receipt for payments made on the debt.[93] The law now requires the mortgagee to give the mortgagor a receipt showing the amount of payment applied to interest, the amount applied to principal, and the amount of the unpaid balance.[94] However, the requirement of a receipt is obviated whenever the mortgagor makes a payment by check. The penalty for failure to give such a receipt, when required, is drastic. Failure to execute the receipt voids the mortgage, and the mortgagor is then restricted to a remedy based solely on the underlying debt.

VII. Criminal Law and Procedure

*William A. Kerr**

Criminal cases continue to constitute a major portion of the workload confronting the Indiana appellate courts. During the past year, the Indiana Supreme Court filed approximately 100 criminal opinions and the various divisions of the court of appeals filed approximately 190 criminal opinions. In view of the number of opinions filed during the year, this survey must be 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 post-trial stages. One opinion of the Indiana Supreme Court is considered first, however, because of its significance for criminal law and precedure in general.

During the 1973 session of the Indiana General Assembly, a portion of the proposed Indiana Code of Criminal Procedure prepared by the Indiana Criminal Law Study Commission was enacted into law.[1] The enacted provisions purportedly became effective on August 1, 1973, following promulgation, but their effectiveness was questionable because of an opinion filed by the Third District Court of Appeals on June 26, 1973, which suggested that

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[93]Ind. Pub. L. No. 267 (April 10, 1973), *amending* IND. CODE § 26-2-2-3 (IND. ANN. STAT. § 51-203, Burns Supp. 1974).

[94]*Id.*

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[1]IND. CODE §§ 35-1.1-1-1 *et seq.* (IND. ANN. STAT. §§ 9-100 *et seq.*, Burns Supp. 1974); *id.* §§ 35-2.1-1-1 *et seq.* (IND. ANN. STAT. §§ 9-402 *et seq.*); *id.* §§ 35-2.1-1-1 *et seq.* (IND. ANN. STAT. §§ 9-903 *et seq.*); *id.* §§ 35-4.1-1-1 *et seq.* (IND. ANN. STAT. §§ 9-1202 *et seq.* All laws, parts of laws, or amendments repealed by these sections are found in Ind. Pub. L. No. 325, § 5 (April 23, 1973).

the provisions would not become effective until approved by the Indiana Supreme Court.[2] Thereafter, in an unusual procedure, the Indiana Supreme Court issued a unanimous opinion in the case, denying a petition to transfer but disapproving the suggestion of the Third District Court of Appeals concerning the effectiveness of the newly enacted rules of procedure.[3] In this opinion, the Indiana Supreme Court concluded that the new rules were in effect and would continue in effect unless the court decided to promulgate rules designed to supersede the ones enacted by the General Assembly or unless any particular provision enacted by the legislature conflicted with a "specific existing rule of this Court."[4] Although this decision helped to clarify the controversy concerning the new rules, the issue was not fully resolved because of the court's reference to a "specific existing rule of this Court." The opinion suggests that the legislative rules are valid even though the rules may conflict with prior decisional rulings of the supreme court, but the opinion does not consider or refer to this possibility and the term "specific existing rule" may be broad enough to cover more than the codified rules of procedure promulgated by the supreme court.

A. Search and Seizure

1. Necessity for Arrest Warrants

Both the United States Constitution and the Indiana constitution include provisions prohibiting unreasonable searches and

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[2]Neeley v. State, 297 N.E.2d 847, 851 n.5 (Ind. Ct. App. 1973). The various divisions of the Indiana Court of Appeals are distinguished throughout this Article in accordance with the particular district involved because of the author's conclusion that these divisions are somewhat autonomous in nature and are somewhat comparable to the various federal circuit courts of appeal. See the author's discussion of this point in Kerr, *Criminal Procedure, 1973 Survey of Indiana Law*, 7 IND. L. REV. 112, 113 n.5 (1973). In that Article, the author predicted that the autonomous nature of the divisions would become apparent and that the various divisions could be expected to develop a body of case law that would differ from division to division. This prediction came true during the past year, within a short time after the completion of the previous Article. The Third District Court of Appeals filed its opinion in Bryant v. State, 299 N.E.2d 200, on July 31, 1973, and the Second District Court of Appeals filed its opinion in Williams v. State, 299 N.E.2d 882, on August 13, 1973. The Second District Court of Appeals referred to the earlier opinion and expressly disagreed with it. *Id.* at 887-88. As a result of the conflict in these decisions, the Indiana Supreme Court granted a petition for transfer in the *Williams* case and reversed the decision of the Second District Court of Appeals. Williams v. State, 307 N.E.2d 457 (Ind. 1974).

[3]Neeley v. State, 305 N.E.2d 434 (Ind. 1974).

[4]*Id.* at 435.

seizures, but neither specifically requires that a warrant be obtained for a lawful arrest or a lawful search. Each constitution merely provides that persons are to be protected from unreasonable searches and seizures and that warrants are not to be issued except (1) when properly obtained by a showing of probable cause supported by a proper oath or affirmation and (2) when issued with particular descriptions of the place to be searched or the persons or things to be seized.[5] These provisions have generally been interpreted to mean that an officer must obtain a warrant for a search if it is at all practicable for him to do so,[6] but this "practicableness test" has not generally been applied to arrests.[7]

In Indiana, all peace officers are authorized by statute to make warrantless arrests for any offense committed within the presence of such officers.[8] An officer may therefore make a warrantless arrest for a misdemeanor committed in his presence and may conduct a search incident to such an arrest.[9] An officer may likewise make a warrantless arrest for a felony committed in his presence and may conduct a search incident to such an arrest.[10] With regard to offenses committed outside the presence of peace officers, it has been held that an officer cannot make a warrantless arrest for a misdemeanor unless the offense is committed in his presence.[11] On the other hand, the Indiana law is uncertain with regard to felonies because the cases are presently in a state of confusion. The traditional view appears to be that an officer may make a warrantless arrest for a felony committed out of his presence provided that he has probable cause to make the arrest.[12] The traditional view appears to have been restated in a number of cases during the past year.[13]

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[5]U.S. CONST. amend. IV; IND. CONST. art. 1, § 11.

[6]Chapman v. United States, 365 U.S. 610 (1961); Idol v. State, 233 Ind. 307, 119 N.E.2d 428 (1954).

[7]United States v. Miles, 468 F.2d 482, 486 (3d Cir. 1972); United States v. Bazinet, 462 F.2d 982, 987 (8th Cir.), *cert. denied*, 409 U.S. 1010 (1972).

[8]IND. CODE § 35-1-21-1 (IND. ANN. STAT. § 9-1024, Burns Repl. 1956).

[9]Lander v. State, 238 Ind. 680, 154 N.E.2d 507 (1958) (arrest for gambling and search revealed narcotics); Rucker v. State, 225 Ind. 636, 77 N.E.2d 355 (1948) (arrest for failure to display driver's license and search revealed stolen liquor).

[10]Von Hauger v. State, 254 Ind. 69, 257 N.E.2d 669 (1970); Williams v. State, 253 Ind. 316, 253 N.E.2d 242 (1969).

[11]Brooks v. State, 249 Ind. 291, 231 N.E.2d 816 (1967).

[12]Peterson v. State, 250 Ind. 269, 273, 234 N.E.2d 488, 490-91 (1968); Wagner v. State, 249 Ind. 457, 461, 233 N.E.2d 236, 238 (1968); Manson v. State, 249 Ind. 53, 56, 229 N.E.2d 801, 803 (1967); Johns v. State, 235 Ind. 464, 466, 134 N.E.2d 552, 553 (1956).

[13]Garr v. State, 312 N.E.2d 70, 71 (Ind. 1974); Holloway v. State, 300 N.E.2d 910, 913 (Ind. Ct. App. 1973); McGowan v. State, 296 N.E.2d 667,

Despite these cases reflecting the traditional view, two of the divisions of the Indiana Court of Appeals stated in opinions during the past year that an officer must obtain an arrest warrant in order to make an arrest for a felony committed outside his presence unless it is impracticable for him to do so or other exigent circumstances exist which excuse him from doing so.[14] These cases follow a line of three opinions issued in recent years by the Indiana Supreme Court, although each of the decisions of the court of appeals referred to only one of the three supreme court opinions. The first statement of this type appears to be in the concurring opinion in the 1968 case of *Hadley v. State*.[15] There it was said that the United States Supreme Court has followed the "practicableness test" with reference to search warrants and that the "same test of 'practicality' was applied by that Court to the law of arrest."[16] It should first be noted that the *Hadley* concurring opinion represented the views of only two members of the court. Furthermore, the opinion cited only one case in support of this statement, and that case did not hold that arrest warrants were required with reference to felonies committed outside the presence of the arresting officers.[17] The first statement of this type in a majority opinion of the Indiana Supreme Court appeared in the 1970 case of *Throop v. State*.[18] The court asserted that there is "ample authority for the proposition that when it is practical for officers to obtain a warrant prior to an arrest, they should do so,"[19] but the opinion did not cite a single case in support of this statement. Five months later, a third statement appeared in the case of *Stuck v. State*.[20] In this opinion, the Indiana Supreme Court asserted that "[c]learly and undeniably the United States Constitution provides that arrests and searches shall

669 (Ind. Ct. App. 1973); Mentzer v. State, 296 N.E.2d 136, 139 (Ind. Ct. App. 1973); Cheeks v. State, 292 N.E.2d 852, 855 (Ind. Ct. App. 1973).

[14]Bryant v. State, 299 N.E.2d 200, 203 (Ind. Ct. App. 1973); Johnson v. State, 299 N.E.2d 194, 197 (Ind. Ct. App. 1973).

[15]251 Ind. 24, 40, 238 N.E.2d 888, 896 (1968) (Lewis, J., concurring), *cert. denied*, 394 U.S. 1012 (1969).

[16]251 Ind. at 40, 238 N.E.2d at 896.

[17]Trupiano v. United States, 334 U.S. 699, 704 (1948). The *Trupiano* case held that an arrest was lawful because officers made the arrest after observing the defendants committing a felony in their presence, but the opinion refers to Carroll v. United States, 267 U.S. 132, 156-57 (1925), a case in which the United States Supreme Court discussed the general authority of an officer to arrest without warrant for a misdemeanor committed in his presence or for a felony upon the basis of probable cause.

[18]254 Ind. 342, 344, 259 N.E.2d 875, 877 (1970).

[19]*Id.* The arrest without a warrant was found to be lawful because the arrest occurred on a Sunday when the courts were not open and at a time when the defendants were in an automobile and could have escaped during the time necessary to obtain a warrant.

[20]255 Ind. 350, 357, 264 N.E.2d 611, 615 (1970).

be made under authority of a warrant" and that "a warrant must be secured wherever practicable,"[21] but the court cited only two cases in support of these assertions. The first case cited was the *Hadley* case. The second case was *United States v. Duke*,[22] but this opinion clearly supports the opposite point of view with the conclusion that "irrespective of the time element, the cases strongly support the right, where probable cause exists, of an officer to arrest and search without a warrant."[23]

It is this line of cases which the two divisions of the court of appeals followed during the past year. In *Johnson v. State*,[24] an officer looked through a hole in the door to the defendant's apartment, observed the defendant inject something into his arm, and promptly arrested him. The defendant argued that the arrest and accompanying search were invalid because the officer could have obtained a warrant for his arrest and for a search of his apartment. Although the Second District Court of Appeals concluded that the arrest and search were lawful, it did so by holding that an arrest warrant was not required because the officer had probable cause to believe that an offense was being committed in his presence. In so doing, the court stated that it agreed that "warrants should be obtained whenever practicable" and cited *Throop* in support of the statement.[25] A similar conclusion was also reached by the Third District Court of Appeals in *Bryant v. State*,[26] but that court cited *Stuck* instead of *Throop* in reaching its conclusion. In the *Bryant* case, an officer received a report of an armed robbery and stopped a suspect who was riding in a taxicab and who met the description of the armed robber. The court of appeals concluded that there were sufficient exigent circumstances to justify the arrest of the robber without a warrant.

The three supreme court opinions and two court of appeals opinions may be interpreted to mean that warrants are required for all arrests, even when an officer has probable cause for an arrest, unless it is impracticable for a warrant to be obtained or unless other exigent circumstances exist which would justify the failure to obtain a warrant. If so, these cases appear to be contrary to earlier Indiana decisions[27] and contrary to other recent decisions

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[21] *Id.* at 356-57, 264 N.E.2d at 614-15. The arrest without a warrant was found to be lawful because of the existing exigent circumstances, including the fact that the defendant had shot a police officer, had taken his gun, and had fled, and was thus a potentially dangerous person on the loose.

[22] 369 F.2d 355 (7th Cir. 1966), *cert. denied*, 386 U.S. 934 (1967).

[23] 369 F.2d at 357.

[24] 299 N.E.2d 194 (Ind. Ct. App. 1973).

[25] *Id.* at 197.

[26] 299 N.E.2d 200, 203 (Ind. Ct. App. 1973).

[27] See cases cited note 12 *supra*.

of the same courts.[28] For example, in *Sanchez v. State*,[29] a case decided after the three Indiana Supreme Court cases discussed above, the defendant was arrested without a warrant when an officer observed the defendant using narcotics. Instead of sustaining the arrest because of the fact that the offense was committed in the presence of the officer, the Indiana Supreme Court held that the arrest was proper because probable cause existed for the arrest.[30] In so doing, the court cited *Johns v. State*[31] and *Manson v. State*,[32] two earlier cases which followed the traditional view. Likewise, in *Smith v. State*,[33] the Indiana Supreme Court applied the same test of probable cause to sustain a warrantless arrest of a defendant who had committed a burglary out of the presence of the arresting officer. This latter case was quoted and relied upon by the Second District Court of Appeals in *Mentzer v. State*[34] to sustain the validity of a warrantless arrest of a defendant who had also committed a burglary out of the presence of the arresting officer. Finally, the Indiana Supreme Court said in *Garr v. State*,[35] the most recent decision on the subject, that there is "no question but what a police officer may arrest a suspect without a warrant when he has probable cause to believe that a felony has been committed by the person arrested."[36] This was a unanimous opinion, and the court upheld the validity of a warrantless arrest of the defendant who had committed statutory rape on a two-year old child out of the presence of the arresting officer.

2. Execution of Warrants

The Indiana Court of Appeals decided two important cases during the past year concerning the execution of search warrants. In *McAllister v. State*,[37] officers obtained a warrant to search an inn for certain drugs and narcotics. During the course of the search based upon this warrant, the officers searched the patrons at the inn and found a packet of marijuana in the defendant's pocket. It

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[28]See cases cited note 13 *supra*.

[29]256 Ind. 140, 267 N.E.2d 374 (1971).

[30]*Id.* at 142, 267 N.E.2d at 375.

[31]235 Ind. 464, 466, 134 N.E.2d 552, 553 (1956).

[32]249 Ind. 53, 56, 229 N.E.2d 801, 803 (1967).

[33]256 Ind. 603, 607-08, 271 N.E.2d 133, 136 (1971).

[34]296 N.E.2d 136, 139 (Ind. Ct. App. 1973).

[35]312 N.E.2d 70 (Ind. 1974).

[36]*Id.* at 71. *See also* Kindred v. State, 312 N.E.2d 100, 102 (Ind. Ct. App. 1974).

[37]306 N.E.2d 395 (Ind. Ct. App. 1974). This case also emphasized the fact that an officer's probable cause affidavit must be incorporated in the body of a warrant, either by being recopied verbatim therein or by being attached to the warrant and incorporated in the warrant by reference thereto.

was argued by the State that the search warrant permitted a search of the persons on the premises as well as the place specifically described in the warrant, but the court of appeals rejected this argument. The First District Court of Appeals concluded that a warrant must specifically describe both the place to be searched and the person or persons to be searched on the premises, although it did recognize that exceptions might exist which would permit a search of the persons on the premises. For example, the court suggested that a person at the inn might have been searched if officers had observed some of the specified drugs in the hands of such a person.

In *Foxall v. State*,[38] officers obtained a warrant to search the defendant's apartment for a stolen television set and some packets of heroin. The television set was found during the search of the apartment, and the defendant, who was at the apartment during the search, was placed under arrest for obtaining control over stolen property. An officer then started to search the defendant, and the defendant attempted to place something in his mouth. A struggle ensued during which the defendant apparently suffered three broken ribs and other injuries, and the officers obtained several packets of heroin from the defendant's mouth by inserting a plastic shoehorn therein. The First District Court of Appeals held that the seizure was valid and that reasonable force could be used to prevent a person from destroying evidence. The opinion did not clearly indicate whether the search of the defendant was based upon the arrest of the defendant or the warrant for the search of the apartment, but the search apparently could have been justified under either theory.

3. Consent to Searches

Although the United States Supreme Court has clearly held that a warning of rights is not required before a suspect is asked to consent to a search, at least when the suspect is not in custody,[39] the issue remains somewhat in question as to persons in custody.[40] The Indiana Court of Appeals has apparently held, however, that the warnings are not required even for persons in custody. In *Black-*

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[38]298 N.E.2d 470 (Ind. Ct. App. 1973).

[39]Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[40]The court, in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), appeared to suggest that the warnings are not required in any case involving consent to a search since the Court distinguished between rights under the fifth amendment intended to protect the integrity of the truth-determining function and promote the fairness of a trial, and rights under the fourth amendment intended to protect a person's right of privacy. Despite this distinction, the Court ultimately concluded with the narrow holding that the decision applied only to a person not in custody.

wood v. State,[41] the defendant was arrested in connection with the theft of a coin collection. While he was in jail under arrest, he was advised of his rights, in accordance with *Miranda v. Arizona,*[42] and then was asked for permission to search his car. He gave verbal permission but refused to sign a consent form and thereafter contended that the consent was invalid. The First District Court of Appeals upheld the validity of the consent despite the fact that the defendant was apparently advised only of his *Miranda* rights under the fifth amendment without any warning as to his fourth amendment rights. This distinction is not discussed by the court and it is possible that the fourth amendment warnings were in fact given, but the opinion states only that the defendant was given his "full *Miranda* warnings."[43]

No Indiana case has yet held that warnings of rights are required, either for persons in custody or for persons not in custody, but some Indiana policemen are apparently giving the warnings merely as an added precaution. In *Zupp v. State,*[44] for example, the defendant was arrested, was advised of his fourth amendment rights, and was asked to sign a consent for a search of his automobile and living quarters. The Indiana Supreme Court endorsed the practice but did not require it. Likewise, in *Cooper v. State,*[45] the defendant was advised of both his fifth amendment and his fourth amendment rights and was asked for permission to search his automobile. He was not in custody at the time and the Second District Court of Appeals, in upholding the consent, noted that the officers had complied even with the requirements suggested by the dissenting opinion in the United States Supreme Court opinion of *Schneckloth v. Bustamonte.*[46]

4. Stop and Frisk

Indiana's "stop and frisk" statute[47] continues to be the subject of a number of unanswered questions,[48] but the Indiana appellate

[41]299 N.E.2d 622 (Ind. Ct. App. 1973).

[42]384 U.S. 436 (1966).

[43]299 N.E.2d at 624.

[44]283 N.E.2d 540, 541 (Ind. 1972).

[45]301 N.E.2d 772 (Ind. Ct. App. 1973).

[46]412 U.S. 218, 277 (1973) (Marshall, J., dissenting), *noted in Cooper* 301 N.E.2d at 775. In Boys v. State, 304 N.E.2d 789, 792 (Ind. 1973) (Hunter, J., concurring), two justices of the Indiana Supreme Court, in a concurring opinion, suggested that officers should be required to advise suspects of their fourth amendment rights before requesting a consent to search, even when the suspects were not in custody. The justices also suggested that a written waiver form should be used with the warnings being printed on the form.

[47]IND. CODE §§ 35-3-1-1 to -3 (IND. ANN. STAT. §§ 9-1048 to -1050, Burns Supp. 1974).

[48]For example, may an officer require a suspect to identify himself or answer any questions asked? May the officer arrest a suspect who refuses

courts did begin to provide answers to some of the questions during the past year. The Third District Court of Appeals was the first Indiana appellate court to consider the effect of the statute, and it apparently concluded, in *Bryant v. State,*[49] without specifically saying so, that the statute was constitutional because of the United States Supreme Court decisions in *Terry v. Ohio*[50] and *Adams v. Williams*[51] and the decision of the Indiana Supreme Court in *Luckett v. State.*[52] A similar conclusion appears to have been reached shortly thereafter by the Second District Court of Appeals in *Williams v. State,*[53] although this decision was later reversed by the Indiana Supreme Court on another ground.[54]

Both of these cases go beyond a consideration of the statute, however, and recognize that a stop and frisk may be justified by either the *Luckett* case or the statute and that the statute is more limited than the *Luckett* case. The statute provides that an officer may make an investigative stop if he "reasonably infers from the observation of unusual conduct under the circumstances and in light of his experience" that criminal activity has occurred. The two courts concluded that the officer would not be limited by this statute but could rely upon information received from other sources in determining the need for a stop and frisk. The two courts then agreed that an officer could stop a person on less than probable cause,[55] but the Second District Court of Appeals apparently concluded that an officer could not stop a person in a motor vehicle on less than probable cause. It was this conflict in the opinions which prompted the Indiana Supreme Court to grant a petition for transfer of the *Williams* case. In reversing *Williams,* however, the plurality opinion of the supreme court did not discuss the "stop and frisk" statute. Instead, the court relied only on the standard set forth in *Luckett.* In the *Luckett* case, the supreme court concluded that a motor vehicle may be stopped if an officer has knowledge of facts which are "sufficient to warrant a man of reasonable caution

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to answer any questions asked? May the suspect be required to accompany the officer to another place for questioning or while the officer is checking on an answer or an explanation given by the suspect?

[49]299 N.E.2d 200 (Ind. Ct. App. 1973). The court reaffirmed its views and rejected the decision of Williams v. State, 299 N.E.2d 882 (Ind. Ct. App. 1973), in the later case of Bonds v. State, 303 N.E.2d 686, 690 (Ind. Ct. App. 1973).

[50]392 U.S. 1 (1968).

[51]407 U.S. 143 (1972).

[52]284 N.E.2d 738 (Ind. 1972).

[53]299 N.E.2d 882 (Ind. Ct. App. 1973), *noted in* 7 IND. L. REV. 1064 (1974).

[54]307 N.E.2d 457 (Ind. 1974).

[55]*See* Williams v. State, 299 N.E.2d 882, 886 (Ind. Ct. App. 1973).

in the belief that an investigation was appropriate."[56] This language was quoted by the supreme court in *Williams* in support of its conclusion that an officer may stop a person in a motor vehicle on less than probable cause.[57] The amount of information required under the statute and the *Luckett* case may ultimately be the same, but the opinions make it clear that there are presently two standards involved in Indiana "stop and frisk" law. The statutory standard emphasizes an officer's knowledge which is obtained by way of "observation" whereas the *Luckett* standard emphasizes the officer's knowledge which may include knowledge gained from other sources or from prior events.

The amount of information necessary to justify a "stop and frisk" was also considered in two other decisions of the Second District Court of Appeals and the Third District Court of Appeals during the past year. In *Elliott v. State*,[58] officers received a tip that a certain person was to make delivery of drugs at a certain place. The officers went to the address, observed two other persons, who were known narcotics users, walking away from the building, stopped the persons, and frisked them. The Second District Court of Appeals held that the stop and frisk could not be justified under the statute by what was observed at the scene and could not be justified under the *Luckett* standard because there was no showing that the informer's tip was reliable. In *Jackson v. State*,[59] officers received a tip that the defendant was at a certain place carrying a gun. The officers located the defendant near a tavern sitting in his car in a parking lot. He was asked to step out of his car, and the officers observed a pistol sticking out of his pocket. After he admitted that he did not have a permit for the pistol, he was arrested. The Third District Court of Appeals also held that the seizure was improper because the informer's tip was not shown to be reliable.

5. *Motor Vehicle Searches and Seizures*

Indiana joined an increasing number of states in 1970 when the Indiana Supreme Court held in *Paxton v. State*[60] that a motor vehicle may not be searched following the driver's arrest for a traf-

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[56]284 N.E.2d 738, 742 (Ind. 1972).

[57]307 N.E.2d 457, 459 (Ind. 1974).

[58]309 N.E.2d 454 (Ind. Ct. App. 1974).

[59]301 N.E.2d 370 (Ind. Ct. App. 1973).

[60]255 Ind. 264, 263 N.E.2d 636 (1970). *See also* United States v. Humphrey, 409 F.2d 1055, 1058 (10th Cir. 1969); People v. Superior Court, 3 Cal. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970); People v. Thomas, 31 Ill. 2d 212, 201 N.E.2d 413, *cert. denied*, 380 U.S. 936 (1964); Lane v. Commonwealth, 386 S.W.2d 743 (Ky. Ct. App. 1965); People v. Gonzales, 356 Mich. 247, 97 N.W.2d 16 (1959); People v. Marsh, 20 N.Y.2d 98, 228 N.E.2d 783, 281 N.Y.S.2d 789 (1967); Annot., 10 A.L.R.3d 314 (1966).

fic violation unless exigent circumstances exist that would justify such a search and suggested that such circumstances probably would not exist in most traffic arrest cases. In the *Paxton* case, the defendant was arrested on a charge of reckless driving and was placed in the arresting officers' squad car. A search was then made of the defendant's car and various stolen items were found inside the car and in the trunk. The search was held unlawful because (1) it could not be justified as a search for weapons for the protection of the officers since the defendant was in custody in the squad car, (2) the officers had no reason to search the car for the protection of property in it since the defendant's companions could not have driven the car away, (3) the officers had no reason to believe that the vehicle contained evidence related to the reckless driving charge, and (4) the officers had no reason to believe that the car contained stolen goods. In its opinion, the court expressed the view that in most cases an officer would probably not have reason to search a vehicle for weapons or evidence incident to a traffic arrest.[61] In a footnote, the court added that a similar question could have been raised concerning the search of the defendant's person after the traffic arrest, but that the question was not raised and thus was not considered by the court.[62]

The *Paxton* decision was followed by the First District Court of Appeals during the past year,[63] but its continued validity has been placed in doubt by the recent decisions of the United States Supreme Court in *United States v. Robinson*[64] and *Gustafson v. Florida*[65] and the decision of the Indiana Supreme Court in *Frasier v. State*.[66] In the *Frasier* case, the defendant was stopped because of a noisy muffler. After observing what appeared to be a tire tool or a pry bar protruding from a paper sack inside the car, the arresting officer ordered the defendant and his companion to get out of the car. The officer then reached inside the car and opened the paper sack which contained a tire tool, three pink rubber gloves, and a hunting knife. Becoming more suspicious, the officer then asked the two men for identification. When the driver pulled a pistol, the officer shot and killed him. The officer then arrested the defendant, conducted a full search of the car, and found numerous stolen items. The defendant argued that the items taken from the car were seized

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[61]255 Ind. at 274, 263 N.E.2d at 641.

[62]*Id.* at 274 n.3, 263 N.E.2d at 641 n.3. *See* People v. Superior Court, 7 Cal. 3d 186, 496 P.2d 1205, 101 Cal. Rptr. 837 (1972); People v. Watkins, 19 Ill. 2d 11, 166 N.E.2d 433 (1960); Barnes v. State, 25 Wis. 2d 116, 130 N.W.2d 264 (1964).

[63]Mann v. State, 292 N.E.2d 635 (Ind. Ct. App. 1973).

[64]414 U.S. 218 (1973).

[65]414 U.S. 260 (1973).

[66]312 N.E.2d 77 (Ind. 1974).

improperly because the officer had no authority to open the paper sack in the first search of the car. In a four to one decision, the Indiana Supreme Court rejected this argument and relied upon the *Robinson* and *Gustafson* decisions to sustain the search of the car. The *Robinson* and *Gustafson* decisions, however, dealt only with the search of a person following a traffic arrest and did not consider the authority of an officer to search a motor vehicle. Furthermore, the *Robinson* and *Gustafson* cases involved "custodial arrests" and the application of the decisions to "non-custodial arrests" was specifically left unresolved.[67] The *Frasier* case thus resolves both of these questions, at least for Indiana, by holding that the search incident to the traffic arrest may extend to the motor vehicle[68] and that no distinction should be made between arrests by which a person is transported to the police station and arrests after which the person is given the option of proceeding on his way after signing a promise to appear in court as directed.[69] The *Frasier* decision thus would appear to overrule or limit the effect of *Paxton*, although the *Paxton* decision is cited only in the *Frasier* dissenting opinion.[70]

B. Lineups and Photographic Identifications

1. Lineups

An opinion of the Indiana Supreme Court during the past year that might appear to merit little, if any, attention may in fact contain an indication as to the court's interpretation of the controver-

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[67]414 U.S. at 236 n.6.

[68]The Illinois appellate court reached a similar conclusion in People v. Cannon, 310 N.E.2d 673 (Ill. Ct. App. 1974).

[69]*See* IND. CODE §§ 9-4-1-130, -131 (Burns 1973). The decision may be interpreted in two different ways: (1) the *Frasier* case may hold that the *Robinson* and *Gustafson* cases apply to "non-custodial" arrests as well as to "custodial arrests," or (2) the *Frasier* case may hold that the *Robinson* and *Gustafson* decisions apply because all arrests, at least in Indiana, are "custodial" by definition. By statute, an arrest "is the taking of a person into custody that he may be held to answer for a public offense." *Id.* § 35-1-17-1 (IND. ANN. STAT. § 9-1004, Burns Repl. 1956). Furthermore, the statute providing for the release of persons on their written promise to appear concludes with the direction that the officer "shall forthwith release the person arrested from custody." *Id.* § 9-4-1-131(d) (Burns 1973). By this view, the person is in custody by virtue of the arrest, and the officer is given authority to release the individual by setting the appropriate bail bond, a release on the person's promise to appear.

[70]Neither the majority nor the dissenting opinion referred to the decision of the First District Court of Appeals in Sizemore v. State, 308 N.E.2d 400, 407 n.3 (Ind. Ct. App. 1974). In that case, the court expressed "grave doubt" that the *Robinson* and *Gustafson* decisions would apply to arrests for minor traffic offenses involving a release on a promise to appear.

sial case of *Kirby v. Illinois*.[71] The *Kirby* case held that a defendant has no right to the presence of an attorney at a pretrial identification that occurs before formal "adversary judicial proceedings" have been instituted.[72] This language, however, has been interpreted differently by various courts. Some courts have concluded that the right to counsel arises only after an indictment or information has been filed,[73] others have concluded that the right arises at least as soon as an arrest warrant has been issued against a defendant,[74] 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.[75]

In *Hardin v. State*,[76] the Indiana Supreme Court made its first reference to the *Kirby* case as it unanimously affirmed a decision of the Second District Court of Appeals.[77] The relatively brief opinion stated that the court of appeals reached the proper decisions concerning the propriety of a pretrial identification of the defendant and the sufficiency of the evidence for the conviction of robbery but that the court of appeals improperly relied upon information outside the trial record in determining the sufficiency of the evidence. The significance of the opinion is in the fact that the Indiana Supreme Court cited the *Kirby* case and affirmed the decision of the court of appeals which contained the statement that the *Kirby* case "has held that the *Wade-Gilbert* rule is inapplicable to confrontations which take place before the defendant has been formally charged with the crime."[78] Since the defendant had been arrested but not yet formally charged by way of an information or indictment at the time of the identification, this case may indicate that both the Second District Court of Appeals and the Indiana Supreme Court agree that *Kirby* requires counsel only at an identification after an information or indictment has been filed. In fact, this view has been expressed by two of the three divisions of the Indiana Court of Appeals during the past year.[79]

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[71]406 U.S. 682 (1972). For a discussion of this case, see Kerr, *Criminal Procedure, 1973 Survey of Indiana Law*, 7 IND. L. REV. 112, 123-24 (1973).

[72]406 U.S. at 689.

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

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

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

[76]296 N.E.2d 784 (Ind. 1973).

[77]287 N.E.2d 359 (Ind. Ct. App. 1972).

[78]*Id.* at 360.

[79]Smith v. State, 312 N.E.2d 896, 899 (Ind. Ct. App. 1974) (first district); Daniels v. State, 312 N.E.2d 890, 893 (Ind. Ct. App. 1974) (second district).

On the other hand, a number of factors may weigh against this interpretation of the *Hardin* opinion. The Indiana Supreme Court did not, in fact, dwell upon this point at all. Its primary purpose in writing the opinion was to discuss the issue concerning the sufficiency of evidence. In addition, the court did not cite or overrule its own earlier opinion in *Martin v. State*,[80] which held that a defendant has a right to counsel at any post-arrest identification other than an immediate or on-the-scene confrontation. Finally, the *Hardin* case involved only the latter type of confrontation which occurred shortly after the robbery. The statement in *Hardin* may then only be dictum since the defendant had no right to counsel even under the *Martin* decision. In fact, the court of appeals noted that an immediate confrontation was involved in the case and that, for this reason as well, the defendant had no right to counsel.[81]

The foregoing cases considered the issue of a defendant's right to counsel at a pretrial lineup, but a number of other cases were considered by the Indiana appellate courts which were concerned with the alleged "suggestiveness" of identifications in violation of fundamental due process.[82] These cases recognized that identification procedures are improper when unduly suggestive, such as when a witness is improperly permitted to view a suspect through a one-way mirror while the suspect is seated alone at a police station,[83] but they emphasized that such improper identifications do not affect the rights of a defendant as long as the witnesses identifying the defendant at the trial have an independent basis for their in-court identifications.

In two somewhat related cases, the Indiana appellate courts also considered the propriety of identifications made at an arraignment and during a trial. In *Ballard v. State*,[84] the victim of a burglary appeared at the defendant's arraignment and identified him as the person involved in the offense. Thereafter, at the trial, the defendant attempted to exclude the victim's in-court identification, contending that it was tainted by the suggestiveness of the identification procedures at the prior arraignment. The Second District Court of Appeals avoided the critical issue concerning the arraign-

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[80]279 N.E.2d 189, 190 (Ind. 1972).

[81]287 N.E.2d at 360. *See also* LeFlore v. State, 299 N.E.2d 871, 875-76 (Ind. Ct. App. 1973).

[82]Frasier v. State, 312 N.E.2d 77, 80 (Ind. 1974); Lawson v. State, 306 N.E.2d 150, 151-52 (Ind. Ct. App. 1974); LeFlore v. State, 299 N.E.2d 871, 876 (Ind. Ct. App. 1973).

[83]See Lawson v. State, 306 N.E.2d 150, 511-12 (Ind. Ct. App. 1974).

[84]309 N.E.2d 817, 822 (Ind. Ct. App. 1974). This question was also considered in James v. State, 297 N.E.2d 485 (Ind. Ct. App. 1973), but the court concluded that the defendant had waived the issue by failing to raise it properly at the trial stage.

ment proceeding by finding that an independent basis existed for the later in-court identification. In *Emerson v. State*,[85] the Indiana Supreme Court was confronted with an even more difficult question. During the trial, a witness was unable to identify the defendant until the trial court, at the prosecutor's request, directed the defendant to stand. Although the supreme court did not condone the procedure, it concluded that the witness had a sufficient independent basis for the identification to permit the testimony to be given.

2. *Photographic Identifications*

Both the United States Supreme Court[86] and the Indiana Supreme Court[87] held early last year that a defendant has no right to have his attorney present when police officers display photographs to a witness for identification purposes. In view of these decisions, most of the photographic identification cases during the past year were concerned with the alleged use of impermissible suggestive identification procedures in violation of fundamental due process.[88] The courts generally held, however, that the in-court identifications were properly admitted because, from a consideration of the totality of the circumstances, they were found to have a sufficient basis independent of any alleged suggestive pretrial procedure. In addition, the supreme court emphasized that a defendant who asserts that an improper photographic identification occurred has the burden of showing not only that the identification occurred but also the suggestive nature of the procedure.[89]

C. *Confessions*

1. Miranda *Requirements*

A number of warnings must be given to a suspect undergoing custodial interrogation, according to the decision of the United States Supreme Court in *Miranda v. Arizona*,[90] and thus officers conducting interrogations may, on occasion, overlook or forget to

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[85]305 N.E.2d 435 (Ind. 1974).

[86]United States v. Ash, 413 U.S. 300 (1973). *See also* Neil v. Biggers, 409 U.S. 188 (1972); Simmons v. United States, 390 U.S. 377 (1968).

[87]Parsley v. State, 300 N.E.2d 652 (Ind. 1973); Sawyer v. State, 298 N.E.2d 440 (Ind. 1973).

[88]Calvert v. State, 312 N.E.2d 925 (Ind. 1974); Boys v. State, 304 N.E.2d 789 (Ind. 1973); Manns v. State, 299 N.E.2d 824 (Ind. 1973); Caywood v. State, 311 N.E.2d 845 (Ind. Ct. App. 1974); Carpenter v. State, 307 N.E.2d 109 (Ind. Ct. App. 1974); Hutts v. State, 298 N.E.2d 487 (Ind. Ct. App. 1973).

[89]Parsley v. State, 300 N.E.2d 652 (Ind. 1973).

[90]384 U.S. 436 (1966).

give one or more of the required warnings. The Second District Court of Appeals finally confronted this issue in *Cooper v. State*[91] and concluded that the failure to give each and every one of the warnings may not necessarily be a fatal error under the circumstances of a given case. In the *Cooper* case, the defendant was arrested for receiving stolen property. After being advised of his rights, he admitted that he knew the property was stolen. At his trial, he objected to the admissibility of this statement because he had not been advised of his right to the appointment of counsel if unable to afford counsel of his own choosing. Since he had employed an attorney after the interrogation and had never asked the trial court to appoint counsel for him, the court of appeals concluded that he was not an indigent and thus could not have been harmed by the lack of a warning of this nature.[92]

The Indiana appellate courts also decided two important cases during the past year concerning the necessity for the *Miranda* warnings. In *Luckett v. State*,[93] the Third District Court of Appeals emphasized the fact that the *Miranda* decision applies only to custodial interrogation by law enforcement officers and not to interrogations by an individual conducting his own private investigation into the theft of his property. On the other hand, the Indiana Supreme Court extended the application of the *Miranda* decision by holding in *Bridges v. State*[94] that a confession of a juvenile could not be used at a juvenile delinquency hearing because the juvenile's parents had not been advised along with the juvenile concerning his *Miranda* rights. In a unanimous opinion, the court held that this issue had been decided the previous year in *Lewis v. State*[95] despite the fact that only two of the five justices had so held in the *Lewis* case. In the *Lewis* case, the opinion for the court asserted that "a juvenile's statement or confession cannot be used against him at a subsequent trial or hearing unless both he and his parents or guardian were informed of his rights to an attorney and to remain silent."[96] Only two justices concurred in this assertion. Two other justices concurred in the result but filed an opinion emphasizing that they did so because the *Lewis* case was a criminal trial. They insisted that they did not agree with the assertion that the rule

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[91]301 N.E.2d 772 (Ind. Ct. App. 1973).

[92]In Michigan v. Tucker, 94 S. Ct. 2357 (1974), the United States Supreme Court considered this question but, in effect, avoided reaching a definitive conclusion because the interrogation in question occurred before the effective date of the *Miranda* decision.

[93]303 N.E.2d 670 (Ind. Ct. App. 1973).

[94]299 N.E.2d 616 (Ind. 1973).

[95]288 N.E.2d 138 (Ind. 1972).

[96]*Id.* at 142.

should be applied to juvenile hearings.[97] The fifth justice dissented without an opinion, and this could mean that he would not have applied the rule even in criminal trials. In any event, the *Lewis* decision thus was conclusive only as to criminal trials involving juveniles. Since the *Bridges* case involved a juvenile arrested for the possession of marijuana, it is possible that the Indiana Supreme Court justices decided to extend the *Lewis* ruling at least to cover any juvenile hearing that involved an act of delinquency which would have been a crime if committed by an adult. If so, then the court may still conclude that the *Lewis* ruling does not apply to neglect and dependency hearings or to delinquency hearings involving an act of delinquency which would not be a crime if committed by an adult.[98]

Finally, there were two important decisions during the past year concerning the burden of proof to be applied in determining the voluntariness and admissibility of a confession. In *Burton v. State*,[99] the Indiana Supreme Court appeared to resolve the question by stating the following:

> The state, according to *Miranda*, has a "heavy burden . . . to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination." We have adopted this standard in past decisions. *Nacoff, supra*; Dickerson v. State (1972), Ind., 276 N.E. 2d 845. The issue, therefore, before this Court, is whether the state met its "heavy burden," *i.e.*, proved beyond a reasonable doubt that the confession was voluntarily given.[100]

Although the opinion suggests that the issue had been resolved by earlier cases, this suggestion is not supported by the cited cases. The cases of *Nacoff v. State*[101] and *Dickerson v. State*[102] both referred to the "heavy burden" involved in deciding whether a defendant waived his privilege against self-incrimination, but neither decision went so far as to say that this involved the standard of proof beyond a reasonable doubt as suggested by the *Burton* case. In fact, no cases are cited in the *Burton* case in support of this suggestion, and the opinion does not consider earlier contrary decisions of the

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[97] *Id.* at 143.

[98] Compare Warner v. State, 254 Ind. 209, 258 N.E.2d 860 (1970), in which the court held that the preponderance standard of proof may be used in all juvenile hearings except those involving an act of delinquency which would have been a crime if committed by an adult. *See also In re* Winship, 397 U.S. 358 (1970).

[99] 292 N.E.2d 790 (Ind. 1973).

[100] *Id.* at 797-98.

[101] 256 Ind. 97, 267 N.E.2d 165, 167 (1971).

[102] 276 N.E.2d 845, 849 (Ind. 1972).

United States Supreme Court and the Indiana Court of Appeals. In *Lego v. Twomey*,[103] the Supreme Court held that the United States Constitution required no more than a preponderance standard in such cases. This standard appears to have been adopted by the Third District Court of Appeals which quoted the *Lego* opinion at length in *Ramirez v. State*,[104] including the statement concerning the preponderance standard, although the court of appeals did not specifically state that it was adopting the standard.

The First District Court of Appeals may have concluded in *Apple v. State*,[105] decided during the past year, that *Burton* did not in fact resolve the question concerning the burden of proof. In the *Apple* case, the court of appeals referred to the *Burton* case and stated that the question to be decided in determining the voluntariness of a confession is "whether, looking at all the circumstances, the confession was free and voluntary, and not induced by any violence, threats, promises, or other improper influence."[106] The court of appeals then applied this standard without in any way commenting upon the preponderance standard or the standard of proof beyond a reasonable doubt. This may indicate that the court of appeals disagreed with the statement in the *Burton* case or that the court was uncertain concerning the meaning and effect that should be given to the statement.

2. *Unlawful Detention*

The *Apple* court also considered the effect of a lengthy detention upon the admissibility of a confession. In that case, the defendant was arrested on a charge of burglary and apparently was kept in detention for several hours before being taken before a magistrate. After approximately twenty-six hours of detention, the defendant sent word to the police officers that she wanted to make a statement, and she did so after being fully advised of her rights. Thereafter, she was taken before a court for the first time, but the exact time is not stated in the opinion. She then argued at her trial that the confession was inadmissible because it was obtained more than six hours after her arrest and the delay in taking her before a court was not caused by the distance to the nearest judge or the availability of means of transportation to the nearest court. This argument was based upon a literal interpretation of the Indiana statute concerning the admissibility of confessions,[107] but the First

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[103]404 U.S. 477 (1972).

[104]286 N.E.2d 219, 221-22 (Ind. Ct. App. 1972).

[105]304 N.E.2d 321 (Ind. Ct. App. 1973).

[106]*Id.* at 326.

[107]IND. CODE § 35-5-5-3 (IND. ANN. STAT. § 9-1636, Burns Supp. 1974). This section ends with the proviso that

District Court of Appeals rejected the interpretation. The court held that a delay of more than six hours is only one factor to be considered in determining the admissibility of a confession and that a confession obtained during such a delay is admissible under the statute if it is found to be a voluntary confession. In so doing, the court upheld the validity of the Indiana statute by noting that it was almost identical to similar federal provisions[108] which have been upheld by various federal courts.[109]

This statute was also considered somewhat summarily by the Third District Court of Appeals during the past year in *Crawford v. State*.[110] 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 his arrest. He filed a motion to suppress the confession, but the motion was denied after a pretrial hearing. The defendant thereafter 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 statute since the confession had been given during the first two hours of the detention. The court thus indicated that a post-confession delay is not to be considered in determining whether a confession obtained within the permitted statutory time is admissible at a trial.

D. Guilty Pleas

A specific and detailed procedure concerning guilty pleas was codified and enacted into law during the 1973 session of the Indiana General Assembly.[111] Although this statutory procedure was mentioned in two cases this past year,[112] the cases before the Indiana appellate courts during the past year involving guilty pleas gener-

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the time limitation contained in this section shall not apply in any case in which the delay in bringing such person before a judge beyond such six-hour period is found by the trial judge to be reasonable, considering the means of transportation and the distance to be traveled to the nearest available judge.

[108]18 U.S.C. § 3501(c) (1970).

[109]*See* 304 N.E.2d at 323-25 and cases cited therein.

[110]298 N.E.2d 22 (Ind. Ct. App. 1973).

[111]IND. CODE §§ 35-4.1-1-2 to -6 (IND. ANN. STAT. §§ 9-1203 to -1207, Burns Supp. 1974).

[112]Boles v. State, 303 N.E.2d 645, 656 (Ind. 1973) (DeBruler, J., dissenting); Bonner v. State, 297 N.E.2d 867, 871 nn.1-3, 877 (Ind. Ct. App. 1973).

ally involved pleas that were entered prior to the enactment of the statutory procedure. Despite this fact, the decisions by and large reflect the law as it is specified in the new statute.

The primary concern of the appellate courts continues to focus on the warnings given to a defendant and the record that must be made to establish that a guilty plea is made voluntarily. This concern is also reflected in the new statute which includes a detailed list of warnings that must be given to a defendant[113] and a specific procedure for determining the voluntariness of a plea.[114] In *Bonner v. State*,[115] the Second District Court of Appeals discussed the procedures at length, emphasizing that a defendant must be advised of his rights with much the same specificity as that required under *Miranda v. Arizona*[116] for persons undergoing custodial interrogation. The court, relying on earlier cases as well as the American Bar Association Standards for Criminal Justice and the provisions of the new Indiana statute,[117] summarized the requirements for the taking of a guilty plea. It observed that the defendant must be advised as to the nature of the crime, the constitutional consequences of his guilty plea, and the nature of the punishment. The court then set aside the defendant's guilty plea because he was not advised of his right to confrontation and his right against compulsory self-incrimination. These two warnings, along with a warning concerning the right to a jury trial, were considered absolute minimum requirements by the court. The Third District Court of Appeals likewise set aside the plea in *Taylor v. State*[118] because the trial record did not show that the defendant was advised as to the nature of the offense and the possible punishment for the offense.

These cases are generally in accord with the provisions of the Indiana statute, but another recent case raises a question about the completeness of the statutory procedure despite the legislature's attempt to be specific in codifying the procedure. In *Boles v. State*,[119] the question is raised as to the necessity for a warning that a court may have no authority to suspend a sentence in a given case. The Indiana statute provides that the defendant must be informed of the "maximum possible sentence and minimum sentence for the offense charged and of any possible increased sentence by reason of the fact of a prior conviction or convictions, and of any possibility

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[113] IND. CODE §§ 35-4.1-1-2, -3 (IND. ANN. STAT. §§ 9-1203, -1204, Burns Supp. 1974).

[114] *Id.* §§ 35-4.1-1-4, -5 (IND. ANN. STAT. §§ 9-1205, -1206).

[115] 297 N.E.2d 867, 874 (Ind. Ct. App. 1973). *See also* Thomas v. State, 306 N.E.2d 136 (Ind. Ct. App. 1974).

[116] 384 U.S. 436 (1966).

[117] 297 N.E.2d 867, 871-72 (Ind. Ct. App. 1973).

[118] 297 N.E.2d 896 (Ind. Ct. App. 1973).

[119] 303 N.E.2d 645 (Ind. 1973).

of the imposition of consecutive sentences"[120] but makes no mention of a warning concerning the impossibility of suspending a sentence. The court divided evenly on this issue, and the meaning of the decision is unclear since the opinion can be interpreted to mean that the justices disagreed over the adequacy of the warning given, not over the necessity of the warning. Nevertheless, the opinion suggests that the statutory procedure may be incomplete and points up the difficulty encountered when the legislature attempts to be specific and to codify procedural matters.

Other aspects of the Indiana statute were also reflected in various decisions during the past year. A number of cases emphasized that the trial court must advise the defendant of his rights and cannot rely upon the defense attorney to give such advice.[121] The Second District Court of Appeals recognized the duty of the trial court to determine that a factual basis exists for a guilty plea and to make a record of that finding.[122] The Indiana Supreme Court emphasized that the trial judge should warn a defendant that the court is not bound by any agreements between the prosecutor and the defense and should permit the defendant to withdraw his plea if the court decides not to follow the terms of any agreement.[123] The supreme court also emphasized that a petition for post-conviction relief, not a motion to correct errors, is the proper way to challenge a plea of guilty after a sentence has been pronounced.[124] On the other hand, the Third District Court of Appeals declined to enforce the procedural requirement of a post-conviction relief petition and set aside a guilty plea following the filing of a motion to correct errors. The court recognized the correct procedure but concluded that it was required to grant relief when a fundamental error was apparent on the face of the record before it.[125]

Finally, the appellate courts considered a number of issues not specifically covered by the Indiana statute. A number of cases recognized the authority of a trial judge to reject a guilty plea when the defendant says that he cannot remember what occurred or de-

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[120]IND. CODE § 35-4.1-1-3(d) (IND. ANN. STAT. § 9-1204(d), Burns Supp. 1974).

[121]Goode v. State, 312 N.E.2d 109, 112 (Ind. Ct. App. 1974); Thomas v. State, 306 N.E.2d 136, 139 (Ind. Ct. App. 1974); Bonner v. State, 297 N.E.2d 867, 877 (Ind. Ct. App. 1973).

[122]Love v. State, 306 N.E.2d 142, 148 (Ind. Ct. App. 1974). *See* IND. CODE § 35-4.1-1-4(b) (IND. ANN. STAT. § 9-1205(b), Burns Supp. 1974).

[123]Watson v. State, 300 N.E.2d 354 (Ind. 1973). *See* IND. CODE § 35-4.1-1-6(c) (IND. ANN. STAT. § 9-1207(c), Burns Supp. 1974).

[124]Crain v. State, 301 N.E.2d 751 (Ind. 1973). *See* IND. CODE § 35-4.1-1-6(c) (IND. ANN. STAT. § 9-1207(c), Burns Supp. 1974).

[125]Goode v. State, 312 N.E.2d 109 (Ind. Ct. App. 1974).

nies an essential element of the offense.[126] On the other hand, the Indiana Supreme Court held that a trial judge may accept a guilty plea when the defendant denies guilt, provided that there is a clear showing that the plea is entered knowingly and voluntarily and is accompanied by sufficient evidence to show a factual basis for the plea.[127]

The Second District Court of Appeals decided one other case of major significance, although the decision is not completely clear in some particulars. In *Ballard v. State*,[128] the defendant was charged with robbery, first degree burglary, and automobile banditry. As the result of plea negotiations, the various charges were dismissed and the defendant entered a plea of guilty to second degree burglary. After beginning to serve a two to five year sentence for the second degree burglary conviction, the defendant filed a petition to withdraw his guilty plea. The plea was set aside, but the state then reinstituted the robbery charge and the first degree burglary charge against the defendant. After a trial and a conviction on both charges, the defendant was sentenced to serve ten to twenty-five years for the robbery conviction and two to five years on the first degree burglary charge. The court of appeals affirmed this action of the trial court on the theory that the defendant had completely rescinded the bargain by withdrawing his guilty plea, but the court emphasized the fact that the defendant was not retried for the same offense for which he was originally sentenced.[129] Thus the opinion leaves some doubt as to whether the state may reinstitute an original charge after the defendant has entered a plea to a lesser included offense.[130] Furthermore, the opinion did not indicate clearly whether or not the trial court was limited to the two to five year sentence on the burglary charge although the opinion would suggest that the trial court was not so limited.

E. Assistance of Counsel

1. Right to Counsel

In *Russell v. Douthitt*,[131] the Indiana Supreme Court reluctantly concluded that a defendant is entitled to a "regular full-blown trial" with the assistance of counsel when involved in a parole revocation hearing. The court reached this conclusion after considering the decision of the United States Supreme Court in *Gagnon v. Scar-*

[126]Parsons v. State, 304 N.E.2d 802, 808 (Ind. Ct. App. 1973); Knight v. State, 303 N.E.2d 845, 846 (Ind. Ct. App. 1973); Nicholas v. State, 300 N.E.2d 656, 661 (Ind. Ct. App. 1973).

[127]Boles v. State, 303 N.E.2d 645, 654 (Ind. 1973).

[128]309 N.E.2d 817 (Ind. Ct. App. 1974).

[129]*Id.* at 827.

[130]For a further discussion of this subject, see 7 IND. L. REV. 761 (1974).

[131]304 N.E.2d 793, 794 (Ind. 1973).

pelli,[132] although the *Gagnon* Court had concluded that the right to counsel should be determined on a "case-by-case" basis. The difference in the opinions was based upon the Indiana court's concern that a "case-by-case" approach would create uncertainty as to the law since no decision concerning the right to counsel would be final until received by either the Indiana Supreme Court or the United States Supreme Court. As a result, the Indiana court decided to resolve this uncertainty by concluding that a parolee is entitled to counsel in every parole revocation hearing.

Shortly after the *Russell* decision, the First District Court of Appeals was confronted with a similar issue concerning a probation revocation proceeding. In *Lazzell v. State*,[133] the defendant's probation was revoked after a hearing which was conducted without the defendant being represented by counsel. The defendant filed a petition for post-conviction relief after the revocation and argued that he should have had the assistance of an attorney during the revocation hearing. This argument was rejected by the court of appeals on the ground that the defendant had failed to show how the "use of the lawyer's skills of developing facts" would have been helpful since the issues in the hearing were "relatively simple."[134] The court did note the *Russell* decision, however, and suggested that the *Russell* decision might eventually be extended to probation revocation proceedings as well.[135]

2. *Effectiveness of Counsel*

The Indiana appellate courts considered a number of cases during the past year involving the alleged ineffectiveness of trial counsel.[136] The great majority of these cases were resolved by the application of Indiana's standard test that an attorney is presumed to be competent and the presumption can be overcome only by strong and convincing proof that the attorney's actions or inactions rendered the proceedings a mockery of justice and shocking to the conscience of the court.[137] Few appellants were able to overcome this presumption.[138]

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[132]411 U.S. 778 (1973).

[133]305 N.E.2d 884 (Ind. Ct. App. 1974).

[134]*Id.* at 885.

[135]*Id.* at 885-86.

[136]For a further discussion of this subject, see Note, *Effectiveness of Counsel in Indiana: An Examination of Appellate Standards*, 7 IND. L. REV. 674 (1974).

[137]Payne v. State, 301 N.E.2d 514 (Ind. 1973); Haddock v. State, 298 N.E.2d 418 (Ind. 1973); Pettit v. State, 310 N.E.2d 81 (Ind. Ct. App. 1974); Tibbs v. State, 303 N.E.2d 294 (Ind. Ct. App. 1973); Sargeant v. State, 299 N.E.2d 219 (Ind. Ct. App. 1973).

[138]Post-conviction relief was granted in only two cases because of the inadequacy of counsel, but special circumstances existed in each case. In

In *Graham v. State*,[139] the defendant was convicted of second degree murder and argued that his attorney was not given adequate time for preparation. The attorney was appointed on the morning of the defendant's trial and consulted with the defendant for only twenty minutes prior to the trial. Despite these facts, however, the Indiana Supreme Court denied post-conviction relief because the record showed that the defendant waived his rights when he insisted on a trial after the trial judge repeatedly offered him a continuance. The supreme court did not discuss the presumption of competency under these circumstances and in fact observed that the limited amount of preparation, "without more, would unhesitatingly lead this Court to the conclusion that the right to effective counsel was impaired by lack of adequate preparation where the crime charged is murder."[140] This observation could mean that the court would consider a murder trial a mockery of justice and shocking to the conscience of the court when the defense attorney prepared for only twenty minutes, or the observation might suggest that the court would apply a different standard when confronted with a case involving an attorney's lack of preparation. At least one judge has taken the latter approach. In *Daniels v. State*,[141] the dissenting judge suggested that inadequacy of pretrial preparation should not be weighed in light of what the attorney did or did not do during the trial but should be viewed in light of the constitutional right to consult with an attorney prior to trial. This approach was rejected by the majority of the court, however, which concluded that the presumption of competency had not been overcome by the alleged lack of preparation prior to trial.[142]

F. Insanity

1. Mental Competency

Following the two landmark decisions in 1972 concerning Indiana's insanity procedures,[143] the 1974 Indiana General Assembly

Chandler v. State, 300 N.E.2d 877 (Ind. 1973), the court granted relief in part because the defendant's attorney was subsequently disbarred for reasons that reflected on his general competence as an attorney. In Simmons v. State, 310 N.E.2d 872 (Ind. 1974), the court granted the defendant permission to file a belated motion to correct errors because his appointed public defender failed to file a timely motion and admitted to the court that he had failed to do so even though the defendant had requested him to do so several times.

[139]303 N.E.2d 274 (Ind. 1973).

[140]*Id.* at 275.

[141]312 N.E.2d 890, 895-96 (Ind. Ct. App. 1974) (White, J., dissenting).

[142]In Sargeant v. State, 299 N.E.2d 219 (Ind. Ct. App. 1973), the court also applied the presumption and concluded that the presumption was not overcome by the defendant's showing of inadequate preparation.

[143]Jackson v. Indiana, 406 U.S. 715 (1972); Wilson v. State, 287

enacted new statutory procedures for determining a defendant's mental competency.[144]

a. Procedure prior to trial

The new statute modified the earlier procedure in a number of ways, but the primary change was in the time limit concerning a defendant's commitment under the statute. A defendant may now be committed under the criminal procedure for a maximum period of only nine months and must be released if he has not regained his competency and if civil commitment proceedings have not been instituted against him within that period of time.[145] The new statute, however, does not resolve all the questions concerning the procedure to be followed, including a number of issues considered by the Indiana appellate courts during the past year.

The new statute retains the language of the former statute which requires a mental competency hearing whenever a judge "has reasonable ground for believing the defendant to be insane."[146] This language gives little guidance to the trial judge who must decide when to hold such a hearing and the language also confuses the question of mental competency with the issue of insanity. In *Parsons v. State*,[147] the Second District Court of Appeals held that a hearing on mental competency is required only if the defendant's competence has been "substantially questioned."[148] This case thus gives some added meaning to the "reasonable ground" standard in the statute, but the case also illustrates the confusion that can arise from the failure of the statute to distinguish between competency issues and insanity issues. The defendant did not plead insanity prior to his trial as required by statute[149] but testified at his trial that he was drinking at the time of the alleged burglary and did not recall the events alleged to have taken place. On appeal, he argued that the trial court had a duty to inquire into his sanity at the time of the alleged offense after being put on notice by the testimony concerning intoxication. Instead of holding that the defendant had waived any defense of insanity by failing to file the required pretrial notice of intent to rely on the defense, the court of appeals examined the statute concerning mental competency and

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N.E.2d 875 (Ind. 1972). For a discussion of these cases, see Kerr, *Criminal Procedure, 1973 Survey of Indiana Law*, 7 IND. L. REV. 112, 142-45 (1973).

[144]IND. CODE §§ 35-5-3.1-1 to -5 (IND. ANN. STAT. §§ 9-1708 to -1712, Burns Supp. 1974).

[145]*Id.* § 35-5-3.1-5 (IND. ANN. STAT. § 9-1712).

[146]*Id.* § 35-5-3.1-1 (IND. ANN. STAT. § 9-1708).

[147]304 N.E.2d 802 (Ind. Ct. App. 1974).

[148]*Id.* at 809.

[149]IND. CODE § 35-5-2-1 (IND. ANN. STAT. § 9-1701, Burns Repl. 1956).

held that the trial court had no duty to hold a hearing because the defendant's competence had not been "substantially questioned" by the evidence of intoxication. The court also added the observation that "Parsons has failed to show that his alcoholism made him unaware of the wrongfulness of his conduct or compelled him to behave in that manner—the requirements which would entitle him to use insanity as a defense."[150] By so doing, the court suggested that a defense of insanity might properly have been considered despite the fact that the defendant had failed to file the required notice. If so, then the court is in disagreement with two other decisions handed down during the past year. In *Hollander v. State*,[151] the Third District Court of Appeals held that pretrial notice is a necessary prerequisite for a defense of insanity and that a trial court has no discretion to admit evidence of insanity during the trial in the absence of such notice, even in a non-jury trial. In *Evans v. State*,[152] decided shortly after *Hollander*, the Indiana Supreme Court held that an issue of mental competency cannot be waived but observed that there is "no legal reason why, in the case of a competent defendant, the defense of insanity should be viewed as a nonwaivable defense."[153]

The new statute also retains, although with somewhat different language, the provision of the former statute which authorized a hearing on competency at any time prior to the submission of the case to the court or jury trying the case.[154] The *Evans* case emphasized that this statute must give way to the need for a competency hearing at any time information justifying such a hearing is brought to the court's attention, even if after the trial and the sentencing of a defendant. This decision was relied upon by the Third District Court of Appeals in *Schmidt v. State*,[155] but the court added a procedural requirement which was not included in the new statute. In the *Schmidt* case, the defendant filed a petition to be examined under the criminal sexual deviancy statute[156] prior to being sentenced. After the examination, the two court-appointed psychiatrists reported that he was not a criminal sexual deviant but expressed the opinion that he was mentally incompetent at the time of his trial. The defendant filed a motion to vacate his conviction, and this motion was considered by the trial court at the same time it heard the testimony on the petition under the criminal sexual devi-

[150] 304 N.E.2d at 809-10.

[151] 296 N.E.2d 449 (Ind. Ct. App. 1973).

[152] 300 N.E.2d 882 (Ind. 1973).

[153] *Id.* at 887.

[154] *See* IND. CODE § 35-5-3.1-1 (IND. ANN. STAT. § 9-1708, Burns Supp. 1974).

[155] 307 N.E.2d 484 (Ind. Ct. App. 1974).

[156] IND. CODE § 35-11-3.1-3 (IND. ANN. STAT. § 9-4003, Burns Supp. 1974).

ancy statute. After hearing the testimony, the trial judge denied both motions but stated in the record that he had observed the defendant during the trial and that the defendant appeared to be fully competent at that time. In reversing this decision, the court of appeals concluded that the testimony of the psychiatrists during the sexual deviancy hearing was sufficient to require a separate hearing on the issue of competency. The court then added that it would be proper for the trial judge to testify at such a hearing concerning his observations of the defendant during the trial but that he should then disqualify himself as judge in the competency hearing and follow the proper procedure for appointing a special judge for the hearing.

b. Procedure after acquittal

The new statute has made a major change in the statutory procedures affecting a defendant acquitted by virtue of insanity. Under the former statutory procedures, the trial court would make a further determination concerning the defendant's sanity at the time of the trial and the probability of the recurrence of an attack of insanity, and the defendant could then be committed until mental health authorities concluded that his sanity had been restored or that the recurrence of an attack of insanity was improbable.[157] The new statute provides that the trial court is to make a further determination concerning the defendant's sanity at the time of the trial, but only for the purpose of deciding whether the defendant is to be retained in custody until civil commitment proceedings can be instituted. The court is authorized to take judicial notice of all the evidence introduced during the trial; the court is authorized to detain the defendant in custody until the hearing; and the court is also authorized to detain the defendant after the hearing if the court finds by a preponderance of the evidence that the defendant is mentally incompetent and dangerous to himself or to others. If there is a finding of incompetency, the court is to direct the Department of Mental Health to institute civil commitment proceedings.[158] This statute has not yet been reviewed by any court, and no cases were decided by the Indiana appellate courts during the past year concerning the prior statutory procedures.

2. Insanity Defense

The statute discussed above does not directly relate to the defense of insanity since it is concerned primarily with the procedures

[157] *Id.* §§ 35-5-3-1, -2-4 (IND. ANN. STAT. §§ 9-1704a, -1705, Burns Repl. 1956).

[158] *Id.* § 35-5-3-3.2-1 (IND. ANN. STAT. § 9-1713, Burns Supp. 1974).

to be followed after an acquittal. Nevertheless, the statute contains a provision which may indirectly affect the defense of insanity. Under the statute, a court is required to conduct a mental competency hearing after "a defendant is found not guilty by reason of mental disease or defect, within the definition" of Indiana Code section 16-14-9-1.[159] The cited statute defines "mental illness" and "psychiatric disorders" for purposes of civil commitments and includes any "mental deficiency, epilepsy, alcoholism, or addiction to narcotic drugs."[160] If the new criminal statute includes this reference in order to broaden the definition of the insanity defense, then it is clearly contrary to the definition adopted in *Hill v. State*[161] in 1969 and reaffirmed by the Indiana Supreme Court during the past year in *Fuller v. State*.[162] The more likely interpretation is that the statute does not change the definition of insanity for purposes of the insanity defense but merely points to the civil commitment standard which is to be the guide for determining the disposition of persons acquitted by virtue of the insanity defense.

Another question has arisen during the past year concerning the insanity defense and the continued validity of the statutory procedures concerning the defense. The 1973 Indiana General Assembly adopted two provisions that could be interpreted so as to eliminate the statutory procedures which require a pretrial notice of intent to rely upon the defense of insanity and establish the procedures for examining a defendant after such notice has been filed.[163] The first of these provisions abolished all pleas "in abatement or in bar" except pleas of guilty and not guilty;[164] the second added the provision that "any matter of defense may be proved under the plea of not guilty," except as otherwise expressly provided.[165] Although it might be argued that these provisions abolished the requirement of a pretrial notice concerning the insanity defense, the 1973 statute did not specifically repeal the statutes concerning such notice[166] and the exception quoted above should be

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[159] *Id.*

[160] *Id.* § 16-14-9-1 (Burns 1973).

[161] 252 Ind. 601, 251 N.E.2d 429 (1969).

[162] 304 N.E.2d 305, 310-11 (Ind. 1973). The standard adopted by the Indiana Supreme Court is the modified version proposed by the American Law Institute. Under this standard, a person is not responsible for criminal conduct "if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." *Id.* at 310.

[163] IND. CODE §§ 35-3-2-1, -2 (IND. ANN. STAT. §§ 10-3042, -3043, Burns Supp. 1974).

[164] *Id.* § 35-4.1-2-(a) (IND. ANN. STAT. § 9-1101(a)).

[165] *Id.* § 35-4.1-1-1(b) (IND. ANN. STAT. § 9-1202(b)).

[166] Ind. Pub. L. No. 325, § 5 (April 23, 1973).

sufficient to provide for the continued validity of the earlier statutes. As noted previously, the Third District Court of Appeals emphasized during the past year that a pretrial notice is a necessary prerequisite for a defense of insanity, and the court reached this conclusion from a review of both the statutory procedures and the earlier common law authorities on the subject, although the case did arise prior to the enactment of the 1973 statute.[167]

G. Habitual Criminal Prosecutions

For the second consecutive year, the Indiana Supreme Court decided two major cases concerning Indiana's habitual offender statutes. During 1972, the court limited the use of the habitual criminal statute by carefully defining the meaning of a "second" and a "third" offense under the statute[168] and revised the nature of habitual criminal proceedings by requiring a two-stage trial for such proceedings.[169] In *Enlow v. State,*[170] the court reviewed its ruling concerning a two-stage trial and concluded that the ruling applied at least to all other cases pending on direct appeal at the time the ruling was made. In the *Enlow* case, the defendant had been convicted under the habitual criminal statute in a one-stage jury trial held in 1954. No appeal was taken at the time, but the defendant petitioned the trial court in October of 1972 for permission to file a belated motion to correct errors. This petition was filed within a month after the ruling requiring a two-stage trial, and the petition was granted by the trial court. The motion to correct errors, however, was ultimately denied by the trial court. On appeal, the Indiana Supreme Court held that the defendant was entitled to a two-stage trial and reversed the habitual criminal conviction. Because the issue was before the court on a belated appeal, the court held that two-stage trials would be required for all cases on direct appeal after September 11, 1972, the date of the ruling requiring such proceedings. At the same time, the court reviewed the general principles concerning the retrospective application of new decisions and concluded that these principles would probably require a retrospective application of the ruling to other cases as well.[171]

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[167]Hollander v. State, 296 N.E.2d 449, 452 (Ind. Ct. App. 1973).

[168]Cooper v. State, 284 N.E.2d 799 (Ind. 1972). In the *Cooper* case, the court held that a person may be prosecuted under the habitual criminal statute, IND. CODE § 35-8-8-1 (IND. ANN. STAT. § 9-2207, Burns Repl. 1956), only when the person has committed a second felony subsequent to conviction and imprisonment for a first felony and has committed a third felony subsequent to conviction and imprisonment for the second felony.

[169]Lawrence v. State, 286 N.E.2d 830 (Ind. 1972).

[170]303 N.E.2d 658 (Ind. 1973).

[171]*Id.* at 660.

A somewhat related issue was also considered by the Indiana Supreme Court in *State ex rel. Van Natta v. Rising*.[172] In the *Rising* case, the defendant's operators license was revoked because he had been convicted three times of driving while under the influence. Under the habitual traffic offenders statute,[173] the prosecutor initiated a civil proceeding to revoke the defendant's license after the defendant's third criminal conviction for the driving offense. Although the statute authorizes the revocation as a result of prior criminal proceedings, the Indiana Supreme Court concluded that the statutory proceeding is civil rather than criminal in nature. Despite this distinction, the court still found it necessary to discuss the proceeding in terms of the criminal law. The court first noted that the habitual traffic offenders statute provided for a separate revocation hearing after the third criminal conviction and thus complied with the due process requirement of a two-stage trial for "similar criminal proceedings."[174] The court then held that the statute was not ex post facto even though it added revocation to the penalties that accompanied the three prior criminal convictions. In so doing, the court emphasized that the revocation was not an additional punishment for the criminal act but was an exercise of the police power for the protection of the public. The court reached this conclusion despite the fact that the statute was enacted in 1972 and two of the defendant's convictions occurred prior to 1972. In this regard, the court reverted almost completely to criminal law considerations. It held that the legislature did not add any additional burden or punishment for the defendant's prior crimes but actually created a completely new crime for which the penalty is imposed—"the act of driving while intoxicated by one twice convicted of driving while intoxicated."[175] This interpretation may indicate that the court could apply a similar interpretation to the habitual criminal statute despite some earlier cases that have said the statute does not impose a punishment for an additional crime but for the status or condition of being an habitual criminal.[176] The interpretation is important because it has been at the center of the controversy concerning the constitutionality of the statute.[177]

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[172]310 N.E.2d 873 (Ind. 1974).

[173]IND. CODE § 9-4-13-1 (Burns Supp. 1974).

[174]310 N.E.2d at 874.

[175]*Id.*

[176]Bernard v. State, 248 Ind. 688, 696, 230 N.E.2d 536, 541 (1967); Smith v. State, 237 Ind. 532, 536, 146 N.E.2d 86, 88 (1957), *cert. denied*, 357 U.S. 909 (1958).

[177]*See* United States *ex rel.* Smith v. Dowd, 271 F.2d 292 (7th Cir. 1959), *cert. denied*, 362 U.S. 978 (1960).

H. Sentencing

1. Proportionality of Sentences

The Indiana constitution provides that all penalties must be "proportioned to the nature of the offense,"[178] and this provision was litigated frequently during the past year. In a number of cases, sentences for the offense of entering to commit a felony were reduced from a term of one to ten years to a term of one to five years.[179] Although the applicable statute provides for a term of one to ten years,[180] this sentence has been found disproportionate because entering to commit a felony is included within the greater offense of second degree burglary and the latter offense carries a penalty of only two to five years.[181] A similar result was reached in a number of other cases with reference to robbery and armed robbery,[182] but these cases all arose prior to the enactment of the current statute on armed robbery which was enacted by the General Assembly in 1971 to make the sentences proportionate.[183] Although the courts in these cases, in effect, determined the length of the permissible sentences, they reaffirmed their authority to do so under this constitutional provision while recognizing that the legislature is still vested with the sole authority to prescribe the punishment for crimes.[184]

Disproportionality of sentences, as discussed in the foregoing cases, is found when the maximum penalty for a lesser included offense exceeds the maximum penalty for the greater offense or when the minimum penalty for the lesser offense exceeds the minimum penalty for the greater offense.[185] At the same time it has been held

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[178]IND. CONST. art. 1, § 16.

[179]Clinton v. State, 305 N.E.2d 897 (Ind. Ct. App. 1973); Maynard v. State, 301 N.E.2d 200 (Ind. Ct. App. 1973); Gullett v. State, 299 N.E.2d 190 (Ind. Ct. App. 1973).

[180]IND. CODE § 35-13-4-5 (IND. ANN. STAT. § 10-704, Burns Repl. 1956).

[181]Lee v. State, 286 N.E.2d 840, 843 (Ind. 1972); Easton v. State, 280 N.E.2d 307 (Ind. 1972); Heathe v. State, 274 N.E.2d 697 (Ind. 1971).

[182]Knight v. State, 303 N.E.2d 845 (Ind. Ct. App. 1973); LeFlore v. State, 299 N.E.2d 871 (Ind. Ct. App. 1973). Both of these cases considered the minimum penalties under the applicable statutes.

[183]IND. CODE § 35-12-1-1 (IND. ANN. STAT. § 10-4709, Burns Supp. 1974). In Jennings v. State, 297 N.E.2d 909 (Ind. Ct. App. 1973), the court considered an issue concerning the maximum penalty under the same statute, but this case arose in 1965 and the issue involved in it was resolved by a statute in 1969 which was carried forward in part into the 1971 enactment.

[184]Clark v. State, 311 N.E.2d 439 (Ind. Ct. App. 1974); Hamblen v. State, 299 N.E.2d 211 (Ind. Ct. App. 1973); Gullett v. State, 299 N.E.2d 190 (Ind. Ct. App. 1973).

[185]These rules have essentially been codified in the provisions of IND. CODE § 35-4.1-4-6 (IND. ANN. STAT. § 9-2201b, Burns Supp. 1974), enacted during the 1973 session of the General Assembly.

during the past year that the maximum penalty for a lesser included offense may be equal to, though not greater than, the maximum penalty for the greater offense.[186] Furthermore, the courts reaffirmed the view that a sentence is not disproportionate merely because of the possibility that a person serving an indeterminate sentence for a lesser included offense might serve more time than a person given a determinate sentence for a greater offense.[187]

2. *Accessories and Accomplices*

In *Schmidt v. State*,[188] the Indiana Supreme Court held that the defendant, who was convicted as an accessory to first degree murder, was entitled to have her conviction and sentence reduced when the other person charged with the offense was thereafter convicted only of being an accessory after the fact to manslaughter. The court agreed that the latter person was the only possible person who could have been the principal to the crime for which the defendant was convicted as an accessory, and the court ordered her conviction and sentence reduced to conform with that of the principal. By way of contrast, the Indiana Supreme Court held only a few months earlier that an accessory was not entitled to have his conviction and sentence for second degree burglary reduced after the principal was permitted to plead guilty to the lesser offense of malicious trespass.[189] In so doing, the court held that the accessory's conviction and sentence are dependent upon the outcome of the principal's case only when the principal is in fact tried and convicted or acquitted.

3. *Criminal Sexual Deviancy*

The Indiana Court of Appeals decided two important cases during the past year concerning the criminal sexual deviancy statute.[190] In *Stiles v. State*,[191] the First District Court of Appeals held that the trial court did not abuse its discretion in refusing to com-

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[186]Emery v. State, 301 N.E.2d 369 (Ind. 1973); Brown v. State, 301 N.E.2d 189 (Ind. 1973); Clark v. State, 311 N.E.2d 439 (Ind. Ct. App. 1974).

[187]Hamblen v. State, 299 N.E.2d 211 (Ind. Ct. App. 1973); Davis v. State, 297 N.E.2d 450 (Ind. Ct. App. 1973); Barbee v State, 296 N.E.2d 884 (Ind. Ct. App. 1973). It was held in Clark v. State, 311 N.E.2d 439, 441 (Ind. Ct. App. 1974), that an indeterminate sentence is not cruel and unusual punishment and is not an unconstitutional delegation of judicial authority to prison authorities.

[188]300 N.E.2d 86 (Ind. 1973).

[189]Combs v. State, 295 N.E.2d 366 (Ind. 1973).

[190]IND. CODE § 35-11-3.1-1 (IND. ANN. STAT. § 9-4001, Burns Supp. 1974).

[191]298 N.E.2d 19 (Ind. Ct. App. 1973). *See also* Berwanger v. State, 307 N.E.2d 891, 899 (Ind. Ct. App. 1974).

mit the defendant for treatment as a criminal sexual deviant despite the fact that reports from the examining physicians recommended commitment. The court of appeals emphasized that the statute authorizing commitment states that the trial court "may determine the question of criminal sexual deviancy in accordance with such findings,"[192] using the word "may" instead of the word "shall." It concluded that the trial court should be reversed only for an arbitrary abuse of discretion since the statute placed no limits upon the exercise of such discretion.

In *Berwanger v. State*,[193] the Second District Court of Appeals held that the defendant was not entitled to an evidentiary hearing on his petition to be declared a criminal sexual deviant because his petition was supported only by his own request for such a hearing and was unaccompanied by any other evidence or statement of a qualified physician placing his mental condition in serious question. The court of appeals also held that the defendant's lack of counsel during his mental examination was not reversible error in the absence of any showing of prejudice. The court, recognizing that the statute provides for a right to counsel,[194] encouraged all trial courts to afford reasonable notice to counsel concerning such examinations, but concluded that the statute does not mandate the presence of an attorney. In so holding, the court emphasized that the right to counsel is strictly a statutory right and that no such constitutional right exists to have an attorney present at a mental examination.[195]

4. Drug Abuse Treatment

In *McNary v. State*,[196] the Third District Court of Appeals emphasized that the 1971 drug abuser rehabilitation statute[197] is mandatory in requiring a trial court to provide a convicted defendant with the opportunity for treatment if the defendant qualifies under the statute. Under the statute, the trial court is required to send the defendant to the Department of Mental Health for an examination once a showing is made that the defendant is qualified. There is no requirement, however, that the Department must accept the defendant for more than an examination. The Department is to determine whether the defendant is in fact a drug abuser and whether he is likely to be rehabilitated through treatment and then

[192] IND. CODE § 35-11-3.1-17 (IND. ANN. STAT. § 9-4017, Burns Supp. 1974).

[193] 307 N.E.2d 891 (Ind. Ct. App. 1974).

[194] IND. CODE § 35-11-3.1-7 (IND. ANN. STAT. § 9-4007, Burns Supp. 1974).

[195] 307 N.E.2d at 894.

[196] 297 N.E.2d 853 (Ind. Ct. App. 1973).

[197] IND. CODE § 16-13-6.1-1 (Burns Supp. 1974), *as amended by* Ind. Pub. L. No. 59 (Feb. 18, 1974).

is to recommend whether the defendant should be placed on probation for purposes of treatment. Since the defendant in the *McNary* case qualified under the statute, the trial court improperly denied his petition for an examination by the Department of Mental Health. The court in *McNary* did not discuss the applicability of the holding to cases in which such a petition is submitted prior to the defendant's conviction. Since the same statute provides for an election of treatment by drug abusers charged with or convicted of crimes, however, it would appear that the *McNary* ruling would apply in both types of cases.

5. *"Good Time" and Credit for Pretrial Confinement*

The 1974 Indiana General Assembly extensively rewrote the prior statute regarding the effect of "good time" in reducing sentences of confinement. Under the new statute,[198] the director of the division of classification of the department of corrections is directed to classify each prisoner in the custody of the department into one of four categories. This classification determines the rate by which "good time" reduces each prisoner's term of confinement. A classification committee is required to review each classification periodically, and a hearing procedure is established in connection with the review if the committee should recommend the demotion of a prisoner to a lower classification. The committee may also, following appropriate procedures set forth in the statute, deprive a prisoner of "good time" already earned under the provisions of the law. The holding in *Begley v. State,*[199] in which the First District Court of Appeals upheld the authority of the parole board to extend a prisoner's sentence by the length of time that the prisoner was away from the prison during an escape and subsequent imprisonment in a federal prison, would appear to be consistent with the terms of the new statute.

In *Lee v. State,* [200] the Third District Court of Appeals, relying upon a 1972 statute,[201] held that a prisoner is entitled to credit on his sentence for the total amount of time served in pretrial confinement from the time of his arrest on a charge until his sentencing for that offense. It should be noted that this statutory requirement still exists although the 1974 General Assembly repealed a statute which was substantially similar to the one relied upon in the *Lee* case.[202]

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[198]IND. CODE § 11-7-6.1-2 (Burns Supp. 1974).

[199]299 N.E.2d 238 (Ind. Ct. App. 1973).

[200]297 N.E.2d 890 (Ind. Ct. App. 1973).

[201]IND. CODE § 35-8-2.5-1 (IND. ANN. STAT. § 9-1828, Burns Supp. 1974).

[202]The 1973 General Assembly enacted IND. CODE § 35-4.1-4-16(a) (IND. ANN. STAT. § 9-1828a, Burns Supp. 1974) which was substantially the same

6. *Resentencing after Revocation of Probation*

During the past year, the Indiana Supreme Court was confronted with two challenges to the statute which permits a court, after a probation violation, to set aside the defendant's original sentence and impose any sentence which was available at the time of the original conviction.[203] In *Nicholas v. State*,[204] the statute withstood an attack based on the theory that the defendant was actually being resentenced for a purported crime of violating his probation.[205] In the other case, *Smith v. State*,[206] the statute withstood a challenge based upon a double jeopardy argument. In that case, the defendant was given a suspended sentence of imprisonment for one year for carrying a pistol without a license. After violating the terms of his probation, he was resentenced to serve a term of ten years in prison. In rejecting the defendant's argument that this increased sentence violated his right not to be placed in double jeopardy, the court held that a more severe penalty could be imposed if justified by the defendant's conduct from the time of the first sentencing to the time of the resentencing.[207] Here the more severe penalty was justified by the probation violation, the uttering of a forged instrument.

VIII. Evidence—Civil

*Marshall J. Seidman**

A. *Demonstrative Evidence*

1. *Admissibility of Photographs*

In *Richmond Gas Corp. v. Reeves & Reinke*,[1] the Indiana Court of Appeals dealt with the power of the trial court to exclude photographic evidence. The case resulted from a series of violent explosions which killed forty-one persons in downtown Richmond, Indi-

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as *id.* § 35-8-2.5-1 (IND. ANN. STAT. § 9-1828, Burns Supp. 1974). Because of this duplication, the 1974 General Assembly repealed the 1973 statute. *See* Ind. Pub. L. No. 147 (Feb. 19, 1974).

[203]IND. CODE § 35-7-2-2 (IND. ANN. STAT. § 9-2211, Burns Supp. 1974).

[204]300 N.E.2d 656 (Ind. 1973).

[205]*Id.* at 664.

[206]307 N.E.2d 281 (Ind. 1974).

[207]*See* North Carolina v. Pearce, 395 U.S. 711, 723 (1969).

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[1]302 N.E.2d 795 (Ind. Ct. App. 1973).