⁴ The trial court did not ask the defendant "whether any promises, force or threats were used to obtain the plea," although such a question was statutorily required.³⁰⁵ At his post-conviction relief hearing, the defendant testified that he pled guilty because his attorney so advised him and because his codefendants threatened him and his family. A majority of the supreme court agreed with the State's argument that the statute was "designed to protect defendants against improper coercion by police or prosecutors; not third parties."³⁰⁶ The majority viewed the statutory language as a codification of its earlier decisions which required the trial court to determine whether the State promised the defendant leniency in return for a plea of guilty.³⁰⁷

The dissent, on the other hand, was troubled by the trial court's obvious failure to follow the statutory mandate and inquire into the voluntariness of the plea. Moreover, the dissent believed that threats by persons other than the police or prosecutor were relevant to the issue of voluntariness.³⁰⁸

commit the crime was questionable. However, unlike the defendant in *Robinson*, the defendant in *Morgan* gave no factual statement implying that he had the necessary intent.

³⁰¹C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2D § 173 (1982).

³⁰²*Heckert v. State*, 396 N.E.2d 132 (Ind. 1979); *cf. Davis v. State*, 418 N.E.2d 256 (Ind. Ct. App. 1981).

³⁰³433 N.E.2d 1188 (Ind. 1982) (3-2 decision).

³⁰⁴*Id.* at 1191 (DeBruler, J., dissenting).

³⁰⁵IND. CODE § 35-4.1-1-4 (1976) (current version at IND. CODE § 35-35-1-3(a) (Supp. 1983)).

³⁰⁶433 N.E.2d at 1190.

³⁰⁷*See Watson v. State*, 261 Ind. 97, 300 N.E.2d 354 (1973); *Dube v. State*, 257 Ind. 398, 275 N.E.2d 7 (1971).

³⁰⁸433 N.E.2d at 1191 (DeBruler, J., dissenting).

[I]f threats be made against the accused or his family by relatives and friends of the putative victim, witnesses, or others having an interest in the outcome of the case, those threats are material to a rational determination of whether plea is being made voluntarily. Indeed, prior to the enactment of this modern statute,

5. *Records of Guilty Pleas.*—Another problem that frequently arises with guilty pleas is that a record or transcript of the guilty plea proceedings is not made or is destroyed. This is especially true in misdemeanor cases in a city or town court, which are not courts of record.³⁰⁹ The guilty plea statute does not state that a defendant in a misdemeanor case need not receive the same advice from the court as a defendant in a felony case; indeed, the statute implies the opposite when it says that in a misdemeanor case the requirement of the statute may be satisfied by a signed written waiver.³¹⁰ However, the Indiana Supreme Court requires that a record be kept in felony cases only.³¹¹ Of course, a knowing, intelligent, and voluntary entry of a guilty plea cannot be presumed from a silent record, let alone an absent one.³¹² Thus, it is reasonable to anticipate many challenges to prior misdemeanor convictions on the basis of inadequate or missing records of guilty pleas. The most frequent challenges can be expected from defendants attempting to avoid prosecution as a second offender for driving under the influence,³¹³ or adjudication as an habitual traffic offender.³¹⁴

One recent Indiana decision set aside a 1964 guilty plea to a felony offense which was used to support an habitual offender adjudication, because no adequate record of the guilty plea proceedings had been preserved.³¹⁵ However, another decision, *Zimmerman v. State*,³¹⁶ demonstrated the use of a procedure that may be attempted if a record of the guilty plea hearing is lost or destroyed. In *Zimmerman*, a tape recording of the guilty plea proceeding was made but had been lost or destroyed. Apparently the recording had not been reduced to a transcript. In the post-conviction hearing challenging the plea, the judge who accepted the plea and the prosecutor who tried the case said that they had made copious notes of the proceeding. The judge presiding at the post-conviction hearing ordered the State to submit a record pursuant to Ap-

this Court held that a plea induced by fear of violence from angry and excited mobs was involuntary in the legal sense. This issue, has been debated by English and American judges for more than three centuries. I regard the [case of *Sanders v. State*, 85 Ind. 318 (1882)] as placing this State on that side of the question which renders promises engendering hope for benefit and threats creating fear and terror as being material in making a judicial determination of the voluntariness of a plea of guilty to a criminal charge. A plea induced by improper promises or threats by private citizens lacks the essential quality of trustworthiness and should not be received in an Indiana court of law.

Id. (citation omitted).

³⁰⁹IND. CODE § 33-10.1-5-7 (1982).

³¹⁰IND. CODE § 35-35-1-2(b) (1982).

³¹¹IND. R. CRIM. P. 10.

³¹²*Campbell v. State*, 262 Ind. 594, 321 N.E.2d 560 (1975); *Brimhall v. State*, 258 Ind. 153, 279 N.E.2d 557 (1972).

³¹³See IND. CODE § 9-11-2-3 (Supp. 1983).

³¹⁴See *id.* § 9-4-13-3.

³¹⁵*Ives v. State*, 436 N.E.2d 370 (Ind. Ct. App. 1982).

³¹⁶436 N.E.2d 1087 (Ind. 1982).

pellate Rule 7.2(A)(3)(c).³¹⁷ This record was submitted by the State and certified by the judge who presided at the guilty plea hearing. The defendant contended that his guilty plea should be set aside because of the State's violation of Criminal Rule 10, which requires the retention of the record of a guilty plea. A unanimous supreme court ruled that the loss of a record or transcript of a guilty plea hearing does not require vacation of a guilty plea per se and held that the reconstruction of the record under Appellate Rule 7.2(A)(3)(c) was proper.

6. *Recent Legislation.*—Some legislative changes should be noted. If a defendant wishes to withdraw a not guilty plea and enter a plea of guilty or guilty but mentally ill, he may now do so orally in open court and need not state any reason for the withdrawal of the plea.³¹⁸ Previous statutory language provided that a defendant must show good cause to withdraw a not guilty plea and file a verified motion to support it.³¹⁹ Additionally, the term plea agreement was added by the legislature and defined to mean "an agreement between a prosecuting attorney and a defendant concerning the disposition of a felony or misdemeanor charge,"³²⁰ and the definition of the term recommendation was altered to mean a proposal "that is part of a plea agreement."³²¹ The term plea agreement was substituted for the term recommendation throughout the statute governing the filing of a plea bargain with the court.³²² The previous plea bargaining statute was governed by the term recommendation which was defined as including only "a proposal by the prosecuting attorney to a court that: (1) a felony charge be dismissed; or (2) a defendant, if he pleads guilty to a felony charge, receive less than the presumptive sentence."³²³ The amendments were made because a plea bargain may encompass more than these two options, including recommendations by the defendant to the court as well. By redefining recommendation as only a part of a plea agreement that is filed with the court, the complete con-

³¹⁷IND. R. APP. P. 7.2(A)(3)(c) provides:

If no report of all or part of the evidence or proceedings at the hearing or trial was or is being made, or if a transcript is unavailable, a party may prepare a statement of the evidence or proceedings from the best available means, including his recollection. If submitted contemporaneously with the matter complained of, the statement may be settled and approved by the trial court. If submitted thereafter, the statement shall be served on other parties who may serve objections or prepare amendments thereto within ten (10) days after service. The statement and any objections or prepared amendments shall be submitted to the trial court for settlement and approval and as settled and approved shall become a part of the record and be included by the clerk of the trial court in the record.

³¹⁸Act of Apr. 18, 1983, Pub. L. No. 320-1983, § 17, 1983 Ind. Acts 1943, 1957-58 (codified at IND. CODE § 35-35-1-4(a) (Supp. 1983)).

³¹⁹IND. CODE § 35-35-1-4(a) (1982) (amended 1983).

³²⁰*Id.* § 35-35-3-1 (Supp. 1983).

³²¹*Id.*

³²²*Id.* §§ 35-35-3-3, -4 (Supp. 1983).

³²³*Id.* § 35-35-3-1 (1982) (amended 1983).

ditions of the plea bargain will now be disclosed to the court. Finally, in another effort to streamline the misdemeanor guilty plea process,³²⁴ the legislature provided that a plea agreement in a misdemeanor case may be submitted orally to the court.³²⁵

F. Jury Trial

1. *Double Jeopardy*.—During the past survey period two cases dealt with an issue which had never previously been directly decided by an Indiana court. Both cases dealt with the trial court's failure to swear in a jury prior to the commencement of trial. In *Steele v. State*,³²⁶ opening statements and the testimony of five witnesses were taken on the first day of trial. At the beginning of the second day, the defendant made a motion for mistrial because the court did not swear in the jury before the trial began. This motion was denied, the trial court swore in the jury, and the trial continued, resulting in the conviction of the defendant. The third district court of appeals reversed the conviction. Citing an old Indiana case,³²⁷ the court held that the proper procedure would have been to discharge the jury, swear in the same panel of jurors or a new panel, and begin the trial anew.

This same issue arose in an earlier case, *Whitehead v. State*.³²⁸ In *Whitehead*, opening statements were made and the jury heard the testimony of the first witness before the trial court discovered that the jury had not been sworn. The defendant moved for a mistrial, which the trial court denied, subject to reconsideration.³²⁹ The jury was sworn in and the first witness was reexamined over the defendant's objection. The prosecutor subsequently told the court that the State had no objection to the defense mistrial motion. The mistrial was granted, and the defendant's attorney did not object to the granting of the mistrial or the discharge of the jury. After the trial judge was disqualified and another judge was selected to try the case, the defendant filed a motion for discharge, claiming that another trial would constitute double jeopardy. This motion was denied and an interlocutory appeal was brought. The court of appeals affirmed the trial court in this case because it found that the defendant, by moving for a mistrial, had thereby waived his double jeopardy claim.³³⁰

Another double jeopardy issue arose in *Haggard v. State*.³³¹ In this case the defendant robbed a liquor store in County A³³² and forced a

³²⁴See *supra* note 292 and accompanying text.

³²⁵IND. CODE § 35-35-3-3(c) (Supp. 1983).

³²⁶446 N.E.2d 353 (Ind. Ct. App. 1983).

³²⁷*Leas v. Patterson*, 38 Ind. 465 (1872).

³²⁸444 N.E.2d 1253 (Ind. Ct. App. 1983).

³²⁹The trial judge said that he would "research the question and reconsider his ruling." The trial judge also reviewed a brief filed by the defendant's counsel overnight. *Id.* at 1254.

³³⁰*Id.*

³³¹445 N.E.2d 969 (Ind. 1983).

³³²Bartholomew County, Indiana. *Id.* at 971.

cashier to leave with him in her car. They drove to County B,³³³ where the defendant raped the cashier. He pled guilty to confinement, robbery, and theft charges in County A. He subsequently pled guilty to confinement and rape in County B and was sentenced for both. The Indiana Supreme Court ruled that only one continuous act of confinement had been committed and that the conviction and sentence for that offense in County B was a violation of double jeopardy principles.³³⁴

Another double jeopardy issue was involved in *Webster v. State*.³³⁵ Generally, if a conviction is reversed on appeal on the grounds of insufficiency of the evidence at trial, a retrial of the case is barred by double jeopardy principles.³³⁶ However, in *Webster*, the supreme court reaffirmed its ruling in an earlier disposition of the case and held that if the insufficiency of evidence is caused by an erroneous trial court ruling excluding evidence, then double jeopardy does not bar a retrial.³³⁷

Finally, a statutory provision which has created confusion since its adoption in 1977 was, at last, interpreted by the Indiana Court of Appeals.³³⁸ In *State v. Burke*,³³⁹ the defense attorney argued that under Indiana Code section 35-41-4-4, all offenses arising out of a criminal transaction must be joined in one trial or be thereafter barred. In *Burke*, a police officer had stopped a car and issued a ticket to Burke for being a minor in possession of alcohol. The officer also discovered marijuana and phencyclidine in the the car. Four days after the crime the defendant pleaded guilty to the alcohol charge and was fined. A month later the State filed a two count information charging Burke with possession of marijuana and phencyclidine. The defendant moved to dismiss these charges, arguing that the State was statutorily required to file these charges at the time the alcohol offense was filed. The trial court agreed and dismissed the charges.

³³³Harrison County, Indiana. *Id.*

³³⁴*Id.* at 972-73. The court rejected a "same transaction" principle of double jeopardy. That is, even though the rape and the confinement were part of a continuing criminal episode, they were separate crimes for which a defendant could be separately convicted and sentenced. *Id.* at 972. *Cf.* *Lutes v. State*, 401 N.E.2d 671 (Ind. 1980) (defendant waived double jeopardy protection by knowingly pleading guilty to same rape offense in two separate counties).

³³⁵442 N.E.2d 1034 (Ind. 1982).

³³⁶*Burks v. United States*, 437 U.S. 1 (1978).

³³⁷442 N.E.2d at 1034 (citing *Webster v. State*, 413 N.E.2d 898, 902 (Ind. 1980) (Pren-tice, J., dissenting)).

³³⁸IND. CODE § 35-41-4-4 (1982) provides in part:

(a) A prosecution is barred if all of the following exist:

(1) There was a former prosecution of the defendant for a different offense or for the same offense based on different facts.

(2) The former prosecution resulted in an acquittal or a conviction of the defendant or in an improper termination under section 3 of this chapter.

(3) The instant prosecution is for an offense with which the defendant should have been charged in the former prosecution.

³³⁹443 N.E.2d 859 (Ind. Ct. App. 1983).

The State and the defense both agreed that the first two subsections of the statute had been satisfied because there had been a former prosecution for a different offense and there had been a conviction. The issue was whether the defendant "should have been charged in the former prosecution."³⁴⁰ In reversing the trial court, the court of appeals began by noting that Indiana has rejected the "same transaction" approach to double jeopardy, thus there was no constitutional requirement that the offenses be joined.³⁴¹ Furthermore, Indiana has a permissive rather than mandatory joinder statute.³⁴² Therefore, there was also no statutory requirement that the offenses be joined.

2. *Alibi Defense*.—One of the more important alibi cases in the past year arose in the Seventh Circuit Court of Appeals' decision in *Alicea v. Gagnon*.³⁴³ The Seventh Circuit held that a state notice of alibi statute was unconstitutionally applied to prevent a criminal defendant from testifying in his own behalf about his alibi, although the defendant did not comply with a notice of alibi statute. This holding conflicts with an earlier Indiana Court of Appeals case.³⁴⁴ The decision in *Alicea* was based upon the court's conclusion that a defendant's right to testify on his own behalf outweighs the state's interest in strictly applying the notice of alibi statute.³⁴⁵ The Seventh Circuit's decision, therefore, should not prevent the exclusion of the testimony of alibi witnesses other than the defendant himself if there is non-compliance with the notice statute.³⁴⁶

In another alibi case, *Brown v. State*,³⁴⁷ the Indiana Supreme Court held that the trial court did not abuse its discretion when it denied the defendant's motion to strike the State's alibi response where the State was a day or two late in filing the response. The court emphasized that the defendant did not indicate what prejudice he suffered as a result of the late response and noted that the defendant did not avail himself of the potential remedy of a continuance.³⁴⁸

3. *Entrapment Defense*.—In *Baird v. State*,³⁴⁹ the Indiana Supreme Court reversed a defendant's conviction on the ground that the State had failed to rebut an entrapment defense. In this case, police took a nineteen-

³⁴⁰*Id.* at 861.

³⁴¹See *supra* note 334.

³⁴²IND. CODE § 35-34-1-9 (1982).

³⁴³675 F.2d 913 (7th Cir. 1982).

³⁴⁴*Hartman v. State*, 176 Ind. App. 375, 383, 376 N.E.2d 100, 105 (1978) (stating that a defendant's due process rights are not violated by requiring the "exclusion of the defendant's testimony where notice of alibi has not been filed and where the defendant has not shown 'good cause' for failure to do so"). *Accord Lake v. State*, 257 Ind. 264, 274 N.E.2d 249 (1971).

³⁴⁵675 F.2d at 923-24.

³⁴⁶See also IND. CODE § 35-36-4-3(b) (1982).

³⁴⁷436 N.E.2d 285 (Ind. 1982).

³⁴⁸*Id.* at 288.

³⁴⁹446 N.E.2d 342 (Ind. 1983) *vacating*, 440 N.E.2d 342 (Ind. Ct. App. 1982).

year-old man to a liquor store, gave him some money, and told him to go into the store and buy an alcoholic beverage. He was instructed that if he was questioned about his age he was to explain that he had no identification and leave the store. The young man went into the store and purchased a six-pack of beer from the defendant clerk. The police did not alter the young man's appearance, but testimony indicated that he looked older than nineteen years of age. The defendant testified that the liquor store's policy was to require proof of age "if the customer was a stranger, appeared to be nervous, and appeared to be under twenty-five years of age."³⁵⁰ The defendant said that he did not remember selling the beer to the young man but that he always followed the store's policy. There had been no previous complaints of the defendant selling alcoholic beverages to minors. Nor did the State introduce any evidence of predisposition to commit the crime.

The supreme court found that under both case law and the entrapment defense statute,³⁵¹ the State must prove two elements to rebut an entrapment defense: police activity in the transaction and predisposition on the part of the accused to commit the offense.³⁵² The court stated:

It is clear that in order to rebut the defense of entrapment the State must show two things; i.e., first, that the level of police activity was not such that it would persuasively affect the free will of the accused, and second, that the accused was predisposed to commit the offense. Part (b) of the statute is explanatory of the level of police activity that would be necessary to support the entrapment defense but this section does not negate the requirement of the necessary predisposition on the part of the accused. We have consistently held that *if* the accused had the predisposition to commit the crime and the police merely afforded him an opportunity to do so, then the defense of entrapment is not available.³⁵³

Baird is a very difficult case to fit into the entrapment defense theory, for it appears there was neither predisposition nor police activity likely to persuade someone to commit a crime. The facts in *Baird* distinguish it from the typical drug entrapment case where the mere possession of

³⁵⁰446 N.E.2d at 343.

³⁵¹IND. CODE § 35-41-3-9 (1982) provides:

(a) It is a defense that:

(1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and

(2) the person was not predisposed to commit the offense.

(b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

³⁵²446 N.E.2d at 344.

³⁵³*Id.*

illicit drugs, especially where the seller has a ready supply and knowledge of "street" prices, in itself, indicates a predisposition. In *Baird*, a clerk in a licensed liquor store sold alcoholic beverages to someone who did not appear to be underage. This is hardly overwhelming evidence of predisposition. On the other hand, there apparently was no police encouragement of the clerk to make the sale, other than simply presenting the clerk with the opportunity. The court of appeals opinion conducted a much more thorough examination of the entrapment issue than the supreme court's opinion and is probably more in accord with the legislative intent behind the entrapment statute.³⁵⁴ Moreover, offenses such as selling alcoholic beverages to a minor³⁵⁵ seem to be "strict liability" crimes because they simply declare it "unlawful" to sell alcoholic beverages to a minor, without stating a required mental state such as intentionally, knowingly, or recklessly selling to a minor. Whether the entrapment defense should even apply to a strict liability crime is an interesting question.³⁵⁶ Nevertheless, the facts of the *Baird* case make it difficult to fault the result reached by the supreme court.³⁵⁷

4. *Insanity Defense*.—The most significant insanity defense case decided in the past survey period was *Taylor v. State*,³⁵⁸ sustaining the constitutionality of Indiana's guilty but mentally ill statute.³⁵⁹ The defendant claimed that this statute violated due process, equal protection, and deprived him of privileges and immunities guaranteed by the Constitution. His argument centered on an allegation that the statutory definitions of insanity³⁶⁰ and mentally ill³⁶¹ are so vague that the verdicts of not guilty by reason of insanity and guilty but mentally ill are essentially the same, resulting in the selective and arbitrary application of the two verdicts. In the alternative, the defendant contended that the terms insanity and mentally ill were so vague and overbroad that he was denied reasonable notice of the charge against him. Finally, the defendant argued that whether a person was insane or mentally ill, he was incapable of forming the intent necessary for the imposition of criminal penalties.

While the supreme court conceded that the definitions of both in-

³⁵⁴See 440 N.E.2d 1143 (Ind. Ct. App. 1982).

³⁵⁵IND. CODE § 7.1-5-7-8(a) (Supp. 1983).

³⁵⁶However, the applicability of the entrapment defense to charges of violating laws regulating the sale of liquor is apparently of widespread and long-standing vintage. See Annot., 55 A.L.R.2d 1322 (1957); see also IND. CODE § 7.1-5-7-5.1 (Supp. 1983).

³⁵⁷Two other entrapment cases of interest were also decided during the survey period. The fourth district court of appeals conducted an extensive analysis of the entrapment defense in ruling on a particular entrapment jury instruction in *Hardy v. State*, 442 N.E.2d 378 (Ind. Ct. App. 1982). In *Whalen v. State*, 442 N.E.2d 14 (Ind. Ct. App. 1982), the first district court of appeals held that a motion to suppress is not a proper procedure to assert an entrapment defense.

³⁵⁸440 N.E.2d 1109 (Ind. 1982).

³⁵⁹IND. CODE § 35-36-2-3 (1982) (formerly IND. CODE § 35-5-2-3 (Supp. 1981)).

³⁶⁰IND. CODE § 35-41-3-6 (1982).

³⁶¹*Id.* §§ 35-36-1-1, 35-36-2-3(4).

sanity and mental illness involve similar behavioral characteristics and may overlap on occasion, the court stated that "a mental disease or deficiency does not *ipso facto* render a defendant legally insane."³⁶² The court found that the statutory distinction between mental illness and insanity was clearly drawn to focus correctly on whether a defendant acts with the requisite mens rea for the offense with which he is charged. The court also rejected the defendant's due process challenge, finding that the allegations in the information and the statutory language gave the defendant full notice of the charges against him and apprised him of the role mental illness and insanity would play in the trial. Additionally, the court rejected the defendant's claim that the terms were so broad that a jury was vested with unlimited discretion in applying them. The choice between the verdicts not responsible by reason of insanity and guilty but mentally ill³⁶³ is no more difficult for the jury to apply than the former choice between sanity and insanity.³⁶⁴

5. *Self-Defense—Battered Woman Syndrome.*—The third district court of appeals decision in *Fultz v. State*³⁶⁵ made it clear that a defendant seeking to assert a "battered woman syndrome" defense must first demonstrate facts which would support an ordinary self-defense claim. In *Fultz*, the defendant offered to prove that she had been subjected to a series of severe beatings by the victim over a number of years. She also offered to prove by expert testimony that she had become affected by a battered woman syndrome and that this led her to shoot the victim when he pointed his finger at her menacingly and uttered an inaudible threat. This evidence was excluded.

The State argued that the evidence was correctly excluded because "the victim had not committed an aggressive act sufficient for Fultz to form a reasonable belief that the imminent use of force was necessary."³⁶⁶ The court of appeals agreed, finding that "[b]efore evidence of the victim's violent character can be admitted, the defendant must show . . . that the victim's aggression was the proximate or efficient cause justifying the defendant's acts of self-defense."³⁶⁷

³⁶²440 N.E.2d at 1111.

³⁶³IND. CODE § 35-36-2-3 (1982).

³⁶⁴The supreme court stated:

The "guilty but mentally ill" verdict serves the state's interest in securing convictions justly obtained and in obtaining treatment for those convicted defendants who suffer mental illness. The classification is thus one which is reasonably related to a legislative purpose, as is necessary to withstand an equal protection attack. Nor can it be said that the statutory definitions and alternative verdicts are not equally available to persons similarly situated; the application of the classifications rests on the evidence regarding any particular defendant's mental condition. There is no patent inequity to support an equal protection or privileges and immunities claim.

440 N.E.2d at 1112 (citations omitted).

³⁶⁵439 N.E.2d 659 (Ind. Ct. App. 1982).

³⁶⁶*Id.* at 662.

³⁶⁷*Id.*

6. *Jury Instructions.*—The entire Criminal Law Survey Article could be devoted to an analysis of recent instruction cases, especially those on lesser included offenses.³⁶⁸ The issue of whether an instruction is warranted on an included offense in any particular case often requires a complex analysis concerning the issues of whether the offense is actually included as a matter of law, and whether it is included given the facts of the particular case. Two valid but often conflicting rationales contribute to the complexity of this area of criminal law. First, a jury should not be encouraged to return a “compromise verdict.” If a defendant is charged with armed robbery and his only defense is that he is not the one who committed the crime, not that he was unarmed, the question of whether the jury should be instructed on the included offense of robbery arises. On the other hand, close factual questions can occur over the exact nature of the defense in the case or a factual dispute may exist about a mental element distinguishing the greater and the lesser offense. In those situations the trial judge must virtually weigh the evidence before deciding to give instruction on an included offense. This is a difficult task for a trial judge, and, obviously, an equally difficult issue for the appellate courts to resolve.

The complexity of this issue was demonstrated in the decision of *Johnson v. State*.³⁶⁹ Johnson was convicted of battery as a Class C felony. The third district court of appeals, in a decision containing three opinions, reversed the conviction on the basis that the trial court erred in refusing to give certain tendered instruction.³⁷⁰ The supreme court granted transfer and reversed the court of appeals, but the supreme court decision produced a majority opinion and two separate concurring opinions. Thus, in two appellate decisions eight judges wrote six separate opinions.

During his trial for Class C battery,³⁷¹ Johnson tendered two instructions, both of which the trial court refused to give. One instruction stated that if the jury was unable to find that the defendant acted knowingly or intentionally, but did find that he committed the acts recklessly, then he could be found guilty of the included offense of recklessly inflicting serious bodily injury.³⁷² The second instruction stated that if the defendant recklessly, knowingly, or intentionally inflicted serious bodily injury on another person the jury could find him guilty of criminal recklessness, a Class D felony.³⁷³

³⁶⁸See IND. CODE § 35-41-1-16 (Supp. 1983) (defining included offense).

³⁶⁹435 N.E.2d 242 (Ind. 1982), *rev'g*, 426 N.E.2d 91 (Ind. Ct. App. 1981).

³⁷⁰426 N.E.2d at 104.

³⁷¹IND. CODE § 35-42-2-1 (1982) provides that “[a] person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery. . . . However, the offense is: . . . a Class C felony if it results in serious bodily injury to any other person or if it is committed by means of a deadly weapon.”

³⁷²435 N.E.2d at 244.

³⁷³*Id.* See IND. CODE § 35-42-2-2(b) (1982). This section provides that “[a] person who recklessly, knowingly, or intentionally inflicts serious bodily injury on another person commits criminal recklessness, a class D felony.” *Id.*

The facts of the case indicated that the defendant shot the victim in the chest after he had been fouled in a basketball game. There was evidence that defendant had smoked marijuana immediately before the game and had said he was high during the game. The victim testified that the defendant's eyes were "spaced and glazed over when the shooting occurred," and that the defendant appeared to be under the influence of drugs.³⁷⁴ However, the defendant testified and "gave a clear and detailed description of the events leading up to and including the shooting."³⁷⁵ The defendant also testified that he carried a pistol for protection because he knew the basketball games became rough. Johnson remembered pulling out the gun, shooting the victim in the chest, and saying, "Do you want some more?"³⁷⁶

In the majority opinion Justice Pivarnik delineated a two-step process for deciding whether instructions or lesser included offenses were erroneously refused.³⁷⁷ First, the language of the statutes and the indictment or information must be compared to determine whether the greater offense includes the lesser. Second, the court must determine whether the included offense instruction is applicable to evidence introduced at the trial. The majority focused on the second test, stating that when the battery was accomplished by the direct act of pulling a pistol and firing it into the body of the victim, there was no necessity for an instruction on criminal recklessness. The majority also said that the alleged impairment of the defendant due to drugs would not warrant an instruction on recklessness. The majority pointed out that because neither battery nor recklessness is a specific intent crime, voluntary intoxication is not a defense to either offense.³⁷⁸

Justice Hunter concurred in the result only on the basis that voluntary intoxication is not a defense to the crime of battery.³⁷⁹ Therefore, the two-step analysis of the majority was not required. However, Justice Hunter stated that if a factual dispute over the defendant's mental state had existed, then the two-step analysis would have required that the instruction on lesser included offenses be given. Moreover, Justice Hunter did not believe that the concept of an included offense or the meaning of the terms knowingly, intentionally, or recklessly were required jury instructions. Justice DeBruler's concurring opinion reiterated his past view that the second step of the two-part analysis discussed in the majority opinion, determining whether the evidence introduced at trial warrants

³⁷⁴435 N.E.2d at 244.

³⁷⁵*Id.* at 244-45.

³⁷⁶*Id.* at 245.

³⁷⁷*Id.*

³⁷⁸IND. CODE § 35-41-3-5(b) (1982) provides that "[v]oluntary intoxication is a defense only to the extent that it negates an element of an offense referred to by the phrase 'with intent' to or 'with an intention to.' "

³⁷⁹435 N.E.2d at 247 (Hunter, J., concurring).

an included offense instruction, leads only to confusion and should be discarded.³⁸⁰

In another significant included offense case, *Jones v. State*,³⁸¹ the supreme court overruled an earlier decision³⁸² and held that criminal trespass may be an included offense of burglary, depending upon the allegations of the charging instrument.³⁸³ The court noted that "while a particular offense may not be inherent in the greater offense, by definition, it may have been committed by reason of the manner in which the greater offense was committed."³⁸⁴

The Indiana Supreme Court also decided *Lacy v. State*³⁸⁵ during the survey period. In this case, the court indicated that the total failure to give a jury instruction on the elements of the crime charged would be fundamental error, but that no fundamental error would occur where at least the preliminary instruction covered the elements.³⁸⁶ In another decision the court held that a defendant cannot predicate error on the trial court's refusal to give an instruction if that instruction is not numbered or signed.³⁸⁷ Additionally, the supreme court held that a defendant's waiver of the right to have final instructions read to the jury can be made by his attorney and need not be "knowingly" made by the defendant.³⁸⁸

G. Hypnosis

Before 1982, the Indiana Supreme Court dealt only tangentially with the issue of hypnotizing witnesses.³⁸⁹ During the survey period, however, the pre-trial hypnosis of witnesses was perhaps the most rapidly developing area of criminal law. It would be interesting to trace carefully the present state of hypnosis law in Indiana sequentially through the year. However, for the criminal law practitioner, only the most recent case, *Peterson v. State*,³⁹⁰ is critically important. That is because the *Peterson*

³⁸⁰*Id.* at 249-50 (DeBruler, J., concurring).

³⁸¹438 N.E.2d 972 (Ind. 1982).

³⁸²*Estep v. State*, 394 N.E.2d 111 (Ind. 1979).

³⁸³*See also Walker v. State*, 445 N.E.2d 571 (Ind. 1983).

³⁸⁴438 N.E.2d at 974. Other interesting included offense cases are *Moore v. State*, 445 N.E.2d 576 (Ind. Ct. App. 1983) (assisting a criminal is an included offense of murder and attempted murder); *Lechner v. State*, 439 N.E.2d 1203 (Ind. Ct. App. 1982) (child molesting involving fondling was not an included offense of child molesting involving deviate sexual conduct); *Ford v. State*, 439 N.E.2d 649 (Ind. Ct. App. 1982) (holding that reckless homicide and involuntary manslaughter could be lesser included offenses, but were not under the facts of that case).

³⁸⁵438 N.E.2d 968 (Ind. 1982).

³⁸⁶*Id.* at 971.

³⁸⁷*Askew v. State*, 439 N.E.2d 1350 (Ind. 1982).

³⁸⁸*Rowley v. State*, 442 N.E.2d 343, 344 (Ind. 1982).

³⁸⁹*See Alleyn v. State*, 427 N.E.2d 1095 (Ind. 1981); *Pavone v. State*, 402 N.E.2d 976 (Ind. 1980); *Merrifield v. State*, 400 N.E.2d 146 (Ind. 1980).

³⁹⁰448 N.E.2d 673 (Ind. 1983). For a further discussion on the use of hypnotized witnesses, see Tanford, *Evidence, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 197, 214 (1984).

case virtually ignores other hypnosis decisions decided only months before.

The first major Indiana hypnosis case, *Strong v. State*,³⁹¹ remains good law and was one case relied upon in the *Peterson* decision. In *Strong*, an eyewitness to a robbery and murder selected the defendant's photograph from a display the day after the crime. The witness was subsequently hypnotized by a police officer trained in hypnosis,³⁹² and a composite picture of the defendant was drawn based on the information the witness provided while under hypnosis. This composite picture was admitted at trial over the defendant's objection.

The Indiana Supreme Court held that the composite picture should have been excluded. The court stated that the "better-reasoned" hypnosis cases in the United States hold that evidence obtained from a witness under hypnosis is "inherently unreliable and should, therefore be excluded as having no probative value."³⁹³ The court ruled that the "product" of hypnosis, if it elicits recall otherwise unavailable, is not subject to cross-examination and should be excluded. The composite picture was clearly the product of the hypnotic session. However, the supreme court also held that it was proper for the witness to make an in-court identification of the defendant. The witness' pre-hypnosis identification of the defendant demonstrated a basis for the in-court identification independent of the hypnosis. *Strong* left open the possibility that a witness' memory might be considered the product of a hypnotic session, if no independent basis for the memory were demonstrated, and indicated that a witness, rather than a composite photograph, might be excluded from a trial. Several subsequent cases held that a witness is not per se incompetent to testify simply because he has undergone pre-trial hypnosis, at least as to the corpus delicti of the crime.³⁹⁴

In *Pearson v. State*,³⁹⁵ the Indiana Supreme Court conducted its most detailed analysis of the hypnosis issue. Justice Hunter's majority opinion³⁹⁶ stated that rulings on the admissibility of the testimony of a witness who has undergone pre-trial hypnosis have followed three trends in the United States. Some jurisdictions have adopted a rule totally excluding the testimony of a witness about any events which were the subject of the hypnotic session.³⁹⁷ Other jurisdictions have held that hypnotically-refreshed testimony could be admitted if certain safeguards were followed during the hypnotic session.³⁹⁸ Still other jurisdiction hold that hypnotically-

³⁹¹435 N.E.2d 969 (Ind. 1982).

³⁹²The detective investigating the crime was also present during the hypnosis session. *Id.* at 970.

³⁹³*Id.*

³⁹⁴*Stewart v. State*, 442 N.E.2d 1026 (Ind. 1982); *Forrester v. State*, 440 N.E.2d 475 (Ind. 1982); *Morgan v. State*, 445 N.E.2d 585 (Ind. Ct. App. 1982).

³⁹⁵441 N.E.2d 468 (Ind. 1982).

³⁹⁶Justice Prentice wrote a concurring opinion. *Id.* at 476 (Prentice, J., concurring).

³⁹⁷*Id.* at 472 (citations omitted).

³⁹⁸*Id.* (citations omitted).

refreshed testimony is admissible with the problems inherent in its use going to the weight of the evidence.³⁹⁹ In *Pearson*, the Indiana Supreme Court appeared to align itself with the third group.⁴⁰⁰

The most recent case in this area is *Peterson v. State*.⁴⁰¹ In *Peterson*, a key witness to a murder was able to tell police about the details of the crime but could not identify the perpetrators. He was unable to select the alleged murderer from a photographic display or a lineup. Over three months after the crime this witness was hypnotized. After one hypnosis session the witness identified a photograph of the defendant and selected a photograph of a man he called "the second guy."⁴⁰² The defendant unsuccessfully attempted to have the witness' identification testimony excluded from trial. The Indiana Supreme Court held that the trial court properly admitted the witness' testimony about the facts of the crime because the witness was able to relate this information to police before the hypnosis. However, the supreme court found that the trial court erred in permitting the identification testimony because it was a product of the hypnotic session and "inherently tainted."⁴⁰³ Its admission denied the defendant his rights to confrontation and cross-examination.⁴⁰⁴

The present Indiana rule with regard to the admissibility of testimony of a witness who has undergone pre-trial hypnosis is unclear. Justice Hunter's concurring opinion in *Peterson* addressed this question and the following quotation provides some guidance to criminal law practitioners:

The instant case sets out this Court's position on the evidentiary use of testimony of a previously hypnotized witness as: (1) the witness is not totally incompetent to testify and there will be no error when the witness testifies to what was remembered before the hypnosis; (2) any evidence derived from a witness while he or she is under hypnosis is inherently unreliable and must be excluded as having no probative value; (3) if evidence that is the product of a hypnosis session is admitted during trial, it will not be reversible error if the jury is aware of all the circumstances surrounding the hypnosis session and the degree to which the witness's statements were changed by the hypnosis, and if the changes in the witness's statements were not significant or did not relate to essential elements of the offense. This position necessarily requires a case-by-case determination of the effect of

³⁹⁹*Id.* (citations omitted). Some jurisdictions in this category also recommend the safeguards required by the decisions in the second category.

⁴⁰⁰The court stated that "the fact of hypnosis should be a matter of weight with the trier of fact but not a *per se* disqualification of the witness." *Id.* at 473 (citations omitted).

⁴⁰¹448 N.E.2d 673 (Ind. 1983).

⁴⁰²*Id.* at 674.

⁴⁰³*Id.* at 678.

⁴⁰⁴The only Indiana hypnosis case cited in the majority opinion was *Strong v. State*, 435 N.E.2d 969 (Ind. 1982). *Pearson v. State*, 441 N.E.2d 468 (Ind. 1982), was not mentioned.

the admission of testimony from a previously hypnotized witness, and I believe this brings about more equitable results than are possible under the "total exclusion" rule.⁴⁰⁵

H. Sentencing

1. *Generally.*—Some of the more significant changes in the law governing the sentence imposed upon a criminal defendant are the result of legislation. For example, a new law provides that a court "may suspend only that part of the sentence that is in excess of the minimum sentence,"⁴⁰⁶ and minimum sentence is defined as a certain number of years for certain grades of felonies.⁴⁰⁷ The minimum penalty for a Class D felony was lowered to one year.⁴⁰⁸ The legislature cleared up another problem area⁴⁰⁹ by providing that a convicted defendant may be ordered to make restitution even if he is not placed on probation.⁴¹⁰

Another sentencing problem which has arisen frequently was answered by the courts in the past year. Indiana law prohibits a trial judge from suspending the sentence for certain listed crimes,⁴¹¹ but it was unclear whether suspension of the sentence for an attempt to commit those crimes was also prohibited.⁴¹² In *Haggenjos v. State*,⁴¹³ the Indiana Supreme Court held that an attempt to commit one of the listed felonies is also a non-suspendable crime.⁴¹⁴ The Indiana court of appeals, however, has held that a conspiracy to commit one of the listed non-suspendable offenses is suspendable because conspiracy is not one of the listed crimes.⁴¹⁵

2. *Habitual Offender.*—There were several major legislative enactments in the habitual offender area. First, following the impetus of *Sweet v. State*,⁴¹⁶ bifurcated trials similar to those required in habitual criminal

⁴⁰⁵448 N.E.2d at 679-80 (Hunter, J., concurring).

⁴⁰⁶Act of Apr. 11, 1983, Pub. L. No. 334-1983, § 2, 1983 Ind. Acts 1992, 1993 (codified at IND. CODE § 35-50-2-2(b) (Supp. 1983)).

⁴⁰⁷"'Minimum sentence' means: (1) for murder, thirty (30) years; (2) for a Class A felony, twenty (20) years; (3) for a Class B felony, six (6) years; (4) for a Class C felony, two (2) years; and (5) for a Class D felony, one (1) year." Act of Apr. 11, 1983, Pub. L. No. 334-1983, § 1, 1983 Ind. Acts 1992, 1993 (codified at IND. CODE § 35-50-2-1 (Supp. 1983)).

⁴⁰⁸Act of Apr. 11, 1983, Pub. L. No. 334-1983, § 3, 1983 Ind. Acts 1992, 1994 (codified at IND. CODE § 35-50-2-7 (Supp. 1983)).

⁴⁰⁹See *Barnett v. State*, 414 N.E.2d 965 (Ind. Ct. App. 1981); see also *Johnson*, *supra* note 117, at 164.

⁴¹⁰Act of Apr. 11, 1983, Pub. L. No. 337-1983, 1983 Ind. Acts 2000 (codified at IND. CODE § 35-50-5-3 (Supp. 1983)).

⁴¹¹Act of Apr. 11, 1983, Pub. L. No. 334-1983, § 2, 1983 Ind. Acts 1992, 1993-94 (codified at IND. CODE § 35-50-2-2(b)(4) (Supp. 1983)).

⁴¹²See IND. CODE § 35-41-5-1 (1982).

⁴¹³441 N.E.2d 430 (Ind. 1982).

⁴¹⁴*Id.* at 430. Haggenjos was convicted of attempted murder.

⁴¹⁵*Huff v. State*, 443 N.E.2d 1234 (Ind. Ct. App. 1983).

⁴¹⁶439 N.E.2d 1144 (Ind. 1982).

proceedings⁴¹⁷ will be required in all cases involving recidivist charges.⁴¹⁸ The habitual offender law itself was amended to exclude prior felony convictions involving substance offenses⁴¹⁹ and a separate statute was added to deal with these substance offenders.⁴²⁰ An habitual prostitution statute was also adopted.⁴²¹

So many habitual criminal cases were decided that no effort will be made to consider them in analytical detail. In at least two decisions, the Indiana Supreme Court made it clear that allegations of habitual criminal status must conform to most of the procedural formalities surrounding any other criminal charges.⁴²² The court indicated that the preferred procedure for a trial court to follow when a defendant is charged with a Class D felony and with habitual criminal status is to consider the presentence investigation report and arguments of counsel before entering judgment on the Class D felony and proceeding to the habitual offender phase of the trial.⁴²³ This procedure is preferred because of the unique sentencing provisions for Class D felonies, which authorize a trial judge to enter the judgment as a conviction for a Class A misdemeanor,⁴²⁴ in which case the defendant could not be considered for habitual criminal status.⁴²⁵

The supreme court also held that a defendant's voluntary testimony at a bond reduction hearing, where he admitted his prior convictions, may be introduced into evidence in the habitual offender portion of the trial.⁴²⁶ The court also approved the technique of using former defense attorneys of defendants alleged to be habitual criminals to identify their former clients as the persons to whom the court records, used to prove the habitual charge, pertain.⁴²⁷ However, the court held that the fact of the prior convictions could not be proved solely through the testimony of former defense counsel.⁴²⁸

⁴¹⁷IND. CODE § 35-50-2-8 (Supp. 1983).

⁴¹⁸Act of Mar. 28, 1983, Pub. L. No. 324-1983, 1983 Ind. Acts 1969 (codified at IND. CODE § 35-38-1-19 (Supp. 1983)).

⁴¹⁹Act of Apr. 18, 1983, Pub. L. No. 335-1983, Sec. 1, § 8(g), 1983 Ind. Acts 1995, 1996 (codified at IND. CODE § 35-50-2-8(g) (Supp. 1983)).

⁴²⁰Act of Apr. 18, 1983, Pub. L. No. 335-1983, § 2, 1983 Ind. Acts 1995, 1996-97 (codified at IND. CODE § 35-50-2-10 (Supp. 1983)).

⁴²¹Act of Apr. 21, 1983, Pub. L. No. 310-1983, § 3, 1983 Ind. Acts 1855, 1860 (codified at IND. CODE § 35-45-4-2 (Supp. 1983)).

⁴²²*Anderson v. State*, 439 N.E.2d 558 (Ind. 1982); *Griffin v. State*, 439 N.E.2d 160 (Ind. 1982).

⁴²³*Gross v. State*, 444 N.E.2d 296, 299 (Ind. 1983).

⁴²⁴IND. CODE § 35-50-2-7(b) (Supp. 1983).

⁴²⁵*Id.* § 35-50-2-8(a) (habitual offender statute only applicable to defendants convicted of a *felony*).

⁴²⁶*Hernandez v. State*, 439 N.E.2d 625, 631 (Ind. 1982).

⁴²⁷*Poe v. State*, 445 N.E.2d 94, 98 (Ind. 1983); *Donnersbach v. State*, 444 N.E.2d 1184, 1185 (Ind. 1983).

⁴²⁸*Washington v. State*, 441 N.E.2d 1355, 1358-59 (Ind. 1982); *Morgan v. State*, 440 N.E.2d 1087, 1090 (Ind. 1982).

