and seems to follow the "fiduciary approach" rejected by the *Great Western* court by excluding tender offers approved by the board of directors of the target company from the definition of a "takeover offer."[137] Finally, the Indiana law also does not require that a majority of the shareholders of the target company reside in Indiana. Instead, the Indiana statute may be effective where the target company was incorporated in Indiana, or had its principal place of business in Indiana, or had a substantial portion of its assests in Indiana.[138]

LEX L. VENDITTI

VII. Criminal Law and Procedure

*Richard P. Good**

The decisions discussed in this Article deal solely with criminal procedure. There have been no appellate decisions on substantive criminal law under the new Indiana Penal Code[1] which became effective October 1, 1977. The discussion is presented in the general order in which the respective issues would arise in the various stages of the criminal process, beginning with pre-trial issues and continuing with issues pertaining to the trial and post-trial stages. In addition, several significant amendments to the penal code during the 1978 session of the General Assembly will be discussed.[2]

A. Search and Seizure

1. Arrest Warrants.—There are two contrary lines of cases in Indiana on whether warrantless arrests are proper absent exigent circumstances.[3] One holds that, in order to have a valid warrantless arrest for a crime not committed in the presence of the officer, there must be probable cause to believe that a crime was committed

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[137]IND. CODE § 23-2-3-1(i)(5) (1976).

[138]*Id.* § 23-2-3-1(j).

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[1]IND. CODE § 35-1-1-1 to 50-6-6 (Supp. 1978).

[2]*See* notes 275-88 *infra* and accompanying text.

[3]*See* Kerr, *Criminal Law and Procedure, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 160, 162 (1975).

by the suspect and exigent circumstances that make it impracticable to obtain a warrant.[4] The other line of cases restates the traditional view that exigent circumstances are not required.[5] The United States Court of Appeals for the Second Circuit held in *United States v. Reed*[6] that the fourth amendment[7] requires exigent circumstances for a warrantless felony arrest, based on probable cause, in the suspect's home.[8] If *Reed* were followed by Indiana courts, then the traditional approach would be used for the lesser intrusion of a warrantless arrest in public and exigent circumstances would be required only when the officer intrudes into the arrestee's home.[9]

2. Effect of Illegal Arrest.—The Indiana Supreme Court twice reiterated the axiomatic doctrine that the illegality of an arrest affects only the admissibility of the evidence obtained as a result of a search following it, but not the right of the state to try the arrestee.[10] In *Mendez v. State*,[11] the defendant questioned the credibility of the probable cause affidavit which supported the arrest warrant. The court found no issue for review because the claim related solely to the validity of the defendant's arrest.[12] In *Massey v. State*,[13] the appellant complained that he was returned to Indiana from Ohio without extradition or waiver of extradition and in violation of the Inter-State Juvenile Compact.[14] The trial court had overruled defendant's motion to dismiss on these facts. The trial court's jurisdiction was held not to depend upon the legality of defendant's

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[4]Stuck v. State, 255 Ind. 350, 264 N.E.2d 611 (1970); Throop v. State, 254 Ind. 342, 259 N.E.2d 875 (1970); Bryant v. State, 157 Ind. App. 198, 299 N.E.2d 200 (1973); Johnson v. State, 157 Ind. App. 105, 299 N.E.2d 194 (1973).

[5]Garr v. State, 262 Ind. 134, 312 N.E.2d 70 (1970); Kendrick v. State, 325 N.E.2d 464 (Ind. Ct. App. 1975).

[6]572 F.2d 412 (2d Cir. 1978).

[7]U.S. CONST. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[8]572 F.2d at 424.

[9]Although the United States Supreme Court has expressly reserved decision on this issue on a number of occasions, the Court has offered important signals pointing to this result. *See* United States v. Santana, 427 U.S. 38 (1976); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Warden v. Hayden, 387 U.S. 294 (1967).

[10]Massey v. State, 371 N.E.2d 703 (Ind. 1978); Mendez v. State, 367 N.E.2d 1081 (Ind. 1977). In actual practice, some trial courts in Indiana do not follow this rule; instead, they dismiss charges in cases involving an illegal arrest.

[11]367 N.E.2d 1081 (Ind. 1977).

[12]*Id.* at 1082.

[13]371 N.E.2d 703 (Ind. 1978).

[14]IND. CODE § 31-5-3-1 (1976).

arrest or return to the charging state: "This Court has consistently held that an illegal arrest does not destroy a valid conviction and that such illegality is of consequence on review only if evidence was obtained and admitted as a result of that illegal arrest."[15]

Dictum in *Pierce v. State*[16] appears to recognize as valid an arrest on less than probable cause. The court wrote that "since the officer had a right to arrest and detain appellant for investigatory reasons on suspicion that he had committed a felony," the alleged illegality of the city court warrant under which defendant was arrested was of no significance and no error was presented.[17]

3. Warrantless Searches.—The Indiana Court of Appeals in *Bandelier v. State*[18] upheld a search of an area not within the appellant's control at the time of the arrest.[19] After arrest for a traffic offense, the appellant left the police car against orders, returned to his own car, and reached inside. The officer observed a brown paper bag on the suspect's car seat and, upon inspection, discovered marijuana. The court held that appellant's own conduct brought the evidence within the area of his immediate control.[20] The Court distinguished *Paxton v. State*[21] because in that case the officer could no longer reasonably believe that he was in danger or that evidence contained in the automobile could be destroyed by the defendants.[22]

The court of appeals in *Griffin v. State*[23] followed *South Dakota v. Opperman*[24] and upheld an inventory search[25] of an automobile where a police officer arrested the defendant for driving without an operator's license and for false registration of a vehicle and impounded the vehicle pursuant to statute.[26] The inventory was made

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[15]371 N.E.2d at 705 (citing Williams v. State, 261 Ind. 385, 304 N.E.2d 311 (1973); Dickens v. State, 260 Ind. 284, 295 N.E.2d 613 (1973)). *See also* Frisbie v. Collins, 342 U.S. 519 (1952).

[16]369 N.E.2d 617 (Ind. 1977).

[17]*Id.* at 619. *But see* Dommer v. Hatcher, 427 F. Supp. 1040, 1045 (N.D. Ind. 1975). "If 'probable cause' is in doubt the 'investigation' must precede the arrest; anything less results in the serious infringment of the Fourth Amendment right to be secure in one's person." *Id.* at 1045.

[18]372 N.E.2d 1235 (Ind. Ct. App. 1978).

[19]*See* Chimel v. California, 395 U.S. 752 (1969) (holding that a search is limited to the area within the arrestee's immediate control).

[20]372 N.E.2d at 1237.

[21]255 Ind. 264, 263 N.E.2d 636 (1970).

[22]*Id.* at 274-75, 263 N.E.2d at 641. In *Paxton* the court found improper the officers' placing the arrestees in the squad car and then returning to the arrestee's car for the purpose of retaking control of the area in which the evidence was found.

[23]372 N.E.2d 497 (Ind. Ct. App. 1978).

[24]428 U.S. 364 (1976).

[25]The purpose of an inventory search is to protect the owner's property and to avoid the occasional danger that may arise in impounding an unsearched vehicle. 372 N.E.2d at 501.

[26]IND. CODE § 9-9-5-5 (1976).

prior to the actual impoundment of the vehicle and in the presence of the defendant, unlike the situation in *Opperman.*

In another type of routine intrusion, the Indiana Supreme Court in *Fair v. State*[27] held that a handwriting exemplar, obtained from the defendant at the time he was booked, may be examined without the benefit of a search warrant.[28] The court relied upon *Farrie v. State*[29] and held that a search incidental to a valid arrest is lawful, even when conducted by a jailer at the time the accused is booked and confined.[30] Unlike *Farrie*, the evidence sought and utilized following the inventory search in *Fair* was directly related to the crime for which the arrest had been made. The police action was merely a logical continuation of investigative procedures that were lawful at their inception.[31]

In *May v. State*[32] the court of appeals held that where a police officer walked up to the front door of the defendant's residence to ask questions concerning two missing individuals and noticed marijuana in plain view through a window next to the door, the contraband could be seized and was admissible in evidence under the "plain view" doctrine.[33] The police officer was present for a legitimate reason unconnected with a search directed against the accused.[34] The same court in another case had also allowed seizure of heroin in plain view of the police arresting the defendant.[35]

The Indiana Supreme Court in *Gaddis v. State*,[36] following *United States v. Robinson*,[37] upheld a search of an abandoned "getaway" car which had been driven by a suspect in the murder of a police officer.[38] The court held that, because the abandoned car in-

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[27]364 N.E.2d 1007 (Ind. 1977).

[28]*Id.* at 1013.

[29]255 Ind. 681, 288 N.E.2d 212 (1971).

[30]364 N.E.2d at 1013.

[31]In this respect, the police action appears to have been approved by Chambers v. Maroney, 399 U.S. 42 (1970); Whitten v. State, 263 Ind. 407, 333 N.E.2d 86 (1975); Luckett v. State, 259 Ind. 174, 284 N.E.2d 738 (1972).

[32]364 N.E.2d 172 (Ind. Ct. App. 1977), *cert. denied*, 98 S. Ct. 1657 (1978).

[33]364 N.E.2d at 173.

[34]The court wrote:

> Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman, or an officer of the law.

Id. at 174 (citing David v. United States, 327 F.2d 301, 303 (9th Cir. 1964)).

[35]Clark v. State, 363 N.E.2d 1045, 1047 (Ind. Ct. App. 1977).

[36]368 N.E.2d 244 (Ind. 1977).

[37]533 F.2d 578 (D.C. Cir.), *cert. denied*, 424 U.S. 956 (1976).

[38]368 N.E.2d at 248.

volved potential mobility, the exigency of the murder suspect being at large justified the warrantless search under the automobile exception, and there was no error in the admission of evidence found in the car.[39] The police's need for information in order to identify and locate the suspect gave rise to the exigent circumstance needed to satisfy the warrrantless search exception established in *Warden v. Hayden.*[40]

4. Search Warrants.—A controversial case regarding search or seizure, handed down by the United States Supreme Court last term, was *Zurcher v. Stanford Daily.*[41] The Court rejected a broadening interpretation of the fourth amendment made by the lower courts.[42] The Court held that the fourth amendment does not prevent the issuance of a search warrant to search for evidence when a third party, the owner or possessor of the place to be searched, is not reasonably suspected of criminal involvement.[43] The Court also rejected the contention that, if the third party is a newspaper, additional factors, derived from the first amendment, justify nearly a per se rule forbidding the search warrant and permitting only the subpoena duces tecum.[44] The Court held that, properly administered, search warrant procedures afford sufficient protection to the third party.[45] The holding in *Zurcher* is consistent with previous decisions of the Court[46] which were ignored by the trial court: "It is an understatement to say that there is no direct authority . . . for the District Court's sweeping revision of the fourth amendment."[47]

The "fruit of the poisonous tree" doctrine[48] resulted in a reversal where the "fruit" of an illegal seizure was the basis of a search warrant. In *Stinchfield v. State,*[49] the court of appeals held that, because a search warrant was based upon a drug which a paid police informant obtained from the defendant's residence by undisclosed means, the trial court erred in overruling defendant's motion to suppress evidence obtained by the search warrant.[50] The court distinguished

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[39]*Id.*

[40]387 U.S. 294 (1967).

[41]98 S. Ct. 1970 (1978).

[42]353 F. Supp. 124 (N.D. Cal. 1972), *aff'd,* 550 F.2d 464 (9th Cir. 1977), *rev'd,* 98 S. Ct. 1970 (1978).

[43]98 S. Ct. at 1978.

[44]*Id.* at 1982.

[45]*Id.*

[46]*See generally,* Moylan, *The Fourth Amendment Inapplicable Vs. The Fourth Amendment Satisfied,* 1977 So. Ill. U.L.J. 75.

[47]98 S. Ct. at 1975.

[48]Wong Sun v. United States, 371 U.S. 471 (1963).

[49]367 N.E.2d 1150 (Ind. Ct. App. 1977).

[50]*Id.* at 1155.

this situation from cases in which the paid informant entered a suspect's house at the latter's invitation and then purchased or otherwise acquired contraband with the consent of the suspect.[51] The court also distinguished, for fourth and fourteenth amendment purposes, searches by private individuals from searches by the state and agents for the state.[52]

In *Misenheimer v. State*,[53] the Indiana Supreme Court considered whether a defendant can attempt to prove that the facts establishing probable cause in a search warrant application were false and, thereby, suppress evidence obtained by the search warrant. The court found that the defendant made no offer to prove that the police officer's affidavit misrepresented facts or that the officer acted in bad faith.[54]

The United States Supreme Court finally addressed this major issue in *Franks v. Delaware*,[55] two months after *Misenheimer*. The Court held that the fourth amendment allows the defendant to show that the warrant would not have been issued except upon an affidavit given with knowledge of its falsity or in reckless disregard for its truth.[56] Showing these facts voids the search warrant "and the fruits of the search [are] excluded [from the trial] to the same extent as if probable cause was lacking on the face of the affidavit."[57] The Court limited this holding by requiring that "to mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine."[58] The allegation of deliberate or reckless falsehood must be specific and accompanied by an offer of proof. Further, there must be a showing that, without the alleged false statement, there is no probable cause.[59]

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[51] *Id.* at 1153. *See* Mills v. State, 325 N.E.2d 472 (Ind. Ct. App. 1975).

[52] 367 N.E.2d at 1153. Searches by agents of the state are controlled by the fourth and fourteenth amendments while searches by private individuals are not. *See* Zupp v. State, 258 Ind. 625, 283 N.E.2d 540 (1972); Machlan v. State, 248 Ind. 218, 255 N.E.2d 762 (1967). *See also* Antrup v. State, 373 N.E.2d 194 (Ind. Ct. App. 1978), which held that evidence found by defendant's parents and turned over to police was not the subject of an illegal search and seizure.

[53] 374 N.E.2d 523 (Ind. 1978).

[54] *Id.* at 527.

[55] 98 S. Ct. 2674 (1978).

[56] *Id.* at 2676-77.

[57] *Id.* at 2677.

[58] *Id.* at 2685.

[59] *Id.* at 2682-83. The Court found six reasons for limiting veracity challenges:

> First, . . . the exclusionary rule . . . is not a personal constitutonal right, but only a judically created remedy . . . as a deterrent . . . [and shall not be extended to] interfer[e] with a criminal conviction in order to deter official misconduct.
>
> Second, . . . a citizen's privacy interests are adequately protected by . . .

B. Lineups and Photographic Identifications

The Indiana appellate courts decided several cases involving one-on-one identifications. *Poindexter v. State*[60] held an in-court identification to be independent of a pre-trial one-on-one identification resulting from an on-the-scene confrontation.[61] *Arkins v. State*[62] upheld an on-the-scene confrontation ten minutes after the robbery when the police brought the handcuffed suspects to the robbery victim, who thereupon identified them.[63] The court of appeals reiterated the rule that "[c]onfrontations occuring immediately after the commission of an offense are not per se unduly suggestive even though the accused is the only suspect present."[64] *Dowdell v. State*[65] held that "in view of the circumstances, the showing of only one picture to [the] victim to identify [the] defendant, was not impermissibly suggestive."[66] *Zion v. State*[67] dealt with an identification problem occurring when the suspect was not in police custody and circumstances suggested that he might flee or further endanger the victim if asked to appear in a police lineup. The rape victim in *Zion* identified the suspect a day and a half after the crime as he appeared outside his place of employment. The court's holding that this was "not impermissibly and unnecessarily suggestive"[68] was based on the highly limited scope of identification alternatives available.

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sworn affidavit[s] and by the magistrate's independent determination of sufficiency . . . .

Third, . . . the magistrate already is equipped to conduct a fairly vigorous inquiry into the accuracy of the factual affidavit [by] question[ing] the affiant, or [by] summon[ing] [other evidence].

Fourth, . . . to make [the magistrate's] inquiry into probable cause reviewable in regard to veracity [would denigrate his function].

Fifth, permitting a post-search evidentiary hearing on issues of veracity would confuse the pressing issue of guilt or innocence with the collateral question as to whether there had been official misconduct in the drafting of the affidavit.

Sixth and finally, . . . a post-search veracity challenge is inappropriate because the accuracy of an affidvait in large part is beyond the control of the affiant.

Id. at 2682-83.

[60]374 N.E.2d 509 (Ind. 1978).

[61]*Id.* at 512.

[62]370 N.E.2d 985 (Ind. Ct. App. 1977).

[63]*Id.* at 987.

[64]*Id.* (citing Wright v. State, 259 Ind. 197, 285 N.E.2d 650 (1972)).

[65]374 N.E.2d 540 (Ind. Ct. App. 1978). *See* Calvert v. State, 160 Ind. App. 570, 312 N.E.2d 925 (1974).

[66]374 N.E.2d at 542.

[67]365 N.E.2d 766 (Ind. 1977).

[68]*Id.* at 769.

Finally, in lineup cases, the Indiana Supreme Court indicated that the use of video tape in lineups would be an alternative to the presence of counsel in that the existence of a video tape recording would insure accurate reconstruction of the lineup and deter abuses as effectively as counsel.[69]

C. *Confessions and Admissions*

1. Voluntariness.—The state, in a suppression hearing, has the burden to prove beyond a reasonable doubt that the defendant knowingly and intelligently waived his privilege against self-incrimination. The legal standard to be applied is "whether, looking at all the circumstances, the confession was free and voluntary, and not induced by any violence, threats, promises, or other improper influence."[70]

In *Blatz v. State*,[71] the court of appeals held that the state failed to prove that an eighteen-year-old defendant who had eight years of special education as a slow learner made a voluntary and knowing waiver of his rights to remain silent and to have counsel present during interrogation.[72] The court, in reversing the conviction, also considered the defendant's detention of more than ninety-six hours prior to making a statement and that he was not taken before a magistrate as required by statute.[73] The same result occurred in *Craft v. State*,[74] where the court of appeals reversed a conviction and held that the state failed to show that the defendant understood his constitutional rights and that he freely and voluntarily waived them.[75] The defendant, after spending a night in jail on a public intoxication charge, signed a waiver of rights form but twice refused to give a statement. After a third request by the police, the defendant dictated a statement to the officers without the presence of an attorney. This, combined with an erroneous instruction on intoxication, led to the reversal.[76]

In *Antrup v. State*,[77] the defendant's attorney instructed the police not to interrogate his client and told the client not to speak

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[69]Bruce v. State, 375 N.E.2d 1042, 1086 (Ind. 1978) (citing United States v. Wade, 388 U.S. 218, 236-37 (1967)).

[70]Gibson v. State, 257 Ind. 23, 28, 271 N.E.2d 706, 709 (1971) (quoting Nacoff v. State, 256 Ind. 97, 101, 267 N.E.2d 165, 167 (1971)).

[71]369 N.E.2d 1086 (Ind. Ct. App. 1977).

[72]*Id.* at 1088-89, 1090.

[73]*Id.* at 1088 (citing IND. CODE § 18-1-11-8 (1976)).

[74]372 N.E.2d 472 (Ind. Ct. App. 1978).

[75]*Id.* at 475.

[76]*Id.*

[77]373 N.E.2d 194 (Ind. Ct. App. 1978).

with anyone. The defendant, nevertheless, asked to speak to a state police officer, signed a waiver, and then made the damaging admission. The court concluded that the defendant voluntarily waived those rights.[78]

In several cases the courts upheld the voluntariness of confessions and admissions made when the defendants were under the influence of alcohol or drugs. In *Lee v. State*,[79] the confession was held to be voluntary even though the defendant was receiving medication "not of the type to overcome his resistance . . . ."[80] Courts held confessions to be valid in other cases in which defendants claimed to be under the influence of drugs or suffering from drug withdrawal.[81] There was conflicting evidence in each of the cases whether the defendants were affected by either the drugs or alcohol, which the trial courts resolved by finding no impairment of defendants' voluntariness in confessing.

A criminal defendant is entitled on motion to a hearing on the issue of voluntariness outside the presence of the jury. The initial determination of voluntariness of a confession is for the court, although the same evidence is admissible to the jury regarding the weight to be given a confession.[82] A murder conviction was remanded for a hearing before the trial judge on the issue of voluntariness in *Craig v. State*,[83] where the trial judge refused the defendant's request for a hearing outside the presence of the jury during trial.

In *Perry v. State*,[84] the court of appeals held that an interrogating officer's statement to the defendant "that it would look better for defendant 'in court' " if he cooperated, did not constitute an implied promise of immunity or an implied promise or mitigation of punishment so as to render incriminating statements made by defendant inadmissible.[85]

The admissibility into evidence of a confession is determined from the totality of the circumstances, by whether it was made voluntarily.[86] The circumstances to be considered include whether the confession was freely made, if it were the product of a rational

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[78]*Id.* at 197.

[79]370 N.E.2d 327 (Ind. 1977).

[80]*Id.* at 329.

[81]Combs v. State, 372 N.E.2d 179 (Ind. 1978); Bean v. State, 371 N.E.2d 713 (Ind. 1978) (defendant's blood alcohol level was .125, four hours after the crime); Hill v. State, 370 N.E.2d 889 (Ind. 1977) (prior to interrogation, defendant consumed valium and mescaline and smoked several marijuana cigarettes); Robinson v. State, 371 N.E.2d 718 (Ind. Ct. App. 1978).

[82]IND. CODE § 35-5-5-1 (1976).

[83]370 N.E.2d 880, 885 (Ind. 1977).

[84]374 N.E.2d 558 (Ind. Ct. App. 1978).

[85]*Id.* at 559.

[86]Works v. State, 362 N.E.2d 144 (Ind. 1977).

intellect, if it were made without compulsion or inducement of any sort, and whether the accused's will was overborne.[87]

2. Miranda Issues.—The United States Supreme Court summarized its holding in *Miranda v. Arizona*[88] as follows: "[T]he prosecution may not use statements . . . stemming from *custodial interrogation* of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[89]

Bugg v. State[90] held that when a police officer, who was a friend of the defendant, visited her in jail to help calm her, and the defendant made self-incriminating statements, this was not interrogation within the meaning of *Miranda*, although certainly it was custodial.[91] Thus, the voluntary statement of the defendant was admissible even though no warnings had been given since the time of arrest.[92]

Several Indiana cases involved spontaneous incriminating statements made by defendants before the police had an opportunity to give the *Miranda* warnings and were held not to be the products of interrogation and, thus, were properly admitted into evidence.[93]

In *Lee v. State*,[94] an incriminating telephone conversation between the unindicted defendant and an accomplice, taped with the accomplice's consent, was held admissible although the defendant was not warned of his *Miranda* rights.[95] The statement was obviously made while defendant was not in custody.

3. Massiah Issues.—The clear rule in *Massiah v. United States*[96] is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him.[97] In *Jackson v. State*,[98] the Indiana Supreme Court rejected a *Massiah* objection and upheld a murder conviction where the defendant was in custody for armed robbery, had counsel appointed on that charge, and confessed to an unrelated murder without his attorney's presence.[99] The court held that the ac-

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[87]Murphy v. State, 369 N.E.2d 411 (Ind. 1977) (citing Johnson v. State, 250 Ind. 283, 235 N.E.2d 688 (1968)).

[88]384 U.S. 436 (1966).

[89]*Id.* at 444 (emphasis added).

[90]372 N.E.2d 1156 (Ind. 1978).

[91]*Id.* at 1158.

[92]*Id.* at 1157.

[93]Cooper v. State, 372 N.E.2d 1172, 1173 (Ind. 1978); Seay v. State, 363 N.E.2d 1063, 1065-66 (Ind. Ct. App. 1977); Roby v. State, 363 N.E.2d 1039, 1042 (Ind. Ct. App. 1977).

[94]369 N.E.2d 1083 (Ind. Ct. App. 1977).

[95]*Id.* at 1085.

[96]377 U.S. 201 (1964).

[97]*Id.* at 206.

[98]375 N.E.2d 223 (Ind. 1978).

[99]*Id.* at 225.

cused's right to counsel was not violated since no formal charge with respect to the murder had been filed and his counsel was appointed only with respect to the armed robbery charge.[100] The confession was made to the prosecutor without any interrogation and, therefore, *Miranda* warnings were not required.[101]

In a case of first impression, *Walls v. State*,[102] the court of appeals held that it was not error per se for the police to take a statement from a defendant in custody without first notifying counsel that the defendant wished to make a statement.[103] This fact "should be considered by the trial court with a critical eye along with all other relevant factors when called upon to determine from the totality of the circumstances whether the State has met its heavy burden of proof of showing that the statement was voluntarily made."[104]

In *Murphy v. State*,[105] the Indiana Supreme Court held that a murder suspect's confession did not violate his right to counsel when the suspect asked to talk to the police without his attorney: "The defendant can waive his right to have an attorney present when making any statement to the police, just as he could waive any other right."[106]

D. Guilty Pleas

1. Advisement of Rights. — The Indiana Supreme Court reversed the denial of post-conviction relief where the record of the guilty plea proceedings did not show that the defendant was fully advised of his *Boykin*[107] rights by the trial judge in *Williams v. State*,[108] *Hollingshed v. State*,[109] and *Mack v. State*.[110] In *Hollingshed*, the record

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[100] *Id.*

[101] *Id.*

[102] 368 N.E.2d 1373 (Ind. Ct. App. 1977).

[103] *Id.* at 1375.

[104] *Id.* The court said it "does not wish to be understood as approving this practice." *Id.*

[105] 369 N.E.2d 411 (Ind. 1978).

[106] *Id.* at 415.

[107] Boykin v. Alabama, 395 U.S. 238 (1969), held:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Second, is the right to trial by jury. Third, is the right to confront one's accusers. We cannot presume a waiver of these three important federal rights from a silent record.

Id. at 243 (footnote & citations omitted).

[108] 363 N.E.2d 971 (Ind. 1977).

[109] 365 N.E.2d 1215 (Ind. 1977).

[110] 373 N.E.2d 1096 (Ind. 1978).

statement that the trial court advised the defendant of his "constitutional right" was not sufficient.[111] In *Mack*, that the defendant was represented by counsel, and that the court asked if the defendant "[had] any questions?"[112] were held insufficient to meet the *Boykin* requirements.[113]

The court of appeals in *Pitman v. State*,[114] reversed the defendant's conviction where the trial court failed to advise defendant that he was waiving his fifth amendment privilege. This reversal was based on Indiana law[115] which codified the *Boykin* requirements for a court to accept a guilty plea. In *Kindred v. State*,[116] the court of appeals held that the failure of the trial judge to personally perform each and every advisement required by the statute did not require reversal, absent showing of harm or prejudice, where the record showed that the defense counsel gave the advisements.[117]

2. Plea Agreements.—The United States Supreme Court in *Bordenkircher v. Hayes*[118] recognized the "give and take" of plea bargaining and held that due process was not violated when a prosecutor carried out a threat, made during plea negotiations, to have the accused reindicted on more serious charges if he did not plead guilty to the offense originally charged.[119] The Court said that plea

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[111]365 N.E.2d at 1215.

[112]373 N.E.2d at 1098.

[113]*Id.*

[114]369 N.E.2d 689 (Ind. Ct. App. 1977).

[115]IND. CODE § 35-4.1-1-3 (1976) states:

The court shall not accept a plea of guilty from the defendant without first addressing the defendant and

(a) determining that he understands the nature of the charge against him;

(b) informing him that by his plea of guilty he is admitting the truth of all facts alleged in the indictment or information or to an offense included thereunder and that upon entry of such plea the court shall proceed with judgment and sentence;

(c) informing him that by his plea of guilty he waives his rights to a public and speedy trial by jury, to face the witnesses against him, to have compulsory process for obtaining witnesses in his favor and to require the state to prove his guilt beyond a reasonable doubt at a trial at which the defendant may not be compelled to testify against himself;

(d) informing him of the maximum possible sentence and minimum sentence for the offense charged and of any possible increased sentence by reason of the fact of prior conviction or convictions, and of any possibility of the imposition of consecutive sentences;

(e) informing him that the court is not a party to any agreement which may have been made between the prosecutor and the defense and is not bound thereby.

[116]365 N.E.2d 776 (Ind. Ct. App. 1977).

[117]*Id.* at 779 (citing Ewing v. State, 358 N.E.2d 204 (Ind. Ct. App. 1976)).

[118]434 U.S. 357 (1978).

[119]*Id.* at 365; *accord*, Howard v. State, 377 N.E.2d 628 (Ind. 1978).

bargaining provides advantages to both defendants and prosecutors who want to avoid trials.[120]

Even though a plea agreement was not filed, and the trial court advised the defendant that it would not be bound by any agreement, the court of appeals in *Henry v. State*[121] reversed a guilty plea as involuntarily made because the record showed that the defendant was relying on the prosecutor to recommend sentencing her under the Minor's Sentencing Act.[122] The trial court did not advise the defendant that the prosecutor failed to make the recommendation and could not make it after acceptance of the guilty plea.

E. Criminal Rule 4—Speedy Trial

1. Speedy Trial.—The Indiana Court of Appeals in *Burress v. State*[123] held both that the defendant was not denied due process by reason of the lapse of 230 days between the defendant's purchase of heroin and the filing of the information because there was no proof of prejudice, and that the constitutional guarantees of speedy trial are not applicable until a person has been accused of a crime and arrested.[124]

2. Criminal Rule 4 Issues.—Indiana Rule of Criminal Procedure 4(F) states that when a delay is caused by the defendant's act, Rule 4 time limitations on prosecution shall be extended by the amount of such delay. In *Bradberry v. State*,[125] the Indiana Supreme Court held that the delay caused by the defendant's motion for selection of a new panel of judges from which to strike was attributable to the defendant, not to the prospective judges.[126] In *State v. Hancock County Superior Court*,[127] the Indiana Supreme Court held that a sixteen-month delay, between the date the defendant struck one name on a panel after a change of judge request and the date the special judge was appointed, was a delay chargeable to the defendant for Rule 4(C) purposes.[128] Criminal Rule 13[129] required that a

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[120]434 U.S. at 363.
[121]370 N.E.2d 972 (Ind. Ct. App. 1977).
[122]*Id.* at 974.
[123]363 N.E.2d 1036 (Ind. Ct. App. 1977).
[124]*Id.* at 1037-38; *accord*, United States v. Lovasco, 431 U.S. 783 (1977).
[125]364 N.E.2d 1183 (Ind. 1977).
[126]*Id.* at 1186.
[127]372 N.E.2d 169 (Ind. 1978).
[128]*Id.* at 171.
[129]IND. R. CR. P. 13 provides in part:
All of the proceedings hereunder shall be taken expeditiously. It shall be the duty of the party who files an application or motion for change of judge to bring it to the attention of the presiding judge although the opposing party may do so. In all other cases when it becomes necessary to select a special

party filing a change of judge motion bring it to the attention of the presiding judge. Thus, the party filing the motion must take the initiative to see that the proceedings are completed.[130]

In *Smith v. State*,[131] the Indiana Supreme Court held that the time limitations of Criminal Rule 4(B) are inapplicable to an accused incarcerated outside Indiana because the other jurisdiction retains the defendant for the proper purpose of standing trial or serving a sentence.[132] *Sharpe v. State*[133] held that the accused's right to a speedy trial is tested by a balancing approach viewing all the facts.[134] Among the factors to be considered, apart from Criminal Rule 4 requirements, in determining whether an accused's constitutional rights to a speedy trial have been violated are "the length of delay, the reasons for the delay, the defendant's assertion of his desire for a speedy trial, and the prejudice to the defendant arising from the delay."[135]

3. Waiver of Criminal Rule 4.—Where attorneys, representing two defendants joined for trial, were unable to agree on a mutually convenient trial date until after the seventy-day limit, and neither moved for a separate trial, discharge under Criminal Rule 4(B)(1) was not appropriate.[136] The court was not required to order separate trials on its own motion.[137]

F. Discovery

In *State ex rel. Grammer v. Tippecanoe Circuit Court*,[138] the Indiana Supreme Court held that interrogatories are never proper in a criminal case if their function can be served by another, allowed, discovery technique and should only be used under exigent circumstances.[139] The court noted that, while criminal discovery has been expanded by allowing various applications of civil discovery techniques, the very nature of the criminal case setting belies the wisdom of an indiscriminate application of civil discovery procedures.[140] Since criminal discovery is largely discretionary, the trial

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judge either party may bring this fact to the attention of the judge authorized to make such selection."

[130]372 N.E.2d at 170.

[131]368 N.E.2d 1154 (Ind. 1977).

[132]*Id.* at 1156; *accord*, Springer v. State, 372 N.E.2d 466 (Ind. Ct. App. 1978).

[133]369 N.E.2d 683 (Ind. Ct. App. 1977).

[134]*Id.* at 686; *accord*, Springer v. State, 372 N.E.2d 466, 469 (Ind. Ct. App. 1978).

[135]369 N.E.2d at 686 (citing Barker v. Wingo, 407 U.S. 514 (1972); Collins v. State, 321 N.E.2d 868 (Ind. Ct. App. 1975)).

[136]Young v. State, 373 N.E.2d 1108 (Ind. Ct. App. 1978).

[137]*Id.* at 1110.

[138]377 N.E.2d 1359 (Ind. 1978).

[139]*Id.* at 1361. *Contra*, Hampton v. State, 359 N.E.2d 276 (Ind. Ct. App. 1977).

[140]377 N.E.2d at 1365.

court is not necessarily bound by the limiting language contained in civil rules.[141]

The Indiana Supreme Court held that an overly broad discovery motion or order places too great a burden on the state and makes a good faith compliance with discovery difficult to determine.[142] The criteria for determining discovery capabilities were set forth in *Dillard v. State*.[143] First, there must be a sufficient designation of the items sought to be discovered. Second, the items must be material. Third, the state must make a showing of paramount interest in non-disclosure.[144]

In the event of noncompliance with discovery, the trial court has broad discretion in imposing sanctions, from granting a continuance to excluding evidence or striking the testimony of a surprise witness. The rationale for limits on discovery in criminal cases is that the trial judge must regulate the proceedings to insure fairness and to obtain such economy of time and effort as is commensurate with the rights of both society and the defendant. Therefore, the enforcement of discovery orders and the sanctions to be invoked are in the trial judge's discretion and should not be overturned absent clear error.[145]

Butler v. State,[146] reversed a conviction where the trial court denied a motion for continuance when a surprise witness was called by the state. In *Hall v. State*,[147] reversal resulted from failure of the state to comply with a discovery order.

In *Reid v. State*,[148] the Indiana Supreme Court upheld the trial court's denial of the defendant's motion to strike a rebuttal witness' testimony where the identity of the witness was not disclosed as required by a discovery order, and held that the defendant was entitled to no more than a continuance, but that, since he did not move for a continuance, the error was waived.[149] The court found a continuance to be the proper remedy for a violation of a discovery order unless exclusion of the undisclosed evidence is needed to protect the defendant's fair trial rights or to deter bad faith violations.[150]

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[141]*Id.* (citing State *ex rel.* Keller v. Criminal Court, 317 N.E.2d 433 (Ind. 1974); Gutowski v. State, 354 N.E.2d 293 (Ind. Ct. App. 1976)).

[142]Brandon v. State, 374 N.E.2d 504 (Ind. 1978); Reid v. State, 372 N.E.2d 1149 (Ind. 1978).

[143]257 Ind. 282, 274 N.E.2d 387 (1971).

[144]*Id.* at 291-92, 274 N.E.2d at 392.

[145]Reid v. State, 372 N.E.2d 1149, 1155 (Ind. 1978).

[146]372 N.E.2d 190 (Ind. Ct. App. 1978).

[147]374 N.E.2d 62 (Ind. Ct. App. 1978).

[148]372 N.E.2d 1149 (Ind. 1978).

[149]*Id.* at 1155.

[150]*Id.*

Ottinger v. State,[151] held that the trial court properly refused to allow the defendant to call two witnesses who were not disclosed to the state until the day of trial.[152] The defendant answered interrogatories by stating that he intended to present no witnesses. The defendant had more than six months to notify the state of his changed intentions and failed to do so until the day of trial.

In *Wright v. State*,[153] the Indiana Supreme Court reversed the lower court's grant of post-conviction relief. The trial court had found a *Brady v. Maryland*[154] violation based on the prosecutor's failure to disclose that the victim may have viewed the defendant's criminal record before identifying the defendant at police headquarters.[155]

The supreme court, following the *United States v. Agurs*[156] interpretation of the *Brady* rule, held that nondisclosure by the prosecutor was not material in the constitutional sense, the creation of reasonable doubt being mere speculation.[157] The standard of materiality defined in *Agurs* limits the *Brady* rule to omitted evidence that "creates a reasonable doubt that did not otherwise exist."[158] Moreover, "the omission must be evaluated in the context of the entire record."[159] In *Walker v. State*[160] the court held that there was no error in failing to disclose a "deal" made with the state's witness by police officers when the promise of consideration was made without authority of the prosecutor and the prosecutor later told the witness that there was no promise and that she would be prosecuted.[161]

The Indiana Supreme Court in *Bruce v. State*[162] disagreed with the court of appeals in *Hampton v. State*.[163] *Hampton* held that the prosecutor, when responding to a pre-trial notice of alibi, is required to state only the date and place of the offense, because there are discovery devices available to the accused for determining the time of day at which the offense occurred.[164] The supreme court said that

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[151]370 N.E.2d 912 (Ind. Ct. App. 1977).

[152]*Id.* at 916.

[153]372 N.E.2d 453 (Ind. 1978).

[154]373 U.S. 83 (1963).

[155]372 N.E.2d at 455.

[156]427 U.S. 97 (1976).

[157]372 N.E.2d at 455.

[158]*Id.* (quoting United States v. Agurs, 427 U.S. at 112).

[159]*Id.*

[160]372 N.E.2d 739 (Ind. 1978).

[161]*Id.* at 740.

[162]375 N.E.2d 1042 (Ind. 1978).

[163]359 N.E.2d 276 (Ind. Ct. App. 1978), *discussed in* Wilcox, *Criminal Law and Procedure, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 122, 139 (1977).

[164]359 N.E.2d at 278.

the notice of alibi procedure is a special pleading device which requires greater specificity than discovery methods and that the prosecution must provide the time of the offense with reasonable specificity, narrowing the alibi time to less than the twenty-four hour period indicated here by the state.[165]

Two recent Indiana cases have upheld the trial court's refusal to allow alibi evidence where the defendant failed to timely file an alibi notice and did not establish good cause for the failure to file.[166] In *Hartman v. State*,[167] the appellate court determined that the trial court's granting the state's motion in limine prohibiting the defendant from testifying regarding his alibi did not violate the defendant's constitutional rights.[168] The court acknowledged that several states and Federal Rule of Criminal Procedure 12.1(d) specifically exempt the defendant's own testimony from the exclusionary sanctions of alibi statutes[169] but followed *Bowen v. State*[170] and *Lake v. State*[171] which require exclusion of the defendant's testimony where the defendant fails to either give notice or show good cause for failure to give timely notice.

G. Double Jeopardy and Merger

Jeopardy attaches when a jury is empaneled and sworn as a matter of constitutional law,[172] and does not attach in a bench trial until the court begins to hear evidence.[173] In *Cabell v. State*[174] the defendant moved to withdraw the case from the jury when the court informed him that the alternate juror had participated in the deliberations. The Indiana Supreme Court held that the defendant's action was tantamount to a motion for a mistrial and, therefore, the double jeopardy clause did not bar his retrial.[175]

Double jeopardy considerations bar prosecution for two crimes only when both offenses require proof of the same fact or act. In *Neal v. State*,[176] the Indiana Supreme Court upheld conviction for

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[165]375 N.E.2d at 1057-58.

[166]Riggs v. State, 376 N.E.2d 483 (Ind. 1978); Hartman v. State, 376 N.E.2d 100 (Ind. Ct. App. 1978).

[167]376 N.E.2d 100 (Ind. Ct. App. 1978).

[168]*Id.* at 104-05.

[169]*Id.* at 105.

[170]263 Ind. 558, 334 N.E.2d 691 (1975).

[171]257 Ind. 264, 274 N.E.2d 249 (1971).

[172]Crist v. Bretz, 98 S. Ct. 2156, 2160-61 (1978).

[173]Lee v. United States, 432 U.S. 23, 27 n.3 (1977).

[174]372 N.E.2d 1176 (Ind. 1978).

[175]*Id.* at 1177 (citing United States v. Dinitz, 424 U.S. 600 (1976)). *See also* Mooberry v. State, 157 Ind. App. 354, 300 N.E.2d 125 (1973).

[176]366 N.E.2d 650 (Ind. 1977).

both robbery and kidnapping against a double jeopardy defense and said that, while carrying away the victim was necessary for the kidnapping conviction, it was not a necessary element of robbery.[177] The court found no factual merger because the robbery had apparently been completed before the defendant kidnapped the victim.[178]

The merger doctrine requires that "facts giving rise to the various offenses must be independently supportable, separate and distinct."[179] Armed robbery merged into a felony murder conviction in *Williams v. State.*[180] In *Bean v. State,*[181] the court stated that judgment cannot be entered on both premeditated murder and felony murder arising from the same operative facts.[182] The Indiana Supreme Court sua sponte vacated an armed robbery conviction because the defendant had also been convicted of felony murder involving the same robbery.[183] Where second degree burglary, automobile banditry, and safe burglary arose from same transaction, the Indiana Court of Appeals held that second degree burglary and automobile banditry merged into the safe burglary.[184] Armed robbery was held to merge into inflicting injury in commission of robbery in *Dew v. State;*[185] assault and battery with intent to commit a felony merged into inflicting injury in the commission of a felony.[186] *Martin v. State*[187] held that the defendant could not be separately sentenced for possession of three different drugs found by police during an arrest.[188] A defendant cannot be sentenced for both armed rape and rape.[189] The Indiana Supreme Court in *Sansom v. State*[190] held that theft and automobile banditry merged into burglary.[191]

The court of appeals held in *Elmore v. State*[192] that theft merged into conspiracy[193] and, in *Davis v. State,*[194] that assault and battery

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[177]*Id.* at 651-52.

[178]*Id.* at 652.

[179]Thompson v. State, 259 Ind. 587, 592, 290 N.E.2d 724, 727 (1972).

[180]373 N.E.2d 142 (Ind. 1978).

[181]371 N.E.2d 713 (Ind. 1978).

[182]*Id.* at 716. *See also* Smith v. State, 373 N.E.2d 884 (Ind. 1978).

[183]Sims v. State, 368 N.E.2d 1352, 1356 (Ind. 1977).

[184]Swinehart v. State, 372 N.E.2d 1244, 1249 (Ind. Ct. App. 1978).

[185]373 N.E.2d 138, 140 (Ind. 1978).

[186]Tessely v. State, 370 N.E.2d 907, 912 (Ind. 1978).

[187]374 N.E.2d 543 (Ind. Ct. App. 1978).

[188]*Id.* at 545.

[189]Goffe v. State, 374 N.E.2d 560, 561 n.1 (Ind. Ct. App. 1978).

[190]366 N.E.2d 1171 (Ind. 1977), *overruled by* Elmore v. State, 1178 S 255 (Ind. Nov. 8, 1978), slip op. at 9.

[191]*Id.* at 1172 (citing Hudson v. State, 354 N.E.2d 164 (Ind. 1976); Coleman v. State, 339 N.E.2d 51 (Ind. 1975)).

[192]375 N.E.2d 660 (Ind. Ct. App.), *rev'd,* 1178 S 255 (Ind. Nov. 8, 1978).

[193]*Id.* at 667.

[194]376 N.E.2d 545 (Ind. Ct. App. 1978)

arising from the same offense as second degree burglary merged into the burglary where the facts giving rise to the offenses were not independently supportable, separate, and distinct.[195] The dissent in *Elmore* noted that the Indiana Supreme Court expressly rejected the "same transaction" test for double jeopardy purposes and adopted the "identity of offense" test, and urged that the same test be applied for both double jeopardy and for the sentences arising from the separate crimes.[196] It further stated that merger cases result in freeing the defendant from punishment for an offense he has committed because it arose from the same transaction even though the lesser crime was not necessarily an included offense.[197]

H. Right to Counsel

Goffe v. State[198] reversed a conviction because defendant was not advised of his right to pauper counsel.[199] An indigent, however, does not have the right to counsel of his own choosing.[200]

The Indiana Supreme Court, in *German v. State*,[201] found no error in permitting the defendant to exercise his *Faretta*[202] right to represent himself and none in the denial of his pro se request for a continuance to prepare for trial since he fired his attorney the morning the trial was scheduled.[203] Appointment of the fired attorney as standby counsel was permissible as was the the court's direction that the attorney assume representation when the defendant said he would not participate in his own defense any further.[204] The court held: "A trial judge may terminate self-representation by a defendant who deliberately engages in serious or obstructionist misconduct."[205] In *Swinehart v. State*,[206] the Indiana Supreme Court held that, while an indigent defendant has a constitutional right to be represented by counsel at state expense and also has the constitutional right to proceed pro se, a defendant had no absolute right to

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[195] *Id.* at 546.

[196] 375 N.E.2d at 669 (Buchanan, J., dissenting) (citing Ford v. State, 229 Ind. 516, 98 N.E.2d 655 (1951)). The supreme court found that conspiracy to commit theft and theft are separate offenses, for which defendants properly receive separate sentences. Elmore v. State, 1178 S 255 (Ind. Nov. 8, 1978), slip op. at 9-11.

[197] *Id.* at 667, 668.

[198] 374 N.E.2d 560 (Ind. Ct. App. 1978).

[199] *Id.* at 561. An affidavit attached to the record stated that defendant, in fact, requested counsel by telephoning the judge several days before trial.

[200] Shoulders v. State, 372 N.E.2d 168 (Ind. 1978).

[201] 373 N.E.2d 880 (Ind. 1978).

[202] Faretta v. California, 422 U.S. 806 (1975).

[203] 373 N.E.2d at 882-83.

[204] *Id.* at 883.

[205] *Id.* (citing Illinois v. Allen, 397 U.S. 337 (1970)).

[206] 376 N.E.2d 486 (Ind. 1978).

both.[207] Allowing such hybird representation is a matter of trial court's discretion.[208]

Several cases addressed the issue of effective assistance of counsel and continued the presumption of competency of counsel. The presumption is overcome only by strong and convincing proof: by showing that the attorney's actions or omissions made the proceedings a mockery and were shocking to the conscience of the court.[209]

In *Logston v. State*,[210] the court held that, by attacking the competence of his defense counsel, the defendant afforded the attorney the right to fully explain his conduct even if that explanation divulged confidential communications between attorney and client.[211]

Holes v. State[212] held that appointment of counsel four days before trial was not per se ineffective assistance, in view of the circumstances that two attorneys previously had withdrawn from the case, that defendant did not use reasonable diligence in securing counsel prior to requesting pauper counsel, that there were only three state's witnesses, and that the prosecutor permitted defense counsel to review the state's entire file.[213] However, *Jones v. State*[214] found ineffective assistance of counsel because the public defender was given less than three hours to consult with the defendant after retained counsel withdrew because he had not been paid.[215]

In two recent cases, the Indiana Supreme Court held that representation of co-defendants by one attorney was not necessarily ineffective.[216]

I. Trial Issues

1. Evidence.—In *Smith v. State*,[217] the court of appeals held that the trial court did not abuse its discretion in finding a six-year-

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[207]*Id.* at 490.

[208]*Id.* (citing Bradberry v. State, 364 N.E.2d 1183 (Ind. 1977)).

[209]Dull v. State, 372 N.E.2d 171 (Ind. 1978); Lenoir v. State, 368 N.E.2d 1356 (Ind. 1977). *Contra*, Cooper v. Fitzharris, 551 F.2d 1162 (9th Cir. 1977). Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), rejected the "mockery" test and applied a standard based on the "range of competence demanded of attorneys in criminal cases." *Id.* at 543 (citing McMann v. Richardson, 397 U.S. 759 (1970)). Counsel error must be so flagrant that it resulted from neglect or ignorance rather than from professional deliberation. 561 F.2d at 544.

[210]363 N.E.2d 975 (Ind. 1977).

[211]*Id.* at 977.

[212]369 N.E.2d 1098 (Ind. Ct. App. 1977).

[213]*Id.* at 1099.

[214]371 N.E.2d 1314 (Ind. Ct. App. 1978).

[215]*Id.* at 1316.

[216]Hudson v. State, 375 N.E.2d 195, 196-97 (Ind. 1978); Ross v. State, 377 N.E.2d 634, 636-37 (Ind. 1978); *accord*, Skinner v. State, 367 N.E.2d 19, 20 (Ind. Ct. App. 1977).

[217]372 N.E.2d 511 (Ind. Ct. App. 1978).

old victim competent to testify in a prosecution for assault and battery with intent to gratify sexual desires.[218] The court stated that the competency statute[219] "is satisfied if the court can find: (1) that the child knows the difference between telling the truth and telling a lie, and (2) that the child realizes that he or she is under some compulsion to tell the truth. The compulsion . . . need not be fear of punishment."[220]

The Indiana Supreme Court, in *Ware v. State*,[221] upheld the trial court's finding that a twenty-eight-year-old rape victim, with a mental age of seven to nine years, was competent to testify.[222] The defendant had contended that the competency of children statute should apply. The supreme court held that the presumption that any person ten years of age or older is competent could apply and that the record supported the trial court's finding.[223]

Where age of the defendant is an essential element of an offense such as armed robbery under the old penal code[224] and child molesting,[225] incest,[226] and contributing to the delinquency of a minor[227] under the new penal code, the issue of the accused's age should be raised by a motion to dismiss;[228] otherwise, the age element is presumed.[229] If the issue is raised by a motion to dismiss with an attached supporting memorandum,[230] the prosecution must then respond and bear the ultimate burden of proof beyond a reasonable doubt.[231]

2. *Instructions.*—Even when an instruction on lesser included offenses is appropriate, failure to tender such instruction waives any

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[218]*Id.* at 515.

[219]IND. CODE § 34-1-14-5 (1976) renders children less than 10 years old incompetent, "unless it appears that they understand the nature and obligation of an oath."

[220]372 N.E.2d at 513. The court did not refer to the general test of competency which is whether the witness has sufficient mental capacity to *perceive*, to *remember*, and to *narrate* the incident he has observed as well as to understand and appreciate the nature and obligation of an oath. Greco v. State, 240 Ind. 584, 166 N.E.2d 180 (1960).

[221]376 N.E.2d 1150 (Ind. 1978).

[222]*Id.* at 1151.

[223]*Id.* at 1151-52. The court discussed the traditional test of competency and the trial court did question the witness concerning the nature and obligation of an oath. *Id.*

[224]IND. CODE § 35-12-1-1 (1976) (repealed 1977).

[225]*Id.* § 35-42-4-3(c), (d) (Supp. 1978).

[226]*Id.* § 35-46-1-3.

[227]*Id.* § 35-46-1-8.

[228]*Id.* § 35-3.1-1-4 (1976) (amended 1978).

[229]Cox v. State, 372 N.E.2d 176 (Ind. 1978); Massey v. State, 371 N.E.2d 703 (Ind. 1978); Moore v. State, 369 N.E.2d 628 (Ind. 1978); McGowan v. State, 366 N.E.2d 1164 (Ind. 1977).

[230]IND. R. CR. P. 3.

[231]McGowan v. State, 366 N.E.2d 1164, 1165 (Ind. 1977).

error in not giving the requested instruction.[232] The test for determining error in a trial court's refusal to instruct on lesser offenses is whether the lesser offense is necessarily included within the greater offense *and* whether evidence was adduced at trial which applied to the included offense.[233] In *Sharp v. State*,[234] the supreme court applied this test and found that the defendant was either guilty as charged or was not guilty of any offense since the sole factual issue was identification of the defendant.[235]

The United States Supreme Court and the Indiana Supreme Court disagreed on the propriety of giving, over defendant's objections, a cautionary instruction that the jury was not to draw any adverse inferences from the defendant's failure to testify. In *Lakeside v. Oregon*,[236] the United States Supreme Court held such an instruction did not violate the privilege against self-incrimination and did not deprive the objecting defendant of his right to counsel by interfering with his attorney's trial strategy.[237] On the other hand, in *Hill v. State*,[238] decided two months before *Lakeside*, the Indiana Supreme Court found reversible error in the trial court's instruction.[239] The Indiana court stated that choice of trial tactics is within the province of the defendant and his counsel, that the decision to remain silent is an often-used trial tactic, and that the cautionary instruction pointedly notified the jurors that the defendant had some personal reason for not testifying.[240]

In *Underwood v. State*[241] the court of appeals held that an instruction that a jury should convict defendant on proof that he was in possession of recently stolen property, absent evidence by the defendant justifying his possession, constituted reversible error.[242] The proper instruction is that unexplained exclusive possession of recently stolen property is a circumstance which may be considered, along with other facts and circumstances of the case, and that mere possession of stolen goods is insufficient to support a conviction.[243]

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[232]Miller v. State, 372 N.E.2d 1168, 1171 (Ind. 1978).

[233]Harris v. State, 366 N.E.2d 186, 188 (Ind. 1977).

[234]369 N.E.2d 408 (Ind. 1977).

[235]*Id.* at 410; *accord*, Lawrence v. State, 375 N.E.2d 208 (Ind. 1978); Poindexter v. State, 374 N.E.2d 509 (Ind. 1978).

[236]98 S. Ct. 1091 (1978).

[237]*Id.* at 1095.

[238]371 N.E.2d 1303 (Ind. 1978).

[239]*Id.* at 1306.

[240]*Id.* As a result of *Lakeside*, *Hill* will not be good precedent unless treated as applicable to Indiana's constitutional provision against self-incrimination. *See* IND. CONST. art. 1, § 14.

[241]367 N.E.2d 4 (Ind. Ct. App. 1977).

[242]*Id.* at 4-5.

[243]Sansom v. State, 366 N.E.2d 1171 (Ind. 1977) (citing Gann v. State, 256 Ind. 429, 269 N.E.2d 381 (1971)).

J. Jury Issues

In *Purdy v. State*,[244] the Indiana Supreme Court found reversible error because the trial court sent written preliminary and final instructions to the jury room without reading them in open court.[245] The court of appeals reversed a conviction in *Jackson v. State*[246] because the trial court sent written notes to the jury in response to notes from the jury without indicating the content of the notes to the defendant. Although the notes may have concerned an innocent subject, such as the menu for a meal or the location of restrooms, prejudice to the defendant had to be presumed and a new trial granted.[247] However, in *Foster v. State*,[248] the Indiana Supreme Court found no error in the trial court's undisclosed written communication to the jury that the court could not respond to the jury's questions and that the jury must base its verdict on the evidence presented.[249]

The presence of an alternate juror in the jury room during final deliberation was held, in *Hill v. State*,[250] to be reversible error. The Indiana Supreme Court overruled *Hill* in *Miller v. State*[251] on the ground that "since an alternate is in every respect a juror and is not a stranger to deliberations, no error resulted from his presence during deliberations."[252]

In 1970, in *Williams v. Florida*,[253] the United States Supreme Court held that the sixth amendment guarantee of a trial by jury did not require a jury of twelve persons.[254] The Indiana Supreme Court in 1975 followed *Williams* and upheld six-man juries under the county court statute[255] in *In re Public Laws Nos. 305 & 309*.[256] In *Smith v. State*,[257] the court of appeals held that a defendant may waive the requirement of a twelve-person jury by personally agreeing to an eleven-member jury.[258]

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[244]369 N.E.2d 633 (Ind. 1977).

[245]*Id.* at 636. The court noted that it would be harmless error to send the instructions to the jury after reading them in open court.

[246]372 N.E.2d 1242 (Ind. Ct. App. 1978).

[247]*Id.* at 1243.

[248]367 N.E.2d 1088 (Ind. 1977).

[249]*Id.* at 1089.

[250]363 N.E.2d 1010 (Ind. Ct. App. 1977).

[251]372 N.E.2d 1168 (Ind. 1978).

[252]*Id.* at 1172.

[253]399 U.S. 78 (1970).

[254]*Id.* at 86. The Court in Ballew v. Georgia, 435 U.S. 223 (1978), held a criminal trial jury of fewer than six persons to be unconstitutional. *Id.* at 245.

[255]IND. CODE § 33-10.5-7-6 (1976).

[256]263 Ind. 506, 513, 334 N.E.2d 659, 662-63 (1975).

[257]373 N.E.2d 1112 (Ind. Ct. App. 1978).

[258]*Id.* at 1113. One of the jurors became ill after the jury had retired to deliberate and the defendant, his counsel, and the prosecutor agreed to an eleven-member jury to decide the case.

K. Sentencing Issues

In *Downs v. State*,[259] the Indiana Supreme Court held that the legislature may constitutionally exclude certain crimes from a court's power to suspend sentences.[260] Appellant claimed that legislation mandating executed sentences arbitrarily and capriciously excluded persons convicted of certain crimes from the benefits of suspended sentences and, thus, violated the equal protection and due process provisions of the fourteenth amendment. The court, in rejecting this argument, stated that there is no constitutional right to probation or suspended sentences for convicted criminals and that the legislature reasonably considered which classes of crime should be excluded from the possibility of suspended sentences.[261] The Indiana Supreme Court held that sentences of persons convicted of the same crime need not be consistent.[262]

In sentencing under the old habitual criminal statute,[263] the Indiana Supreme Court held: "[T]he life sentence was not imposed as an *additional* sentence to the sentence imposed for the instance crime but was properly imposed as an *alternative* sentence for the instant crime."[264] In *Bradberry v. State*,[265] the Indiana Supreme Court found no violation of equal protection in allowing a greater sentence to be imposed after a retrial following a successful appeal, but not after a successful post-conviction petition.[266]

Finally, in *Maynard v. State*,[267] the court of appeals held that a defendant, who was convicted of delivering a controlled substance, should have been sentenced under the provision in force at the time of his trial rather than under the harsher sentencing provision in effect at the time of the offense.[268] The court used the doctrine of amelioration despite the general saving clause of Indiana Code sec-

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[259]369 N.E.2d 1079 (Ind. 1977).

[260]*Id.* at 1083.

[261]*Id.* The new penal code limits suspension of sentences. IND. CODE § 35-50-2-2 (Supp. 1978).

[262]Hall v. State, 371 N.E.2d 700 (Ind. 1978); *cf.* Combs v. State, 260 Ind. 294, 295 N.E.2d 366 (1973) (If there are two separate judicial determinations on the merits, the law imposes consistency as to findings not as to sentences.). See IND. CODE. § 35-41-2-4 (Supp. 1978) for new penal code view.

[263]IND. CODE § 35-8-8-1 (1976) (repealed 1977). *But see* IND. CODE § 35-50-2-8 (Supp. 1978) ("A person who is found to be an habitual offender shall be imprisoned for an *additional fixed term* of thirty years . . . ." (emphasis added)).

[264]Jones v. State, 369 N.E.2d 418, 421 (Ind. 1977) (quoting Eldridge v. State, 361 N.E.2d 155, 159 (Ind. 1977) (emphasis added)).

[265]364 N.E.2d 1183 (Ind. 1977).

[266]*Id.* at 1189.

[267]367 N.E.2d 5 (Ind. Ct. App. 1977).

[268]*Id.* at 8.

tion 1-1-5-1.[269] This decision could have a great impact regarding application of the sentencing provisions of the new penal code for crimes committed before October 1, 1977, and tried after that date, despite the saving clause and the clear legislative intent not to give the new penal code retroactive effect.[270]

L. Revocation of Probation

The Indiana Supreme Court in *Hoffa v. State*[271] reversed the court of appeals and held that the defendant's probation could be revoked even though his guilt of a subsequent offense had not been adjudicated.[272] The court stated that revocation was proper since there was probable cause to believe that the defendant had committed another crime.[273] This is signficant because under the new penal code the state must prove a violation of probation only by a preponderance of the evidence.[274]

M. Amendments to Penal Code

Several significant amendments to the penal code were made during the 1978 session of the Indiana General Assembly.

1. Omission.—Prior to 1978, the omission section stated that a person who did not act committed an offense only if the statute defining the offense imposed a duty of performance.[275] This section limited severely the common law doctrine of legal duty to act. The common law imposed a duty in four general categories: (1) Where the duty was expressly provided by statute; (2) where the duty arose from a legal relationship; (3) where the duty sprung from a fac-

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[269]*See* Conour, *Criminal Justice Notes*, 22 RES GESTAE 174 (1978) (criticizing *Maynard*).

[270]Act of Apr. 12, 1977, Pub. L. No. 340, § 150, 1977 Ind. Acts 1533 provides in part:

> (a) Neither this act nor Acts 1976, P.L. 148 affects: (1) rights or liabilities accrued; (2) penalties incurred; or (3) proceedings begun, before October 1, 1977. Those rights, liabilities and proceedings are continued, and penalties shall be imposed and enforced as if this act and Acts 1976, P.L. 148 had not been enacted.
>
> (b) An offense committed before October 1, 1977, under a law repealed by Acts 1976, P.L. 148 shall be prosecuted and remains punishable under the repealed law.

[271]368 N.E.2d 250 (Ind.), *rev'g* 358 N.E.2d 753 (Ind. Ct. App. 1977); *see* Wilcox, *Criminal Law and Procedure, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 122, 148 (1977).

[272]368 N.E.2d at 252.

[273]*Id.*

[274]IND. CODE § 35-8-2-2(d) (Supp. 1978).

[275]Act of Apr. 12, 1977, Pub. L. No. 340, § 3, 1977 Ind. Acts 1533, (codified at IND. CODE § 35-41-2-1(a) (Supp. 1978) (amended 1978)).

tual situation, or (4) where the duty was imposed by contract.[276] The 1978 amendment[277] corrects the defect by providing that a person who omits to perform an act commits an offense only if he has a statutory, common law, or contractual duty of performance.

2. Insanity Defense.—The 1978 General Assembly made several changes in the insanity defense and mental competency proceedings.[278] Notice of intent to interpose an insanity defense must be filed within thirty days of entry of a not guilty plea unless good cause is shown for late filing.[279] The form for an acquittal verdict has been changed from "not guilty by reason of insanity" to "not responsible by reason of insanity at the time of the offense."[280]

The most signficant change relates to the burden of proof for an insanity defense. In the past, the defendant had the burden of showing some evidence of insanity to rebut the presumption of sanity, whereupon the burden of persuasion shifted to the state to prove the defendant sane beyond a reasonable doubt.[281] Under the new law, the burden of proof is on the defendant to establish the defense of insanity by a preponderance of the evidence.[282]

The competency statutes were amended to eliminate the confusing term "insanity" and to substitute a test for competency —whether the defendant lacks the ability to understand the proceedings and assist in the preparation of his defense.[283] This section also clarifies the nature of competency proceedings.

3. Check Deception.—The 1978 General Assembly created a new offense entitled "check deception"[284] which amends that portion of the general deception statute concerning bad checks.[285] As in general deception, check deception is a Class A misdemeanor. Under the new statute a person does not commit an offense if he pays the payee or holder the amount due plus appropriate fees within *twenty days* after the *mailing* of notice that the check has not been paid.[286] The deception statute and the present theft section[287] provide that a

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[276]*See* R. PERKINS, CRIMINAL LAW 518 (1957).

[277]Act of Mar. 8, 1978, Pub. L. No. 144, § 3, 1978 Ind. Acts 1313 (codified at IND. CODE § 35-41-2-1 (Supp. 1978)).

[278]Act of Mar. 8, 1978, Pub. L. No. 145, §§ 1-8, 1978 Ind. Acts 1322 (codified at IND. CODE § 35-5-2-1 to 3.1-4) (Supp. 1978)).

[279]IND. CODE § 35-5-2-1 (Supp. 1978).

[280]*Id.* § 35-5-2-3(a)(3).

[281]Fuller v. State, 261 Ind. 376, 383, 304 N.E.2d 305, 310 (1973).

[282]IND. CODE § 35-41-4-1(b) (Supp. 1978).

[283]*Id.* § 35-5-3.1-1.

[284]*Id.* § 35-43-5-5.

[285]*Id.* § 35-43-5-3(a)(2).

[286]*Id.* § 35-43-5-5(e).

[287]*Id.* § 35-43-4-5(b).

person does not commit an offense if the person pays the amount due within *ten days* after *receiving* notice that the check was not paid.

The check deception statute also states that the drawee's refusal to pay and reasons thereof printed, stamped, written, or attached to the check constitute prima facie evidence that due presentment was made and that the check was dishonored for the reasons stated.[288]

VIII. Decedents' Estates and Trusts

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Although the developments during the survey period in the areas of wills, guardianships, and administration of decedents' estates were far from earthshaking, several cases resolved issues of first impression in Indiana.[1] In addition, several sections of the Probate Code were amended.

A. Judicial Developments

1. Execution of Wills.—In *Arnold v. Parry*,[2] the court dealt with a will contestant's allegation that the will admitted to probate was not properly published.[3] The statute setting forth the requirements for the due execution of a will provided: "[T]estator shall signify to the attesting witnesses that the instrument is his will."[4] In *Arnold*, the only surviving witness to the probated will could not positively state that the testator had signified to her that the instrument was his will. She testified that she knew the instrument was

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[288] *Id.* § 35-43-5-5(b).

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[1] The title of this discussion is misleading because, during this survey period, no trust cases were decided. In addition to the cases presented in the text, *see* Anderson Fed. Sav. & Loan Ass'n v. Guardian of Davidson, 364 N.E.2d 781 (Ind. Ct. App. 1977) (discussing the impropriety of a court order directing a bank to turn over a ward's savings certificate to the ward's successor guardian because the bank had no opportunity to present evidence of its right to a security interest in the certificate).

[2] 363 N.E.2d 1055 (Ind. Ct. App. 1977).

[3] The contestant was a beneficiary under a prior will. The contestant raised other issues for review in addition to the publication issue. One issue, involving an allegation of undue influence, is discussed at notes 12-16 *infra* and accompanying text.

[4] IND. CODE § 29-1-5-3(a)(1) (1976) (amended 1978).