apply "except where inconsistent with the provisions and purpose of this Act," and that the professional corporation act "shall take precedence in the event of any conflict with the Indiana General Corporation Act."[174] Since the professional corporation acts contemplate sole ownership and require that all officers be licensed professionals, it is not inconceivable that a court would rule that the General Corporation Act was impliedly amended to permit one person to hold the offices of president and secretary when there is no other eligible person involved in the corporation.[175]

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[173]*E.g.*, ALA. CODE tit. 46 § 336 (Cum. Supp. 1971); GA. CODE ANN. § 84-5404(c) (Supp. 1972); S.C. CODE ANN. § 56-1606 (Supp. 1971).

[174]IND. CODE §§ 23-1-13-11 (general), -14-5 (medical), -15-5 (dental) (1971).

[175]*Cf.* Christian v. Skideler, 382 P.2d 129 (Okla. 1963), in which the court held that the three director requirement of the Oklahoma general corporation law did not apply when only two persons were incorporating and a third qualified director might not be available.

VI. CRIMINAL PROCEDURE

*William A. Kerr**

On January 1, 1972, the Indiana Court of Appeals acquired jurisdiction over criminal appeals, thus marking a major change in Indiana criminal procedure.[1] Under the new procedure, the court of appeals has jurisdiction over all criminal appeals except for a limited number of cases over which the Indiana Supreme Court has retained exclusive jurisdiction such as appeals from judgments imposing a sentence of death, life imprisonment, or a minimum sentence of greater than ten years, and appeals involving cases in which a state or federal statute has been declared unconstitutional in whole or in part.[2] Since there are only a few offenses

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[1]*See* IND. R. APP. P. 4 (adopted by the Indiana Supreme Court pursuant to Ind. Code § 33-2.1-3-1 (1971) and the amendment to article 7 of the Indiana Constitution which was approved on November 3, 1970).

[2]IND. R. APP. P. 4(A)(7)-(8), (B).

that are punishable by a sentence of death or life imprisonment or by a minimum sentence of greater than ten years,[3] the court of appeals thus has jurisdiction over the bulk of criminal appeals. The court of appeals has, however, questioned the constitutionality of such a broad grant of jurisdiction, suggesting that the supreme court should have retained jurisdiction over any appeal involving a maximum sentence of greater than ten years.[4]

Although each of the three divisions of the court of appeals filed an opinion prior to June of 1972,[5] the divisions did not begin

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[3]IND. CODE § 35-21-4-3 (1971) (Murder of police officer); *id.* § 35-1-55-1 (kidnapping); *id.* § 35-13-4-1 (first degree murder); *id.* § 35-1-54-1 (second degree muder); *id.* § 35-24-1-20 (second sale of narcotics); *id.* § 35-13-5-6 (physical injury inflicted during robbery); *id.* § 35-13-5-3 (rape of child under twelve years of age).

[4]Ware v. State, 284 N.E.2d 543, 544 n.1 (Ind. Ct. App. 1972). Article 7, § 4 of the Indiana Constitution provides "that appeals from a judgment imposing a sentence of . . . imprisonment for a term greater than ten years shall be taken directly to the Supreme Court." The Indiana Supreme Court had previously ruled that indeterminate sentences are for the maximum time prescribed by the statute. Moore v. State, 276 N.E.2d 840 (Ind. 1972); Boyd v. State, 275 N.E.2d 797 (Ind. 1971). Consequently, the court of appeals sitting en banc disagreed with, but was bound by, the Indiana Supreme Court's decision to give the court of appeals jurisdiction over criminal appeals in all cases except those in which the minimum sentence is greater than ten years.

[5]Davis v. State, 281 N.E.2d 833 (Ind. Ct. App. 1972); Johnson v. State, 281 N.E.2d 922 (Ind. Ct. App. 1972); Lewis v. State, 280 N.E.2d 828 (Ind. Ct. App. 1972).

The *Lewis* case was filed by the First District Court of Appeals on April 6, 1972; the *Davis* case was filed by the Second District Court of Appeals on May 3, 1972; and the *Johnson* case was filed by the Third District Court of Appeals on May 8, 1972. Although the Indiana Court of Appeals is a unified court to the extent that the nine judges select one of their number to serve as a chief judge pursuant to the provisions of the IND. CODE § 33-2.1-2-4 (1971) and sit en banc to make certain decisions, *see e.g.*, Ware v. State, 284 N.E.2d 543 (Ind. Ct. App. 1972), the court is divided into three distinct divisions with appellate jurisdiction over clearly defined geographic areas of the State of Indiana as specified by IND. CODE § 33-2.1-2-2 (1971). This statute further provides that the various divisions of the court are to be designated as the First District Court of Appeals, the Second District Court of Appeals, and the Third District Court of Appeals. Furthermore, the judges of the respective districts are required to be residents of such geographic districts, IND. CODE § 33-2.1-2-3 (1971), and are to select one of their number to be chief judge of each such district court, IND. CODE 33-2.1-2-4 (1971). In view of these factors, the author has concluded that the divisions of the Indiana Court of Appeals are somewhat autonomous in nature, that they are somewhat comparable to the various federal circuit courts of appeal, and that they can be expected to develop a body of case law that may differ from

to file opinions with any regularity until June 6, 1972.[6] Since that date, the various divisions have filed approximately 195 opinions.[7] During the same period of time, by way of comparison, the supreme court has filed approximately 140 criminal opinions. This survey will review the major decisions of both courts since June of 1972 as well as the opinions filed by the supreme court from January to June of 1972 which were approximately eighty in number. In view of the number of opinions filed during the period, this survey is necessarily somewhat selective in nature. The opinions that are included in the survey are reviewed in the general order in which the respective issues involved would arise in the various stages of the criminal process, beginning with pretrial issues and continuing with issues pertaining to the trial and posttrial stages.

A. Search and Seizure

1. Stop and Frisk

In *Luckett v. State*,[8] the Indiana Supreme Court unanimously held that an officer may stop and detain a suspect briefly for investigation even though the officer does not have probable cause to make a formal arrest. In that case, an eyewitness to a burglary reported his observations to the police, including the fact that three persons drove away from the scene of the burglary in what appeared to be a green Chevrolet with a license prefix of "82J." An officer on patrol in the area received this information over the police radio and shortly thereafter stopped three persons who were in a green Oldsmobile with a license prefix of "82J." While the driver of the car was producing his operator's license, the officer observed a case of wrist watches in plain view on the back seat of the car. Since a case of wrist watches had been reported stolen during the burglary, the officer promptly placed all three occupants of the car under arrest. The supreme court concluded that the detention for investigation was lawful on the basis of

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division to division. For these reasons, the various divisions are carefully distinguished throughout this article in accordance with the particular district involved.

[6]Four opinions were filed on June 6, 1972. Coakley v. State, 283 N.E.2d 392 (Ind. Ct. App. 1972); Treadwell v. State, 283 N.E.2d 397 (Ind. Ct. App. 1972); McMinoway v. State, 283 N.E.2d 553 (Ind. Ct. App. 1972); Allen v. State, 283 N.E.2d 557 (Ind. Ct. App. 1972).

[7]This survey reviews the opinions filed by the court of appeals and the supreme court up to the end of July 1973.

[8]284 N.E.2d 738 (Ind. 1972).

the information known to the officer at the time and that the observation of the case of wrist watches added enough information under the circumstances to establish probable cause for the arrests. In so holding, the court followed *Adams v. Williams*[9] which was decided by the United States Supreme Court only a few weeks prior to the *Luckett* decision. The Indiana Supreme Court also cited *Terry v. Ohio*[10] but did not cite or discuss the Indiana "stop and frisk" statute, thereby continuing to leave the effect and validity of that statute in question.[11]

The Indiana "stop and frisk" statute was enacted in 1969, following the decision of the United States Supreme Court in the *Terry* case. The statute authorized both the stopping and the frisking of a suspect despite the fact that the United States Supreme Court expressly declined to rule upon the validity of the "stop" in the *Terry* case or to decide the authority of an officer to stop a suspect on less than probable cause.[12] In *Terry*, the Court considered only the propriety of a frisk of a suspect who had been stopped by an officer for questioning concerning suspicious activity. The Court concluded that a limited frisk of the suspect for weapons was lawful under the circumstances since the officer had reason to believe that he might be in danger during the course of the questioning, but the Court declined to rule on the validity of the initial stopping or detention of the suspect for questioning before the frisk occurred. Despite the narrow holding, the *Terry* case has often been referred to as a "stop and frisk" case rather than as a "frisk" case.[13]

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[9]407 U.S. 143 (1972).

[10]392 U.S. 1 (1968).

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> When a law enforcement officer . . . reasonably infers . . . that criminal activity has been, is being, or is about to be committed by any person . . . said officer may stop such person for a reasonable period of time and may make reasonable inquiries . . . .

IND. CODE § 35-3-1-1 (1971).

> When a law enforcement officer has stopped a person for temporary questioning . . . and he further reasonably concludes . . . that the person with whom he is dealing may be armed and presently dangerous, he shall be entitled . . . to conduct a carefully limited search of the outer clothing of such person in an attempt to discover weapons which might be used to assault him.

Id. § 35-3-1-2.

[12]392 U.S. at 19 n.16.

[13]*See, e.g.*, Chimel v. California, 395 U.S. 752, 762 (1969); Hadley v. State, 251 Ind. 24, 42, 238 N.E.2d 888, 897 (1968) (Lewis, J., concurring).

Four years after the *Terry* decision, the United States Supreme Court decided *Adams v. Williams,*[14] another case which appears to be a "stop and frisk" case but which is in fact not a "frisk" case. In *Adams,* an informer told a police officer that the defendant was sitting in a nearby vehicle, was carrying narcotics, and had a gun at his waist. The officer approached the car and asked the defendant to open the door. When the defendant rolled down the window instead, the officer reached into the car and removed a pistol from the defendant's waistband. The pistol was not visible from outside the car but was exactly where the informer had said it would be. An arrest followed and a further search revealed heroin on the defendant's person and in the car. The Court referred to the *Terry* decision and concluded that the officer acted reasonably in light of the circumstances. The Court observed that the informant was known to the officer personally, that the informant had provided the officer with information in the past, and that the information was immediately verifiable at the scene and then concluded that the information "may have been insufficient for a narcotics arrest or search warrant"[15] but was sufficiently reliable to justify the forcible stop of the defendant. Thus the Court did not clearly state that the stop was based upon less than probable cause but held that the stop was justified even though it may not have been based upon probable cause. Furthermore, the Court upheld the action of the officer in seizing the pistol even though this was not a "frisk," at least in the usual sense of the word. The officer reached directly into the car and pulled the hidden pistol from the defendant's waistband instead of first conducting a limited patdown of the defendant's outer garments. Thus the *Adams* decision is a "stop" case and not necessarily a "frisk" case.

Returning to the *Luckett* decision, the Indiana Supreme Court also dealt only with the propriety of the "stop" involved since the officer there did not attempt to frisk the three suspects prior to making the arrests. The court did, however, clearly hold that the stop was made on less than probable cause but was justified under the circumstances. In so holding, the court stated that the officer had sufficient information "to warrant a man of reasonable caution in the belief that an investigation was appropriate,"[16] thus suggesting that this is the standard for determining the validity

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[14]407 U.S. 143 (1972).

[15]*Id.* at 146-47.

[16]284 N.E.2d at 742.

of a stop made on less than probable cause. If so, then the court has taken at least one step toward clarifying the validity and effect of the Indiana "stop and frisk" statute, but there are still many additional issues to be resolved concerning that statute.[17]

2. *Motor Vehicle Searches and Seizures*

The *Luckett* decision also dealt with two other issues of particular concern with regard to motor vehicles. Despite the fact that the court concluded that the stopping of the suspects was justified even though probable cause for a formal arrest was lacking, the court also concluded that the initial stopping of the vehicle amounted to a detention of the persons involved and thus "in its technical sense, constituted an arrest."[18] The court thus declined to use terminology which would distinguish between an arrest based upon probable cause and a detention based upon less than probable cause. In so doing, the court appeared to follow the view expressed earlier in the term in *Lynch v. State*[19] in which it was held that an arrest occurred as soon as an officer on patrol turned on his red light and stopped the defendant's car. The United States Supreme Court also struggled with this same question of terminology in the *Terry* case but concluded only that the word "seizure" in the fourth amendment should be broad enough to include both an "arrest" and a "detention" if both terms are used.[20]

The second issue in the *Luckett* case concerned the validity of the search of the defendant's motor vehicle after the vehicle was impounded and removed to the police station. In the case, the vehicle was stopped along a highway at night and the officer had probable cause to believe that the vehicle contained stolen property after seeing the case of wrist watches. The officer, who was alone at the time, called for assistance and then the three defendants were taken to the police station. The motor vehicle was impounded and was later searched without a warrant. Items found in the car were later identified as property taken during the burglary. The court relied upon the decision of the United States Supreme Court in *Chambers v. Maroney*[21] in holding that the later search

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[17]For example, can an officer require a suspect to identify himself or answer any questions asked? Can the suspect be required to accompany the officer to another place for questioning or while the officer is checking on an answer or explanation given by the suspect? Can items other than weapons found during a frisk be used in evidence against the suspect?

[18]284 N.E.2d at 741.

[19]280 N.E.2d 821, 823 (Ind. 1972).

[20]392 U.S. at 17-19.

[21]399 U.S. 42 (1970).

at the police station was valid. It held that a search could have been conducted at the time that the car was stopped because of probable cause to believe that the car contained stolen property and that the officers were authorized to impound the car and search it later without a warrant since a search at the time the car was stopped may have been impractical or even unsafe under the circumstances.[22] Since such exigent circumstances were found to exist, the *Luckett* case thus leaves open the more difficult question as to the propriety of a search at the police station when a search at the scene of the stopping would not have been impractical under the circumstances. This question was left unresolved in *Chambers v. Maroney* because the text of the opinion appears to make no distinction between the two situations whereas a footnote to the text emphasizes that a search at the scene would have been impractical under the circumstances.[23]

3. Inventory Searches

Since the *Luckett* case involved a situation in which probable cause existed to believe that stolen property was inside the defendant's automobile, the Indiana Supreme Court was not called upon to consider the validity of an "inventory search" after the impounding of the defendant's vehicle. In fact, the validity of such "searches" of motor vehicles continues to remain in question in Indiana as well as under the United States Supreme Court decisions. On the other hand, the validity of such "searches" of persons is apparently becoming fairly well established under the Indiana decisions.

In *Ramirez v. State*,[24] the defendant was arrested while attempting to commit a burglary at a certain office. He was taken to the police station where he was directed to remove everything from his pockets. An envelope was produced containing money which was found to have been taken during a burglary of another building. The Third District Court of Appeals held that the envelope was properly admitted into evidence in a prosecution for the burglary of the second building since the envelope was obtained contemporaneously with the booking of the defendant for the burglary of the first building. In so doing, the court of appeals relied upon a similar decision of the Indiana Supreme Court in *Farrie v. State*[25] which was decided during the preceding year.

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[22]284 N.E.2d at 743-44.

[23]399 U.S. at 52 n.10.

[24]286 N.E.2d 219 (Ind. Ct. App. 1972).

[25]255 Ind. 681, 266 N.E.2d 212 (1971).

The Second District Court of Appeals relied upon both *Farrie* and *Ramirez* in reaching a similar conclusion in *McGowan v. State.*[26] In *McGowan,* a jailkeeper was making a routine search of the defendant following an arrest for the unlawful possession of a pistol. During the search, a packet of marihuana was "dropped" by the defendant. The court of appeals held that this evidence was properly admitted against the defendant on a charge of possession of marihuana.

4. Consent to Searches

In *Sayne v. State,*[27] the Indiana Supreme Court recognized that a search may be based upon consent but emphasized that the state has the burden of proving a voluntary and intelligent waiver of rights and that mere passive submission to the authority of an officer does not amount to such consent. In *Sayne,* an officer asked the defendant to pull down the sunvisor in the defendant's car but could not recall the exact words used in making the request. The court held that the defendant's compliance with this request could not be interpreted as a consent for the officer to reach behind the sunvisor to locate a package of marihuana hidden between the windshield and the car's convertible top.

The supreme court turned to an even more controversial question in *Zupp v. State,*[28] the question of whether or not a person must be advised of his fourth amendment rights before being asked to consent to a search. In the *Zupp* case, the defendant was arrested on a charge of rape. He was then advised of his fourth amendment rights, including the right to refuse to permit the search and the right not to have the search conducted without a warrant, and was asked for permission to conduct a search of his automobile and his living quarters. The defendant signed a waiver form which recited the warning of rights which was given to him. Thereafter, the defendant objected to the admissibility of evidence which was obtained during the search, alleging that he had been illegally arrested upon a warrant which was issued without a showing of probable cause. The supreme court held that the consent to the search was valid and that it insulated the search from any taint that might have existed because of the illegal arrest. In so doing, the court commended the officers for

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[26]296 N.E.2d 667 (Ind. Ct. App. 1973).

[27]279 N.E.2d 196 (Ind. 1972).

[28]283 N.E.2d 540 (Ind. 1972).

advising the defendant of his rights and said, "We wholeheartedly endorse the police procedure employed herein in this regard."[29]

Since the warning of rights was actually given in this case, the "endorsement" of the practice by the court is ambiguous, leaving open the question as to whether or not the practice would in fact be required. If the court intended to require such a practice, then the decision would appear to be contrary to the more recent opinion of the United States Supreme Court in *Schneckloth v. Bustamonte*.[30] Although the *Schneckloth* opinion was limited to a situation in which the subject of the search was not in custody at the time of the search, the language of the opinion would appear to be broad enough to suggest that there is no requirement for a warning of rights even as to a suspect in custody, such as in the *Zupp* case.

The other aspect of the *Zupp* holding is just as important as the part concerning the warning. The court commended the officers for following the practice because the court concluded that the consent eliminated any question concerning the admissibility of the evidence produced by the search. Thus the court has placed a limitation on the extent of the doctrine concerning the "fruit of the poisonous tree."[31] Ordinarily, evidence that is obtained during a search incident to an unlawful arrest is tainted by the arrest and is not admissible against the arrested person. Under the *Zupp* case, however, a search is not considered incident to the arrest if the officers are able to obtain the arrested person's consent for the search following the arrest.

5. Search Warrants

In *State v. Dusch*,[32] the supreme court rendered a major decision concerning the execution of search warrants. In that case, an officer obtained a warrant to search the defendant's apartment for certain illicit drugs. The officer and four other policemen went to the apartment and broke open the front and back doors to conduct the search without first knocking and announcing their authority and purpose. The defendant was found inside the apartment along with some marihuana and certain pills. At the defendant's trial, the evidence was suppressed and

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[29]*Id.* at 541.

[30]93 S. Ct. 2041 (1973).

[31]Nardone v. United States, 308 U.S. 338, 341 (1939).

[32]289 N.E.2d 515 (Ind. 1972).

a judgment of acquittal was entered for the defendant. The State appealed on a reserved question with reference to the suppression ruling.[33] The court first held that the requirement for a knock and an announcement of authority and purpose is a matter of fundamental due process which is required under the provisions of both the Indiana and the United States Constitutions. In particular, the court interpreted the decision in *Ker v. California*[34] as holding that the requirement is binding upon the states through the fourteenth amendment, although it recognized that there has been some question concerning such an interpretation of the *Ker* case. The court then held that exigent circumstances might justify an exception to the requirement but that the requirement could not be avoided by the mere fact that drugs were the object of the search. The state argued that a per se exception should be allowed in such cases because of the disposable nature of drugs, but the court held that the officers would have to show other exigent circumstances to justify an exception such as furtive conduct of the subject at the time of the search or knowledge that the drugs were of such a small amount that they could easily be destroyed.

The court, in this opinion, has resolved certain issues which were left unanswered by a sharply divided court in *Hadley v. State*[35] some four years earlier. In particular, the court, by holding that the knock and announcement requirement is a constitutional requirement, resolved the issue as to whether or not the Indiana statute requiring a knock and announcement prior to the execution of an arrest warrant[36] should be extended to arrests made without a warrant, as in the *Hadley* case, or to searches, as in the *Dusch* case. On the other hand, the *Dusch* decision appears to question the *Hadley* decision, at least insofar as the latter decision, in effect, permitted fresh pursuit to justify an exception to the knock and announcement requirement even when the person being pursued did not then know that he was being pursued.

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[33] The prosecuting attorney may except to any decision of the court during the prosecution of any cause, and reserve the point of law for the decision of the Supreme Court . . . . In case of the acquittal of the defendant . . . [t]he Supreme Court is not authorized to reverse the judgment upon such appeal, but only to pronounce an opinion upon the correctness of the decision of the trial court. . . .

IND. CODE § 35-1-43-2 (1971).

[34] 374 U.S. 23 (1964).

[35] 251 Ind. 24, 238 N.E.2d 888 (1968).

[36] IND. CODE § 35-1-19-6 (1971).

Finally, the First District Court of Appeals issued another major opinion with reference to search warrants in the case of *Holtel v. State.*[37] In that case, a search warrant was issued by the trial court, a superior court judge, after a hearing at which evidence was taken and recorded on the issue of probable cause. Thereafter, a motion was filed to suppress the evidence which was obtained from the defendant's apartment on the ground that no affidavit had been filed to support the issuance of the search warrant. The trial court denied the motion, holding that the transcript of the hearing was sufficient in lieu of an affidavit. The court of appeals rejected this conclusion, holding that an affidavit is an absolute requirement for the issuance of a search warrant and that the affidavit cannot even be supplemented by sworn testimony or additional evidence outside the affidavit. The court relied upon the express language of the Indiana statute concerning the issuance of search warrants[38] and the holding of the supreme court in *Ashley v. State*[39] but did not consider the later statement of the supreme court in *State ex rel. French v. Hendricks Superior Court*[40] which expressed a contrary rule, at least with reference to the issuance of arrest warrants.

B. Lineups and Photographic Identifications

1. Lineups

The Indiana Supreme Court, during the past year, handed down a landmark decision concerning lineups, ending some five years of controversy and speculation in the area, only to have the issue placed in question again within four months by another decision of the United States Supreme Court. In *Martin v. State,*[41] the Indiana Supreme Court concluded that a defendant has the right to the presence of an attorney at any "postarrest" lineup, holding that the only exception is for an immediate or on-the-scene confrontation within a short period of time after the offense in question. Thus the court ended the controversy that began five years earlier with the decisions of the United States Supreme Court in *United States v. Wade*[42] and *Gilbert v. California.*[43] Despite the

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[37]290 N.E.2d 775 (Ind. Ct. App. 1972).

[38]IND. CODE § 35-1-6-2 (1971).

[39]251 Ind. 359, 241 N.E.2d 264 (1968).

[40]252 Ind. 213, 224, 247 N.E.2d 519, 526 (1969).

[41]279 N.E.2d 189, 190 (Ind. 1972).

[42]388 U.S. 218 (1967).

[43]388 U.S. 263 (1967).

fact that all five members of the Indiana Supreme Court agreed on this aspect of the *Martin* case, the members of the court apparently were unable to predict the eventual holding of the United States Supreme Court on the critical issue. Within four months of the *Martin* decision, the Supreme Court handed down the decision of *Kirby v. Illinois*[44] which failed to resolve the controversy begun by *Wade* and *Gilbert* but did cast some doubt on the continued vitality of the *Martin* decision.

In the *Kirby* case, the two defendants were stopped by officers for investigation concerning a certain offense. When asked for identification, they produced a wallet and papers bearing the name of one Willie Shard. They were then arrested after giving an unsatisfactory explanation as to how they had obtained the wallet. After going back to the police station, the officers learned that Willie Shard had reported the theft of the wallet on the preceding day. Shard was promptly brought to the station and there identified the defendants as the persons who had taken his wallet. Some six weeks later, the defendants were indicted for the offense of robbery. The United States Supreme Court arguably could have considered this identification as an immediate confrontation, occurring within a very short period of time after the offense, but the Court did not do so, possibly because the identification occurred at the police station. Instead, the Court purported to resolve the controversy which had followed in the wake of *Wade* and *Gilbert* by holding that the defendants had no right to the presence of an attorney at the identification because "adversary judicial proceedings" had not been initiated against them at the time of the identification.

By emphasizing that the right to counsel does not arise until the initiation of adversary judicial criminal proceedings, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,"[45] the Court has given rise to a new controversy as various courts have attempted to decide precisely when adversary proceedings are initiated in a given case. Some courts have concluded that the right to counsel under *Kirby* arises only after formal charges have been filed, whether by way of indictment or information;[46] other courts have concluded that the right to counsel arises at least as soon as an arrest warrant

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[44]406 U.S. 682 (1972), *noted in* 6 IND. L. REV. 365 (1972).

[45]*Id.* at 689.

[46]Commonwealth v. Lopes, 287 N.E.2d 118 (Mass. 1972); Chandler v. State, 501 P.2d 512 (Okla. 1972).

is issued in a case, since the issuance of a warrant would mark the beginning of adversary judicial proceedings;[47] and at least one court has concluded that *Kirby* cannot be applied "mechanically" and that the right to counsel at a lineup must be determined from a consideration of all of the circumstances surrounding the particular lineup.[48]

Two of the divisions of the Indiana Court of Appeals have now considered the issue, and both divisions apparently have agreed that the right to counsel does not exist at a lineup held before an indictment or charging affidavit has been filed, although the decision is not altogether clear in the first opinion. In *Auer v. State,*[49] the defendant was accused of assaulting a twelve year-old girl. At the request of the victim's mother, officers took the victim and her mother to a factory to see if they could identify the defendant who was working there. The victim and her mother went to an office in the factory from which they could observe the defendant and six other men working in the factory. The defendant argued that this procedure violated his right to counsel, but the Third District Court of Appeals held that no right to counsel existed under the circumstances of the case. The court emphasized the fact that the defendant "was not in custody nor was he under arrest or charged at the time of the lineup."[50] The *Kirby* case was quoted at some length in support of this decision whereas the *Martin* case was cited only in a footnote and no attempt was made to harmonize the decisions. Since the defendant was not even under arrest at the time of the identification, the *Auer* decision does not necessarily resolve the issue as to whether adversary proceedings are initiated with the issuance of an arrest warrant or by the filing of an indictment or a charging affidavit.

Six months after the *Auer* decision, the First District Court of Appeals considered the same issue in the case of *Snipes v. State.*[51] In that case, the defendant was arrested for robbery and

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[47]Arnold v. State, 484 S.W.2d 248 (Mo. 1972); United States *ex rel.* Robinson v. Zelker, 468 F.2d 159 (2d Cir. 1972).

[48]Moore v. Oliver, 347 F. Supp. 1313, 1319 (W.D. Va. 1972).

[49]289 N.E.2d 321 (Ind. Ct. App. 1972).

[50]*Id.* at 326.

[51]298 N.E.2d 503 (Ind. Ct. App. 1973). The remaining district court, the Second District Court of Appeals, has also reached the same conclusion although the court has not made a direct holding to that effect. In Hardin v. State, 287 N.E.2d 359, 360 (Ind. Ct. App. 1972), the defendant argued on appeal that he had been denied the right to counsel at an on-the-

was thereafter placed in a lineup. The defendant's attorney was not present at the lineup even though the defendant had requested the officers to ask the attorney to be present. Although the defendant argued that his right to counsel had been violated, the State contended that the defendant had agreed to proceed with the lineup after being told that his attorney was unable to be present at the time the lineup was scheduled to be held. The court did not have to resolve this factual issue because it concluded that the defendant had no right to the presence of an attorney since the lineup was held before the charging affidavit had been filed against him. In so holding, the court cited both the *Auer* and the *Kirby* decisions but did not discuss the *Martin* case.

2. Photographic Identifications

In *Sawyer v. State*,[52] the Indiana Supreme Court held that a defendant who had been charged with a robbery had no right to have his attorney present when police officers thereafter displayed various photographs to a victim of the robbery. In so doing, the court followed the recent decision of the United States Supreme Court in *United States v. Ash*.[53] The *Ash* decision resolved a conflict which had arisen in the cases on this issue, and the Indiana Supreme Court followed the decision without in any way relating the decision concerning photographic identifications to the current controversy concerning lineup identifications. The Indiana Supreme Court did, however, hold that it was improper for the officers conducting the investigation to advise the witness that the defendant had been arrested and that his picture was included in the group of photographs being examined and noted that such a procedure would be unduly suggestive even with reference to a lineup identification.

The Indiana Supreme Court also decided one additional case during the past term which is of equal importance to both lineup

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street confrontation. This argument was rejected by the court of appeals because the argument had not been raised at the trial, but the court noted that *Kirby* had held that there is no such right to counsel before the defendant has been formally charged with a crime. A similar conclusion was reached by the same court in McGowan v. State, 296 N.E.2d 667, 672 (Ind. Ct. App. 1973), but within a different context. In *McGowan*, the defendant argued that a custodial search was a critical stage of the criminal process and that he was denied his right to counsel when he was searched while being booked at the city jail. The court of appeals held that the defendant had no right to counsel at the time of the search since formal charges had not been instituted against him. *Kirby* was cited in support of the conclusion.

[52]298 N.E.2d 440 (Ind. 1973).

[53]93 S. Ct. 2568 (1973).

and photographic identifications. In *Johnson v. State,*[54] the court held that a witness could testify at a trial that he had identified the defendant previously at a lineup, provided that the lineup was conducted properly. In so doing, the court expressly overruled two earlier cases to the contrary.[55]

C. Confessions

1. Miranda Requirements

In *Dickerson v. State,*[56] the Indiana Supreme Court plunged back into the controversy as to whether the emphasis upon "custody" in *Miranda v. Arizona*[57] has replaced the emphasis upon "focus" as discussed in *Escobedo v. Illinois.*[58] In *Dickerson,* the victim of a rape filed a complaint with the police and alleged that the defendant had committed the offense. On the day after the complaint was filed, the defendant went to the police station on other business and was recognized by a policeman who knew about the rape complaint. The officer told the defendant about the complaint and asked if he could talk to the defendant but stated that the defendant was not under arrest. The defendant consented and went into an interrogation room where he was advised of his rights and signed a waiver form before being questioned. He then admitted having been with the victim on the night in question but denied the rape. Although the various members of the court disagreed as to the propriety of the warnings given to the defendant, all members apparently agreed that the warnings were required under the circumstances of this case. The court recognized that the defendant was told that he was not under arrest at the time, but it concluded that the circumstances were such as to subject the defendant to a "significant deprivation of freedom" so as to require a warning of rights. In discussing the various circumstances, the court referred twice to the fact that the investigation had "focused" on the defendant,[59] thus re-emphasizing the language of the *Escobedo* case. Despite the use of this language, however, the opinion does suggest that the court merely considered this as one factor among others which led to the conclusion that the defendant was deprived of his free-

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[54]281 N.E.2d 473 (Ind. 1972).

[55]Thompson v. State, 223 Ind. 39, 58 N.E.2d 112 (1944); Jacoby v. State, 203 Ind. 321, 180 N.E. 179 (1932).

[56]276 N.E.2d 845 (Ind. 1972).

[57]384 U.S. 436 (1966).

[58]378 U.S. 478 (1964).

[59]276 N.E.2d at 848.

dom to such an extent as actually to be in custody at the time of the interrogation. In fact, the court led into this part of its opinion by referring to the language of the *Miranda* decision and stating that its duty was to decide whether the defendant was "in custody or otherwise deprived of his freedom of action in any significant way."[60] The court might have reached the same conclusion in a similar way by finding that the defendant actually was under arrest and in custody at the time despite the fact that he was told that he was not under arrest. In this regard, the First District Court of Appeals restated the general rule in *Yeley v. State*[61] that the making of an arrest does not necessarily depend upon what is said to the subject but depends upon a consideration of all of the circumstances at the time.

The *Dickerson* decision also dealt with another issue that has been before the court a number of times during the past year as well as in previous years. The court once again approved the propriety of a warning by which a defendant is advised of his right to the assistance of appointed counsel before and during any interrogation and is then told that "[w]e have no way of giving you a lawyer but one will be appointed for you, if and when you go to court and the court finds that you are a pauper." The court approved similar language in two later cases during the year[62] despite the fact that the United States Court of Appeals for the Seventh Circuit, after the *Dickerson* case, had disapproved the same language in the case of *United States ex rel. Williams v. Twomey*.[63]

The Indiana Supreme Court decided two other major cases during the year which dealt with the *Miranda* warnings. In view of the controversy over the language of the warnings as discussed above, the first decision is especially significant. In *Johnson v. State*,[64] the court held that statements obtained in violation of the *Miranda* requirements are admissible at a trial on rebuttal for impeachment purposes only. Although the court was sharply

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[60]*Id.* at 847.

[61]286 N.E.2d 183 (Ind. Ct. App. 1972).

[62]Burton v. State, 292 N.E.2d 790 (Ind. 1973); Emler v. State, 286 N.E.2d 408 (Ind. 1972).

[63]467 F.2d 1248 (7th Cir. 1972). The *Twomey* case arose in Illinois but involved both Illinois and Indiana waiver forms which used substantially the same language as that used in the *Dickerson* case. The opinion was written by Judge S. Hugh Dillin of the United States District Court for the Southern District of Indiana.

[64]284 N.E.2d 517 (Ind. 1972).

divided on the issue, the majority decided to follow the earlier decision of the United States Supreme Court in *Harris v. New York.*[65] The second decision, *Lewis v. State,*[66] involved the first degree murder conviction of a juvenile who was tried by jury in a circuit court. The supreme court reversed the conviction because the juvenile's confession had been admitted into evidence and the juvenile's parents had not been advised of the juvenile's rights before the interrogation took place. The court concluded that special protections should be given to juveniles before interrogations occur, including a warning of rights to the juvenile and his parents or guardian and an opportunity for the juvenile to consult with his parents or guardian or an attorney before deciding upon a waiver. The opinion of the court apparently was intended to establish this rule for juvenile hearings as well as criminal trials,[67] but only two justices concurred on this point. Two other justices concurred in the result of the case but insisted that the rule should apply only in criminal trials and not in juvenile proceedings. Thus the issue remains in doubt in the area of juvenile hearings.

The Indiana Court of Appeals also handed down an important decision during the year concerning the *Miranda* warnings and confessions in general, but the opinion merely poses a major question without providing the necessary answer. In *Ramirez v. State,*[68] the defendant was interrogated concerning a certain burglary. At his trial, he contended that the confession was involuntary. A hearing was held by the trial court out of the presence of the jury and the police officers testified that they had given the defendant a copy of his rights, had read the rights to him, and had made sure that he understood the rights before he signed a waiver and agreed to discuss the burglary. The defendant's testimony contradicted that of the officers but the trial court concluded that the confession was voluntary. The confession and waiver were admitted into evidence and the jurors were properly instructed that they were the sole judges of the credibility of the witnesses and of the weight to be given to their testimony. The Third District Court of Appeals reviewed the procedure followed by the trial court and held that the confession was properly admitted into evidence. In support of this decision,

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[65]401 U.S. 222 (1971).

[66]288 N.E.2d 138 (Ind. 1972).

[67]*Id.* at 142.

[68]286 N.E.2d 219 (Ind. Ct. App. 1972).

the court quoted extensively from the recent opinion of the United States Supreme Court in *Lego v. Twomey*.[69] The importance of the decision is in the fact that the Third District Court of Appeals did not directly state the burden of proof that is to apply in a hearing on voluntariness but did quote the portion of the *Lego* opinion which clearly stated that the burden of proof may be by a preponderance of the evidence. The court, however, left some doubt as to the applicability of this standard by quoting from a decision of the Indiana Supreme Court to the effect that the state had a "heavy burden" to prove the voluntariness of a confession.[70]

The issue is uncertain, especially in view of the earlier decision of the Indiana Supreme Court in *Smith v. State*[71] in which the court suggested that the burden of proof was proof beyond a reasonable doubt but left the issue unclear by using the following language:

> The state must establish beyond reasonable doubt all necessary elements of the crime. This requires that the state establish to the satisfaction of the Court that the confession is in truth and in fact a confession, that is that it was rendered freely and voluntarily, before the same may be submitted to a jury.[72]

If the present standard is proof beyond a reasonable doubt, the *Ramirez* case may indicate a move in the direction of lowering the standards in accordance with the *Lego* decision. Some states have done so,[73] but others have decided to continue with the heavier burden of proof despite the *Lego* decision.[74]

2. Unlawful Detention

The Indiana Supreme Court has consistently held that an unlawful detention is a circumstance to be considered in determining the voluntariness of a confession given during the period of such detention but that the confession is not automatically rendered inadmissible by such an unlawful detention.[75] The Indiana

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[69]404 U.S. 477 (1972).

[70]*See* Nacoff v. State, 267 N.E.2d 165, 167 (Ind. 1971), *quoted in* 286 N.E.2d at 222.

[71]252 Ind. 425, 249 N.E.2d 493 (1969).

[72]*Id.* at 438, 249 N.E.2d at 500 (citation omitted).

[73]*See, e.g.*, State v. Wajda, 206 N.W.2d 1 (Minn. 1973); McDole v. State, 13 CRIM. L. RPTR. 2270 (Fla., May 16, 1973).

[74]*See, e.g.*, State v. Collins, 297 A.2d 620 (Me. 1972).

[75]Nacoff v. State, 267 N.E.2d 165 (Ind. 1971); Smith v. State, 252 Ind. 425, 249 N.E.2d 493 (1969); Pearman v. State, 233 Ind. 111, 117 N.E.2d 362 (1954); Krauss v. State, 229 Ind. 625, 100 N.E.2d 824 (1951).

General Assembly codified this rule in the statute enacted in 1969 concerning the admissibility of confessions in criminal cases[76] but appeared to modify the rule somewhat by making a distinction between confessions given within six hours and confessions given more than six hours after the arrest or detention of the subject.[77] The interpretation of this statute is critical because the statute, on its face, purports to exclude any confession made after the six hour period has elapsed unless any further detention is found to be reasonable because of "the means of transportation and the distance to be traveled to the nearest available judge." If this provision is interpreted literally, the statute would appear to preclude the consideration of any other circumstance that might in fact make a delay reasonable and might even mean that the state is required to have a judge available at all hours of the day and night since the unavailability of a judge apparently cannot be taken into consideration.

The supreme court has indicated, however, that the statute should not be interpreted in this fashion although its decision did not in any way refer to this statute. In *Hill v. Otte*,[78] a motorist was arrested at 3:00 a.m. for driving while under the influence of intoxicating liquor and was taken before a magistrate at 8:30 a.m. the same morning. The court held that there was a duty to take the motorist before a magistrate as soon as practicable under the circumstances but that it was only necessary to take the motorist before a magistrate during the usual hours for conducting court. The court reaffirmed its earlier decision in *McClanahan v. State*[79] in which it was stated that the legislature could not even require magistrates to conduct court twenty-four hours every day because of the separation of powers doctrine.

The effect of an unlawful detention upon the admissibility of a confession was considered by the supreme court in two other cases during the past term, and the court reaffirmed the general rule as stated by it previously without in any way commenting upon the effect of the 1969 statute.[80] Both of these cases involved offenses arising prior to the effective date of the statute, however, and thus there was no necessity for the court to make any

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[76]IND. CODE § 35-5-5-2 (1971).

[77]*Id.* § 35-5-5-3.

[78]281 N.E.2d 811 (Ind. 1972).

[79]232 Ind. 567, 572, 112 N.E.2d 575, 577 (1953).

[80]Sanders v. State, 284 N.E.2d 751 (Ind. 1972); James v. State, 281 N.E.2d 469 (Ind. 1972).

comment concerning the effect of the statute. On the other hand, the Third District Court of Appeals did recognize and refer to the statute in the case of *Crawford v. State*.[81] In that case, the defendant was arrested without a warrant on a charge of robbery, was interrogated, and gave a written confession within two hours after the arrest. The defendant was thereafter kept in custody by the police for five days until a charging affidavit was filed against him, and he was not brought into court until fourteen days had elapsed from the time of the arrest. The defendant filed a motion to suppress the confession but the motion was denied after a pretrial hearing. Thereafter, the defendant made no objection to the admissibility of the confession when offered at his trial. In fact, his attorney affirmatively stated that he had no objections to the confession. Although the court of appeals held that the issue had been waived by the failure to object at the trial, it did observe that there was no violation of the 1969 statute since the confession had been given during the first two hours of the detention.

D. Self-Incrimination

1. Nontestimonial Evidence

The United States Supreme Court held in *Schmerber v. California*[82] that the fifth amendment privilege against self-incrimination does not apply to the production of evidence that is nontestimonial in nature. This decision was cited and relied upon by the Indiana Supreme Court in three major cases during the past term in which the court held that an accused may be required to provide handwriting exemplars,[83] to perform physical acts as tests to determine sobriety or intoxication,[84] and to provide blood samples.[85] In the handwriting and the sobriety test cases, the defendants provided the evidence voluntarily and thereafter challenged its admissibility on the ground that they had not been advised of their rights before giving the evidence. The court held that such warnings were not required since the privilege against self-incrimination did not protect the defendants from compulsion to provide such evidence. In the blood sample case, the defendant challenged only the validity of the seizure of blood samples under the fourth amendment, but the court did observe that *Schmerber*

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[81]No. 2-173-A-2 (Ind. Ct. App., June 28, 1973).

[82]384 U.S. 757 (1966).

[83]Hollars v. State, 286 N.E.2d 166, 168 (Ind. 1972).

[84]Heichelbech v. State, 281 N.E.2d 102, 104 (Ind. 1972).

[85]DeVaney v. State, 288 N.E.2d 732, 735 (Ind. 1972).

had specifically held that the taking of a blood sample did not violate the privilege against self-incrimination.

The Indiana Supreme Court also held in another case, in reliance upon *United States v. Wade*,[86] that a defendant may be required to state his name and address for identification purposes during the course of a lineup.[87] The First District Court of Appeals likewise relied upon *Schmerber* in holding that the privilege against self-incrimination does not protect an accused from being compelled to submit to fingerprinting and that fingerprint evidence is admissible even though the accused is not advised of his rights prior to the taking of the fingerprints.[88]

2. Testimony of a Defendant

Indiana, by statute, provides that a defendant is competent to testify in his own behalf but that his failure to do so cannot be commented upon or referred to in any manner during the course of a trial.[89] The statute specifically refers to the duties of the prosecuting attorney, the jury, and the judge when a defendant chooses not to testify but includes no provisions in this regard when a defendant chooses to testify. The supreme court dealt with this situation in *Sears v. State*[90] in which the court restated the basic rule that a defendant who chooses to testify is subject to the same rules which govern the cross-examination of any other witness. In *Sears*, the defendant was charged with burglary and testified at his trial that he and certain named friends entered the building in question to get warm and not with any intention to take any property from the building. On cross-examination, the prosecuting attorney asked if these friends were in the courtroom and if they still lived in the vicinity. The defendant argued that such questions were improper because the jury could have drawn an adverse inference from the defendant's failure to produce the friends as witnesses and that this would have shifted the burden of proof to the defendant. The supreme court concluded that the cross-examination was completely proper since the defendant was to be considered the same as any other witness after choosing to testify.

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[86]388 U.S. 218 (1967).

[87]Stephens v. State, 295 N.E.2d 622, 625 (Ind. 1973).

[88]Paschall v. State, 283 N.E.2d 801 (Ind. Ct. App. 1972).

[89]IND. CODE § 35-1-31-3 (1971).

[90]282 N.E.2d 807 (Ind. 1972).

The Indiana statute provides that the prosecuting attorney is not to comment upon or refer in his closing argument to the failure of a defendant to testify but contains no guidelines for determining what is or is not to be considered as such a comment. This question was considered by the supreme court in *Rowley v. State*[91] in which the prosecuting attorney, in closing argument, reviewed the various items of evidence concerning the guilt of the defendant and then asserted that there had not been one bit of evidence from the witness stand to indicate that the defendant was not guilty. The State contended that this statement was merely an assertion that the prosecution's own evidence was uncontradicted and undisputed, but the court concluded that the statement necessarily reflected upon the defendant's failure to testify since (1) the prosecution relied primarily upon the testimony of an accomplice and (2) the defendant was the only person who could have contradicted such testimony. In so doing, the court took the opportunity to discuss the guidelines to be used in determining whether a comment by a prosecuting attorney is, in fact, a comment upon a defendant's failure to testify. It recognized that some courts look to see whether the language is such that the jury would "naturally and necessarily" take the statement to be a comment on the failure to testify but concluded by stating a "preference" for the view that a comment is improper if it is "subject to an interpretation by a jury as a comment upon failure of a defendant to testify."[92] The conclusion was stated only as a preference, however, since the court held that the comment in this case was improper under either test.

Finally, in *Thorne v. State*,[93] the supreme court also considered the effect of the statutory provision that the trial court has the duty to give an instruction to the jury concerning a defendant's failure to testify. In the *Thorne* case, the trial court gave an instruction concerning the defendant's failure to testify although the defendant did not request such an instruction. On appeal, the defendant argued that the instruction should not have been given but the supreme court rejected this contention. It noted that no objection had been made to the instruction and concluded that "the instruction could only benefit the appellant, not harm him" and that it "was not erroneous to give the instruction, and in fact, would have been erroneous to refuse the instruction had

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[91] 285 N.E.2d 646 (Ind. 1972).

[92] *Id.* at 648.

[93] 292 N.E.2d 607 (Ind. 1973).

it been requested."[94] By these statements, the supreme court appears to suggest that such an instruction is proper whether or not the instruction is requested by the defendant and whether or not the defendant makes an objection to the instruction. In particular, the statement that "the instruction could only benefit the appellant, not harm him" would suggest that the instruction would be proper even over the defendant's objection.[95] Thus the Indiana Supreme Court appears to have joined with those courts which find the instruction to be proper even though the instruction arguably appears to direct the jury's attention to the fact that the defendant has failed to testify.[96]

3. Immunity

A general immunity statute was enacted during the 1969 session of the Indiana General Assembly.[97] This statute provides that a witness may be required to testify or produce evidence, provided that "he shall not be prosecuted or subjected to penalty or forfeiture for or on account of any answer given or evidence produced." If the language of this statute is examined carefully, it would appear that the statute has embodied language that is drawn in part from a "transactional" immunity statute but that the statute is more nearly in the nature of a "use" immunity statute. For example, the present federal use immunity statute provides that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness . . . ."[98] On the other hand, one of the statutes which was replaced by the federal statute quoted above was a transactional statute which provided that "no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence . . . ."[99] The Indiana statute appears to be more nearly like the latter statute in the actual language that is used, but a literal reading would suggest that it is more

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[94]*Id.* at 609.

[95]For a similar holding, see Harvey v. State, 187 So. 2d 59 (Fla. App. 1966).

[96]*See generally* Annot., 18 A.L.R.3d 1335 (1968).

[97]IND. CODE § 35-6-3-1 (1971).

[98]18 U.S.C. § 6002 (1970).

[99]Act of Aug. 20, 1954, ch. 769, § 1, 68 Stat. 745 (repealed 1970).

nearly akin to a "use" statute since the statute provides that the witness cannot be prosecuted "for or on account of any answer given or evidence produced."

The statute has not been interpreted by any of the Indiana appellate courts, but the Third District Court of Appeals did consider the statute in *Millington v. State*[100] in reference to another matter and apparently treated the statute as a transactional statute. In *Millington*, the defendant was charged with burglary and safe stealing. An accomplice, who had admitted his participation in the offenses in a prior juvenile proceeding, was called as a witness against the defendant. The defendant objected to the testimony and the accomplice thereupon refused to testify. The prosecuting attorney then obtained an order for the accomplice to testify after the trial court had granted the accomplice "immunity from further prosecution." This order was upheld by the court of appeals which concluded that the grant of immunity was sufficient to require the accomplice to testify despite the Indiana statute providing that an accomplice is competent to testify only when he consents to testify.[101] The court did not rule directly upon the validity and nature of the immunity statute, however, but held only that the accomplice was properly ordered to testify after "being granted immunity from further prosecution."[102] Thus the question concerning the nature of the statute remains unanswered and its ultimate determination is especially important in view of the recent decisions of the United States Supreme Court holding that the fifth amendment privilege against self-incrimination does not require the granting of transactional immunity before a witness can be compelled to testify.[103]

E. Discovery

A few years ago, Indiana provided for only a limited amount of discovery in criminal cases.[104] Recent cases have changed this situation substantially and have made Indiana a leader in the field of criminal discovery. The decisions during the past year did not make any major changes in the area of discovery but tended to develop and clarify various aspects of the

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[100]289 N.E.2d 161 (Ind. Ct. App. 1972).

[101]IND. CODE § 35-1-31-3 (1971).

[102]289 N.E.2d at 166.

[103]Kastigar v. United States, 406 U.S. 441 (1972); Zicarelli v. State Comm'n, 406 U.S. (1972), *noted in* 6 IND. L. REV. 356 (1972).

[104]*See* Orfield, *Criminal Discovery in Indiana*, 1 IND. LEGAL F. 117 (1967).

rules and procedures established by the landmark cases already handed down by the supreme court.

One of the earliest cases on criminal discovery was *Bernard v. State*[105] which provided for the discovery of the names of prospective prosecution witnesses. This decision provided that the defense could obtain an order directing the state to produce a list of prospective witnesses but did not specify the remedy if a prosecuting attorney failed to produce such a list. In particular, the decision did not give any guidance concerning the procedure to be followed when a prosecuting attorney, after producing an appropriate list prior to trial, called an additional witness at the time of trial. It has been argued that testimony of such witnesses should be excluded because of the State's failure to obey the order of discovery, and an early case appeared to support this position,[106] but the Indiana Supreme Court finally resolved the controversy by holding in *Pinkerton v. State*[107] that the defendant's proper remedy is a motion for a continuance.

Procedures for the discovery of pretrial statements made by prosecution witnesses were established in the case of *Antrobus v. State.*[108] This case, in effect, adopted the provisions of the fed-

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[105]248 Ind. 688, 230 N.E.2d 536 (1967).

[106]Johns v. State, 251 Ind. 172, 240 N.E.2d 60 (1968). In the *Johns* case, the supreme court did reverse the conviction because two witnesses were permitted to testify even though their names were not included on the list of witnesses provided prior to trial. The court did indicate, however, that the defendant should have moved for a continuance under the circumstances.

[107]283 N.E.2d 376 (Ind. 1972). *See also* Hunt v. State, 296 N.E.2d 116 (Ind. 1973); Gregory v. State, 286 N.E.2d 666 (Ind. 1972); Luckett v. State, 284 N.E.2d 738 (Ind. 1972).

[108]253 Ind. 420, 254 N.E.2d 873 (1970). The court held that pretrial statements were discoverable after the defendant laid an appropriate foundation, showing that (1) the witness whose statement is sought has testified on direct examination, (2) a substantially verbatim transcript of the statement is probably within the control of the prosecution, and (3) the statement relates to matters covered in the testimony of the witness on direct examination. Once this foundation is laid, discovery must be granted unless the prosecution alleges that (1) there are no statements within the control of the State, (2) there is a necessity for keeping the contents of the statement confidential, or (3) portions of the statement are unrelated to the testimony of the witness and the State does not want to reveal such portions. The trial court must hold a hearing to resolve the first allegation but is to decide the second and third allegations by reviewing the statements in camera.

eral "Jencks Act."[109] During the past year, the supreme court decided a number of cases which suggest that the court will insist that a defendant adhere closely to the requirements set forth in *Antrobus* in order to obtain such discovery. In *Witherspoon v. State*,[110] the defendant made a motion for discovery after a police officer had testified on direct examination for the state. The defendant, by this motion, asked for discovery of "the police report of the incident for the purpose of impeachment." The supreme court held that discovery was properly denied because the defendant had failed to show that the witness had probably made such a report and that the prosecuting attorney probably had such a statement under his control. In *Blackburn v. State*,[111] the court recognized that grand jury testimony is discoverable under the *Antrobus* case but concluded that discovery was properly denied by the trial court since the defendant had made only a pretrial motion for such discovery and had not renewed his request after witnesses had testified for the state at the trial. A similar conclusion was reached in *Cherry v. State*[112] in which the defendant made a motion prior to trial for discovery of the names of prosecution witnesses and their statements and did not renew the request for statements after the testimony of the witnesses at the trial. In the *Cherry* case, however, the supreme court again indicated, as it had said previously in *Dillard v. State*,[113] that there might be an appropriate way in which to obtain such statements even prior to trial by the showing of an "*Antrobus* type" foundation, but the court did not give any more guidance here than in *Dillard* as to what such a foundation should be.[114]

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[109]18 U.S.C. § 3500 (1970).

[110]279 N.E.2d 543 (Ind. 1972).

[111]291 N.E.2d 686 (Ind. 1973).

[112]280 N.E.2d 818 (Ind. 1972).

[113]274 N.E.2d 387 (Ind. 1971). The court said:

> In *Antrobus*, we did not discuss the discovery of these statements prior to trial and that case does not purport to afford the right to pre-trial production of such statements. Under the *Bernard* principle, the trial court has the power to permit the pre-trial production of such statements upon the laying of an *Antrobus*-type foundation tailored to fit the pre-trial situation and such a trial court order would not be an abuse of discretion.

Id. at 393.

[114]The court in *Cherry* said:

> As an "Antrobus motion," it is clear that the defendant's motion was both premature and entirely too broad. Under proper circum-

In a related case, the Third District Court of Appeals held that it was improper for a defendant to be denied the right to depose a police officer prior to trial. In *Reynolds v. State*,[115] the defendant was charged with the possession of marihuana and sought to depose the police officer who was to be the chief witness for the prosecution. Since the State made no showing of a paramount state interest against the deposition, the court held that the request should have been granted. The court relied upon *Howard v. State*[116] and *Amaro v. State*[117] in which the supreme court had previously held that a defendant should be able to depose prosecution witnesses prior to trial. Thus, since a defendant can depose a prosecution witness prior to trial, it is only reasonable to conclude that the court will ultimately develop an appropriate procedure to permit pretrial discovery of any statements made by prosecution witnesses. Such a procedure would be less expensive and time-consuming than the taking of a deposition, and the production of a pretrial statement might then be used as a basis for denying any further request to depose the prosecution witness involved.

A somewhat different problem was confronted by the supreme court in *Zupp v. State*.[118] In that case involving kidnapping and rape charges, the prosecuting witness had submitted to a lie detector test. Thereafter, the defendant filed a motion for discovery of the results of the test. Although the results of such a test would appear to be similar to a pretrial statement of the witness, the court held that the discovery was properly denied because the results of the test would be inadmissible and would not be of assistance to the defendant in the preparation of his defense.[119]

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stances, the trial court might entertain a motion of this type at this stage of the proceedings. However, an "Antrobus type" foundation would have to be laid, and the material sought would have to fit the foundation.

280 N.E.2d at 820.

[115]292 N.E.2d 290 (Ind. Ct. App. 1973).

[116]251 Ind. 584, 244 N.E.2d 127 (1969).

[117]251 Ind. 88, 239 N.E.2d 394 (1968).

[118]283 N.E.2d 540 (Ind. 1972).

[119]Justice DeBruler, in a concurring opinion, contended that such tests should be discoverable under *Antrobus* as pretrial statements of the witness but concurred in the decision because the trial of this case occurred prior to the *Antrobus* decision. *Id.* at 543-44.

The basic requirements for the discovery of other items under the control of the state were set forth in *Dillard v. State.*[120] In that case, the supreme court stated that discovery should be permitted when the defendant designates certain items with reasonable particularity and shows that the items might be beneficial to the preparation of the defendant's case and the state fails to show some paramount interest in nondisclosure. This procedure was restated and followed in *Sexton v. State*[121] in which the court held that the defendant was entitled to obtain a copy of his own statement to the police because the state had failed to oppose the motion for discovery.[122]

F. Guilty Pleas

Guilty pleas account for the great bulk of criminal convictions and the supreme court and court of appeals gave considerable attention during the past year to the procedures to be followed in the taking of guilty pleas. In *Brimhall v. State,*[123] the supreme court virtually adopted the American Bar Association suggested standards for the taking of a guilty plea,[124] and clarified the statement made two years earlier in *Wright v. State*[125] that the purpose of a hearing on a plea of guilty is for the trial court "to determine whether or not the appellant is fully apprized of the consequences of his plea of guilty and also to determine whether or not there is factual evidence that the crime to which he has attempted to plead guilty was in fact committed."[126] Although the statement in the *Wright* case was not a direct holding con-

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[120]274 N.E.2d 387 (Ind. 1971).

[121]276 N.E.2d 836 (Ind. 1972).

[122]The court also held that the State should have produced a diagram of the scene of the crime made by the police shortly after the offense although Chief Justice Arterburn, in a dissenting opinion, suggested that the diagram was a "work product" of the police and should not be discoverable unless reciprocal discovery was provided to the State. *Id.* at 840.

[123]279 N.E.2d 557 (Ind. 1972).

[124]ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY §§ 1.4-.7 (Approved Draft 1968).

[125]255 Ind. 292, 264 N.E.2d 67 (1970). In *Wright,* the trial court rejected an offer to plead guilty after holding a hearing on the plea, at which witnesses for the State testified concerning the offense. When the defendant thereupon stated that the testimony of the witnesses was untrue, the trial court rejected the plea and set the case for trial. The supreme court rejected the defendant's argument that this action was tantamount to a finding that the defendant was not guilty.

[126]*Id.* at 295-96, 264 N.E.2d at 70.

cerning the duties of a trial court at a hearing on a guilty plea, the supreme court confronted the issue squarely in *Brimhall* and discussed the duties of the trial court at length. In its discussion, the supreme court emphasized that a defendant must be fully advised of his rights under both the federal and state constitutions, that the trial court should ascertain that a factual basis exists for the taking of the plea, and that a record must be made to show that the plea is being entered knowingly and voluntarily in accordance with the earlier decision of the United States Supreme Court in *Boykin v. Alabama.*[127] Although the opinion does not state directly that the trial court must determine that a factual basis exists for the plea, the court did emphasize that the lack of such a determination was a factor for reversing the trial court in *Brimhall.* Furthermore, the court quoted the American Bar Association's minimum standards for pleas of guilty and recommended them as "guidelines" for trial courts to follow,[128] and these standards provide for the determination of a factual basis before a guilty plea is accepted.[129]

If the supreme court intended to adopt a requirement concerning the determination of a factual basis, the *Brimhall* decision does not fully disclose the nature of such a determination or the extent of the evidence which should be introduced. In the *Wright*

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[127]395 U.S. 238 (1969). In Conley v. State, 284 N.E.2d 803 (Ind. 1972), the Indiana Supreme Court concluded that *Boykin v. Alabama* should not be given retroactive effect. The court thus made a distinction between defendants represented by counsel and defendants not represented by counsel and held that a trial court, prior to the *Boykin* case, had no duty to advise a defendant of his rights at a guilty plea hearing at which the defendant was represented by counsel. The court did recommend, however, that trial courts follow rule 11 of the Federal Rules of Criminal Procedure in taking guilty pleas from defendants, whether represented by counsel or not. This rule would require the trial court to address the defendant personally to determine that the plea is being entered voluntarily and with an understanding of the nature of the charge and the consequences of the plea. The rule would also require the trial court to determine that a factual basis existed for the plea.

[128]279 N.E.2d at 563 n.1. In Conley v. State, 284 N.E.2d 803, 808 (Ind. 1972), the Indiana Supreme Court quoted rule 11 of the Federal Rules of Criminal Procedure and said, "We feel, however, that the common law, as expressed in the cases of this state, is in substantial conformity with the federal rule." Although the court was concerned only with the question of a trial court's duty to advise a defendant of his rights, the rule does refer also to the duty of a trial court to determine a factual basis for a guilty plea.

[129]ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 1.6 (Approved Draft 1968).

case, witnesses actually testified at the hearing on the guilty plea,[130] but the court in *Brimhall* said only that there was "no evidence that the appellant understood the facts to which he was admitting nor that he understood the law in relation to those facts" and that there was "no evidence in this case that any attempt was ever made to ascertain the appellant's version of the events in question, and to analyze that version in relation to the formal charge."[131] Since the thrust of the opinion is with reference to the defendant's understanding of the facts and the law, the sugestion appears to be that the trial court may make the factual determination by questioning the defendant himself without requiring that any additional evidence be presented either by the defendant or by the prosecuting attorney. This, in fact, is the procedure which was codified into statutory form during the 1973 session of the Indiana General Assembly as follows:

> The court shall not enter judgment upon a plea of guilty unless it is satisfied from its examination of the defendant that there is a factual basis for the plea.[132]

The *Brimhall* decision was followed by the Third District Court of Appeals in *Lovera v. State*[133] in which a guilty plea was set aside because the trial court failed to make a proper record to show that the defendant was properly advised of his constitutional rights and entered his guilty plea knowingly and voluntarily. The Second District Court of Appeals likewise followed the *Brimhall* decision, setting aside a guilty plea in *Bonner v. State*[134] because the record did not show that the defendant was specifically advised of his rights to confront his accusers and his rights against compulsory self-incrimination. The court elaborated at length upon the *Brimhall* decision, giving special emphasis to the types of warnings and the nature of the advice that must be given to a defendant before a guilty plea can be accepted. In fact, the court concluded that the defendant when entering a guilty plea, must be advised of each of his constitutional rights with as much specificity as required by *Miranda v. Arizona*[135] for defendants

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[130]255 Ind. at 295-96, 264 N.E.2d at 70.

[131]279 N.E.2d at 564-65.

[132]Ind. Pub. L. No. 325, § 4(1)(4)(b) (April 23, 1973).

[133]283 N.E.2d 795 (Ind. Ct. App. 1972).

[134]297 N.E.2d 867 (Ind. Ct. App. 1973).

[135]384 U.S. 436 (1966).

undergoing custodial interrogation.[136] The Third District Court of Appeals added another decision to this group of cases by holding in *Taylor v. State*[137] that a trial judge may use a printed form to advise a defendant of his rights at a guilty plea hearing but may not rely upon the use of such a form without also determining for himself that the defendant fully understands what is printed on such a form.

G. Insanity

Two landmark decisions concerning Indiana insanity procedures were handed down during the past year, one by the United States Supreme Court and the other by the Indiana Supreme Court. The first concerned the procedures for determining a defendant's competency to stand trial and the second dealt with the procedures to be followed after a defendant has been acquitted because of insanity.

1. Competency to Stand Trial

In *Jackson v. Indiana*,[138] the United States Supreme Court cast doubt upon the constitutionality of the Indiana statutory procedures[139] for determining the competency of a defendant to stand trial. In *Jackson*, the defendant was a mentally defective deaf mute who could not read, write, or otherwise communicate except through limited sign language. After the defendant had entered pleas of not guilty to two robbery charges, the trial court conducted a competency hearing pursuant to the Indiana statutory procedure, found that the defendant lacked "comprehension sufficient to make his defense," and ordered him committed until the Department of Mental Health certified that "the defendant [was] sane."[140] At the hearing, two experts testified that the defendant's condition probably would never improve. As a result, the defendant contended that the commitment violated his right to equal protection of the law and basic due process because he was, in effect, given a life sentence without a proper hearing. The Indiana Supreme Court rejected these contentions, concluding that the language in the statute in question was sufficiently broad to cover persons who were not actually insane, that the Department of

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[136] 297 N.E.2d at 874.

[137] 297 N.E.2d 896 (Ind. Ct. App. 1973).

[138] 406 U.S. 715 (1972).

[139] IND. CODE § 35-5-3-2 (1971).

[140] 406 U.S. at 719.

Mental Health had authority to commit the defendant to an appropriate institution, and that the state had the authority under the police power to adopt a statute to cover situations such as this.[141] This decision was reversed by the United States Supreme Court which agreed with the defendant's contentions. With reference to the equal protection argument, it agreed that the defendant was committed under a less stringent standard than that used to commit feeble-minded persons under the Indiana civil statutes and was subject to more stringent standards with reference to his release. For example, under the criminal statute, he was committed for incapacity to stand trial and could be released only when he regained such capacity; under the civil statute, he could be committed only if shown to be mentally ill and in need of care, treatment, training, or detention, and could be released whenever his condition justified it or when release would be in his best interest. The Court concluded that the existence or nonexistence of pending criminal charges should not be a sufficient basis to justify different standards for commitment of persons for incompetency. With reference to the due process argument, the Court also agreed that the indefinite commitment of the defendant solely because of his incapacity to stand trial violated fundamental due process and that such a person cannot be held on that basis longer than the time necessary to determine whether he will probably regain his capacity in the foreseeable future. If so, he may be held on that basis, depending upon his continued progress toward regaining his capacity to stand trial. If not, the State must promptly institute the usual civil commitment proceedings.

The Indiana Supreme Court decided two other cases during the term which are of importance with reference to the competency issue. In *Cook v. State,*[142] the court emphasized that a defendant is not entitled to a competency hearing merely upon his own request but that he must present sufficient evidence to raise a bona fide doubt as to his competency before a hearing is required. In *Tinsley v. State,*[143] the court concluded, however, that a competency hearing must be held whenever the defendant does produce sufficient evidence to cast doubt upon his competency to stand trial, even if the evidence is produced after the conviction and sentencing of the defendant. In *Tinsley,* the defendant was convicted and thereafter filed a belated motion to correct errors, including a motion to

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[141]Jackson v. State, 253 Ind. 487, 255 N.E.2d 515 (1970).

[142]284 N.E.2d 81 (Ind. 1972).

[143]298 N.E.2d 429 (Ind. 1973).

hold a hearing in support of his competency to stand trial. The defendant filed a copy of a previous court order which had adjudged the defendant incapable of managing his estate because of mental illness and had appointed a guardian for him. This was held to be sufficient to require a hearing on his competency to stand trial, and the court specifically noted that the issue had not been waived even though it had not been raised prior to or during the trial.

2. Procedure After Acquittal

The *Jackson* case was followed shortly thereafter by *Wilson v. State,*[144] a decision in which the Indiana Supreme Court held that the Indiana criminal procedures for committing defendants after an acquittal because of insanity were unconstitutional. Under the Indiana statute,[145] a hearing was to be held after an acquittal because of insanity and the trial court was authorized to commit the defendant to the Department of Mental Health (1) if the court found that the defendant was insane at the time of the trial or (2) if the court found that the defendant was sane at the time of the trial but that the recurrence of an attack of insanity was highly probable. A person committed under this procedure had the right to petition the trial court for a discharge every six months thereafter and was to be released whenever his hospital superintendent certified that he had regained his sanity and that a recurrence of insanity was improbable.[146]

In *Wilson,* the supreme court held that the Indiana criminal statutes denied criminal defendants the equal protection of the law and that defendants who were acquitted because of insanity were entitled to have the issue of their mental competency determined by civil commitment proceedings. The supreme court reviewed the Indana criminal and civil commitment procedures and noted a number of substantial differences, both before and after commitment. The court, for example, noted (1) that the issue of mental competency is to be determined by a jury in a civil proceeding but not in a criminal proceeding and (2) that the person committed civilly may be discharged at any time within the discretion of the superintendent of his institution whereas a person committed in a criminal proceeding may be released only

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[144]287 N.E.2d 875 (Ind. 1972), *noted in* 6 IND. L. REV. 300 (1972).

[145]IND. CODE § 25-5-3-1 (1971).

[146]*Id.* § 35-5-2-4. At the time of the *Wilson* insanity hearing, the statute provided for a review of the commitment every two years after the commitment.

upon an order of the court and may not petition for release except at specified intervals of time after the commitment.

This decision has left a major gap in Indiana insanity procedures, and the court's one suggestion concerning this gap has raised more questions than it has resolved. Since the effect of this decision might be to release an insane and potentially dangerous defendant into the community following an acquittal because of insanity, the court suggested that "[i]f the State is concerned about the potential danger to the defendant or the community in the event of an acquittal upon the criminal charge, the procedure for civil commitment should be commenced . . . in advance of the verdict."[147] Although this appears to be a plausible suggestion, the court did not make any suggestion as to the manner in which the civil procedure should be instituted. Prosecuting attorneys would be reluctant to institute the proceeding because of the possibility of civil liability for such action and because of the possible effect of their inconsistent action upon the outcome of the criminal case itself. For example, if a prosecuting attorney who has been arguing to the jury that a defendant is sane and guilty of a particular offense should suddenly change his mind because of the extended nature of the jury's deliberations, his subsequent inconsistent action in instituting civil proceedings prior to the return of the verdict might be a fact that should be brought to the attention of the jury while deliberations are still continuing. On the other hand, the trial court might not have authority to institute civil commitment proceedings on its own motion and might not even have authority to conduct such proceedings. Even if the trial court had such authority, however, the decision of the trial court to institute such proceedings might be construed in some way to require a directed verdict in favor of the defendant in the criminal action or at least to require that the criminal proceeding be set aside because of the doubt in the court's mind as to the sanity of the defendant. Other persons might be reluctant to rush into a court to institute such proceedings either because of the possibility of civil liability or because of a lack of time to become fully acquainted with the facts of the case to determine whether to institute such proceedings. Such questions created by the *Wilson* case remain to be resolved, either by further court action or by action of the Indiana General Assembly.

3. Insanity Defense

The Indiana appellate courts decided a number of cases during the past year concerning the defense of insanity. In *Young v.*

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[147] 287 N.E.2d at 881.

State,[148] the supreme court reviewed the burden of proof in insanity cases and held that the presumption of sanity is sufficient to establish a prima facie case for the State so that the State does not have to introduce evidence of sanity in its case in chief. The court also held that the burden of going forward with evidence of insanity rests upon the defendant, that the presumption of sanity disappears when competent evidence of insanity has been introduced by the defendant, and that the burden is on the State to prove the defendant's sanity at the time of the offense beyond any reasonable doubt when the defendant has introduced evidence of insanity. Four of the justices agreed that the defendant's burden of going forward is satisfied when the defendant has introduced any competent evidence, either direct or circumstantial, on the issue of insanity and overruled *Berry v. State*[149] which had required that some "credible" evidence be introduced by the defendant.

The supreme court also held in *Smith v. State*[150] that an expert may give an opinion as to sanity based in part upon hearsay records and reports if such records and reports are customarily relied upon by others in his profession. In the *Smith* case, two court-appointed psychiatrists examined the defendant prior to trial and later reviewed two reports prepared by staff members of the hospital where the defendant was kept until the time of the trial. A unanimous court concluded that the psychiatrists were properly permitted to give their opinions at the trial even though they relied in part upon the hospital reports and the staff members were not called to testify concerning such reports.

The test for determining insanity was considered by the First District Court of Appeals in *Faught v. State.*[151] In that case, two defense experts testified that the defendant had committed armed robbery at a time when he was under a compulsion to obtain drugs because of addiction to heroin. This testimony was stricken by the trial court on the basis that drug addiction is not a defense to the commission of a crime. After reviewing the test for insanity as discussed in *Hill v. State*,[152] the court of appeals held that the testimony should not have been stricken because the jury, in

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[148]280 N.E.2d 595 (Ind. 1972).

[149]251 Ind. 494, 242 N.E.2d 355 (1968).

[150]285 N.E.2d 275 (Ind. 1972).

[151]293 N.E.2d 506 (Ind. Ct. App. 1973).

[152]252 Ind. 601, 251 N.E.2d 429 (1969).

deciding the issue of insanity, should have been permitted to consider all qualified medical testimony concerning the defendant's state of mind at the time of the offense.

H. Assistance of Counsel

1. Right to Counsel

Various decisions of the Indiana appellate courts during the past year considered the defendant's right to counsel, covering the right to counsel during the full range of the criminal covering the right to counsel during the full range of the criminal process from the pretrial stage to posttrial proceedings. The cases concerning the right to counsel during a lineup or photographic identification have already been discussed above with reference to such identification procedures.[153] The right to counsel at the time that a defendant is required to produce nontestimonial evidence was considered in *Hollars v. State*[154] in which the Indiana Supreme Court concluded that there is no right to the presence of an attorney at the time that handwriting exemplars are produced. In *McGowan v. State,*[155] the defendant argued that a custodial search is a critical stage of a criminal prosecution and that he was entitled to the presence of an attorney during a custodial search conducted while being booked at the city jail. Instead of holding that the defendant had no such right to an attorney because only nontestimonial evidence was obtained during the search, as suggested by the *Hollars* case, the Second District Court of Appeals held that the defendant had no right to the presence of an attorney because formal charges had not been filed against him at the time of the search. In so doing, the court relied upon the *Kirby* case.

In *Anderson v. State,*[156] the First District Court of Appeals held that a defendant is not necessarily entitled to an attorney at his initial appearance before a magistrate or court if the court acts promptly to determine the defendant's right to counsel and to provide counsel as necessary or appropriate. The right of a defendant to have counsel at an arraignment was recognized in a number

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[153] *See* note 41 & accompanying text *supra.*

[154] 286 N.E.2d 166, 168 (Ind. 1972). *See* note 83 & accompanying text *supra* for the discussion concerning compulsion to produce nontestimonial evidence.

[155] 296 N.E.2d 667 (Ind. Ct. App. 1973).

[156] 291 N.E.2d 579 (Ind. Ct. App. 1973).

of cases.[157] This right was given a special emphasis in *Hall v. State*[158] in which the First District Court of Appeals held that an arraignment is a critical stage of the criminal proceeding requiring the presence of an attorney even when the defendant enters a plea of not guilty.

Several cases were decided with reference to the right to counsel during the trial stage. One decision, *Lovera v. State*,[159] noted that the right to counsel exists even in misdemeanor cases under the Indiana constitution, whereas the United States Supreme Court had held just two days earlier in *Argersinger v. Hamlin*[160] that the right to counsel exists in a misdemeanor case under the federal constitution only if the defendant is incarcerated as a result of the prosecution. In *State v. Irvin*,[161] the supreme court emphasized that an indigent defendant has no right to choose his appointed counsel and held that the appointment of counsel is wholly within the discretion of the trial court. The court concluded that an indigent defendant cannot be required to accept the services of the appointed counsel but must represent himself if he does not accept such counsel or otherwise obtain representation. When an indigent defendant properly waives counsel and chooses to represent himself, however, he must accept the consequences of his action and cannot thereafter allege that he was prejudiced by his own incompetence as an attorney.[162]

With reference to appeals, the supreme court held that an indigent on an appeal could not withdraw as counsel even if he appointed to represent him and cannot insist that the same person who represented him at the trial stage be appointed to represent him on appeal.[163] On the other hand, the Second District Court of Appeals held that a public defender appointed to represent an indigent defendant has no right to choose the attorney who is considered the appeal to be completely frivolous.[164]

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[157]Grimes v. State, 278 N.E.2d 271 (Ind. 1972); Darmody v. State, 294 N.E.2d 835 (Ind. Ct. App. 1973); Hall v. State, 288 N.E.2d 787 (Ind. Ct. App. 1972).

[158]288 N.E.2d 787 (Ind. Ct. App. 1972).

[159]283 N.E.2d 795 (Ind. Ct. App. 1972).

[160]407 U.S. 25 (1972).

[161]291 N.E.2d 70 (Ind. 1973).

[162]Haynes v. State, 293 N.E.2d 204 (Ind. Ct. App. 1973).

[163]Moore v. State, 293 N.E.2d 28 (Ind. 1973); State *ex rel.* Shorter v. Allen Superior Court, 292 N.E.2d 286 (Ind. Ct. App. 1973).

[164]Dixon v. State, 284 N.E.2d 102 (Ind. Ct. App. 1972).

Finally, the supreme court held in *Russell v. Douthitt*[165] that a parolee is not entitled to be represented by an attorney at a parole revocation hearing and thereby purported to resolve an issue specifically left unanswered by the United States Supreme Court the previous year in *Morrissey v. Brewer*.[166] This decision has necessarily been modified, however, by the more recent opinion of the United States Supreme Court in *Gagnon v. Scarpelli*[167] which held that the right to counsel at probation and parole revocation hearings should be determined according to the circumstances on a case by case basis.

2. *Incompetency of Counsel*

The Indiana appellate courts continued during the past term to impose a heavy burden upon any defendant who sought to overturn his conviction on grounds that his counsel was incompetent. The various cases reaffirm the long-standing Indiana position that an attorney, whether appointed or retained, is presumed to be competent.[168] This presumption may be overcome only if the defendant is able to prove that his attorney's acts or omissions transformed the proceedings into a "mockery" which is found to be "shocking to the conscience" of the court.[169] Reviewing courts frequently expressed a reluctance to "second guess" counsel on matters of trial strategy or tactics.[170] For example, in *Blackburn v. State*,[171] the defendant alleged that his attorney made no effort to suppress or object to the admission of certain unconstitutionally seized evidence, including incriminating statements by the defendant and an unfinished letter from the defendant to his wife. The Indiana Supreme Court held that since both the statement and the letter contained material which helped to explain the defend-

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[165]291 N.E.2d 361 (Ind. 1973), *noted in* 6 IND. L. REV. 768 (1973).

[166]408 U.S. 471 (1972).

[167]93 S. Ct. 1756 (1973).

[168]Blackburn v. State, 291 N.E.2d 686 (Ind. 1973); State v. Irvin, 291 N.E.2d 70 (Ind. 1973); Kelley v. State, 287 N.E.2d 872 (Ind. 1972); Conley v. State, 284 N.E.2d 803 (Ind. 1972).

[169]State v. Irvin, 291 N.E.2d 70, 73 (Ind. 1973); Kelley v. State, 287 N.E.2d 872, 874 (Ind. 1972); Wilson v. State, 291 N.E.2d 570, 573 (Ind. Ct. App. 1973).

[170]Kidwell v. State, 295 N.E.2d 362, 364-65 (Ind. 1973); Blackburn v. State, 291 N.E.2d 686, 696 (Ind. 1973); Poindexter v. State, 290 N.E.2d 512, 513 (Ind. Ct. App. 1972).

[171]291 N.E.2d 686, 696-97 (Ind. 1973).

ant's actions and bolstered his insanity defense, the attorney's failure to object to the admission of the evidence was a matter of trial strategy. Thus the cases indicate that an attorney in Indiana is expected to demonstrate only reasonable skill and diligence, not perfection, in order to be considered competent.[172]

I. Habitual Criminal Prosecutions

Habitual criminal prosecutions are authorized in Indiana whenever a person is charged with a felony "after having been twice convicted, sentenced and imprisoned" for prior felonies.[173] During the past term, the Indiana Supreme Court introduced the concept of two-stage jury trials into Indiana criminal procedure by holding that a defendant in a habitual criminal prosecution is entitled to a two-stage trial. In *Lawrence v. State*,[174] the court unanimously held that the principal or substantive charge must be tried first and that the habitual criminal charge is then to be tried in a second stage of the trial so that the jury will not be aware of the defendant's prior convictions while determining his guilt or innocence on the principal charge. The United States Supreme Court has held, however, that the federal constitution does not require the states to hold such two-stage trials,[175] and the Indiana Supreme Court has upheld the validity of one-stage trials in previous cases.[176]

In *Cooper v. State*,[177] the Indiana Supreme Court also reviewed the language of the habitual criminal statute and emphasized that a person may be prosecuted under that statute only when the commission of the second felony was subsequent to the conviction and imprisonment for the first felony and when the commission of the third felony was subsequent to the conviction and imprisonment for the second felony. In *Cooper*, the defendant

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[172]This standard would appear to be in accord with federal constitutional standards as suggested by the recent decision of the United States Supreme Court in Tollett v. Henderson, 95 S. Ct. 1602 (1973).

[173]IND. CODE §§ 35-8-8-1, -2 (1971).

[174]286 N.E.2d 830 (Ind. 1972).

[175]Spencer v. Texas, 385 U.S. 554 (1967).

[176]Kelley v. State, 204 Ind. 612, 185 N.E. 453 (1933). The Indiana Supreme Court upheld the validity of the one-stage trial in Johnson v. State, 252 Ind. 70, 75-77, 245 N.E.2d 659, 661-62 (1969), but cast doubt upon the continued validity of the procedure by stating that it would not review the issue because it had not been raised properly by the defendant.

[177]284 N.E.2d 799 (Ind. 1972).

was arrested and charged with an offense of burglary. He thereafter escaped from jail while being detained for trial. Upon being rearrested, he pleaded guilty to charges of burglary and escape and was sentenced to prison for both offenses, the sentences to run consecutively. After being released from prison, he committed another burglary and was charged with an offense of burglary and with being a habitual criminal. The supreme court held that the defendant could not be convicted of the habitual criminal charge because the conviction for escape could not be considered as a second conviction under the habitual criminal act. The court thus emphasized that the habitual criminal penalty is not to be imposed until a defendant, by separate convictions, sentencings, and imprisonments, has been given due warning concerning the consequences of his persistence in criminal conduct.

J. Sentencing

By statute, Indiana provides that appeals from certain courts, including justice of the peace, municipal, and magistrate courts, are to be taken to the criminal or circuit courts of the respective counties.[178] With certain exceptions,[179] such appeals are to be determined by a trial de novo.[180] In *Anderson v. State*,[181] the First District Court of Appeals held that the penalty imposed after a trial de novo could not be greater than the penalty originally imposed at the first trial. The significance of this decision is in the fact that the court of appeals elected to follow an earlier decision of the Indiana Supreme Court instead of following a more recent decision of the United States Supreme Court which permitted a contrary conclusion.

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[178]IND. CODE § 35-1-13-3 (1971). *See also id.* §§ 18-1-14-2, 33-7-1-6, 33-11-1-55.

[179]Appeals from the Marion Municipal Court to the Marion Criminal Court are not determined by a trial de novo. *Id.* § 33-6-1-9.

[180]Hensley v. State, 251 Ind. 633, 635, 244 N.E.2d 225, 226 (1969).

[181]293 N.E.2d 222 (Ind. Ct. App. 1973).

In Oliver v. State, 289 N.E.2d 545 (Ind. Ct. App. 1972), the defendant was convicted in the Fort Wayne City Court of selling obscene magazines and was sentenced to pay a $500.00 fine and to serve ten days in the Allen County Jail. After an appeal and a trial de novo in the Allen Circuit Court, he was again convicted and was then sentenced to pay a $1000.00 fine and to serve thirty days in the Allen County Jail. On appeal, the State conceded in oral argument that the punishment imposed by the Allen Circuit Court was erroneous. The Third District Court of Appeals noted that this concession was made by the State but limited its opinion to another issue in the csae which required reversal of the defendant's conviction.

In 1969, the United States Supreme Court held in *North Carolina v. Pearce*[182] that a trial judge could not impose a more severe penalty on a defendant after a retrial following an appeal unless the judge stated the reasons for the increased penalty and based his reasons upon identifiable conduct of the defendant occurring after the prior sentence. Thereafter, the Indiana Supreme Court concluded in *Eldridge v. State*[183] that the *Pearce* decision also applied to sentences imposed following an appeal and a trial de novo in the criminal or circuit courts. Other jurisdictions disagreed with this conclusion, and the United States Supreme Court finally resolved the issue by holding in *Colten v. Kentucky*[184] that the *Pearce* rule does not apply in cases involving a trial de novo.

In the *Anderson* case, the First District Court of Appeals relied upon *Eldridge* without even referring to the *Colten* case. It might be argued that the court of appeals was required to follow the Indiana Supreme Court decision unless and until the latter court reversed itself, but the court of appeals did not even discuss the question. Furthermore, the same court of appeals took the opposite approach just four months later when it held in *Snipes v. State*[185] that a defendant has no right to an attorney at a line-up held before formal charges have been filed. In the latter decision, the court relied upon the United States Supreme Court decision in *Kirby v. Illinois*[186] without referring in any way to the decision of the Indiana Supreme Court in *Martin v. State*[187] which appears to be to the contrary.

If the *Anderson* decision is to be followed in Indiana, it should be noted that the decision must be read in conjunction with the *Eldridge* and *Pearce* decisions in order to have a complete statement of the holding concerning resentencing. The *Anderson* decision, standing alone, appears to hold without any qualifications that a penalty imposed after a trial de novo may not be greater than the penalty originally imposed at the first trial. Since *Anderson* relied upon *Eldridge* and *Pearce,* the holding would appear to be qualified so as to permit an increased penalty provided that the trial record includes reasons for the increased penalty based upon

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[182]395 U.S. 711, 726 (1969).

[183]267 N.E.2d 48 (Ind. 1971).

[184]407 U.S. 104 (1972).

[185]298 N.E.2d 503 (Ind. Ct. App. 1973).

[186]406 U.S. 682 (1972).

[187]279 N.E.2d 189 (Ind. 1972).

identifiable conduct occurring after the imposition of the first sentence. The continued validity of the *Anderson* decision has been placed in doubt, however, by another decision of the United States Supreme Court which was decided subsequent to *Anderson*. In *Chaffin v. Stynchcombe*,[188] the Supreme Court held that the *Pearce* rule does not apply when a jury imposes the penalty after a retrial following an appeal, provided that the jury is not informed of the prior sentence. Since the penalty in the *Anderson* case was, in fact, imposed by the jury after the trial de novo, the *Anderson* ruling is clearly no longer required by any of the decisions of the United States Supreme Court.

VII. Domestic Relations*

A. Adoption

The "best interests of the child" continues to be the polestar of adoption proceedings.[1] But prior to reaching this consideration, the trial court normally determines whether or not consent of the parties is required in order to grant the adoption petition. Before the 1969 amendment to Indiana's adoption law,[2] the Indiana Supreme Court was faced with the question of whether or not the refusal to pay support payments constituted a waiver of the consent required in adoption proceedings.[3] The court had answered this issue in the affirmative.

In *Jackson v. Barnhill*[4] the respondent-father refused to pay support to his former wife and children on the grounds that his

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[188]411 U.S. 903 (1973).

*David C. Campbell, Lawrence D. Giddings, James G. Scantling, Joseph A. Walsh.

[1]Ind. Code § 31-3-1-6 (1971).

[2]Prior to the amendment, the trial court had discretionary authority to find that failure to provide support payments for a period of one year was a waiver of the consent required in adoption proceedings. Under the 1969 amendment, specific requirements are laid out in order to find waiver: payments required by law or judicial decree, ability of the father to make the payments, and willful refusal to make the same. *Id.* § 31-3-1-6(g)(1).

[3]Reynard v. Kelly, 252 Ind. 632, 251 N.E.2d 413 (1969).

[4]277 N.E.2d 162 (Ind. 1972).